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153 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App. P.2d			Cal.App. P.2d			Cal.App. P.2d			Cal.App. P.2d		
Page	Vol.	Page	Page	Vol.	Page	Page	Vol.	Page	Page	Vol.	Page
1	314	95	170	314	89	452	314	473	707	315	67
5	314	161	174	314	518	456	314	824	717	314	989
11	314	172	187	314	92	462	314	560	723	314	986
15	313	863	190	314	31	465	314	746	730	315	42
21	314	42	193	314	531	473	314	828	734	314	973
26	314	47	213	314	182	478	314	517	740	315	484
32	314	56	217	314	549	480	314	577	751	315	14
35	313	868	234	314	543	485	314	558	759	315	446
41	314	93	243	314	226	488	315	101	767	315	473
44	314	124	249	314	500	498	314	745	776	315	503
53	313	930	260	314	217	500	314	820	784	315	88
55	314	178	275	314	493	505	314	767	788	315	38
58	314	196	287	314	485	515	315	33	795	314	983
64	314	142	300	314	21	523	314	1007	799	314	1002
79	313	669	310	314	27	528	315	49	803	314	1015
84	313	896	315	314	807	541	314	1011	806	315	391
88	314	58	325	314	596	548	314	1004	812	315	73
91	313	886	328	314	759	553	315	57	821	315	347
97	314	52	331	314	19	564	314	751	828	315	343
100	313	672	333	314	175	572	314	756	834	315	355
104	313	912	339	314	793	574	314	995	837	315	383
107	314	230	361	314	525	584	315	45	841	315	364
117	315	433	363	314	526	590	315	19	847	315	95
120	314	138	365	314	475	613	314	1017	852	315	439
125	314	184	373	314	511	618	314	787	858	315	459
132	314	507	377	314	484	626	315	107	870	315	468
138	313	968	379	314	812	639	315	84	879	315	386
144	314	60	391	314	574	646	315	64	887	314	128
146	314	164	397	314	598	651	314	993	889	314	1020
152	314	84	402	314	482	653	315	79	891	314	241
155	314	106	404	314	563	661	315	98	894	316	100
158	313	924	421	314	773	667	315	91	897	315	116
162	314	135	432	314	513	673	315	394	900	314	1020
166	314	86	437	314	581						

154 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App. P.2d			Cal.App. P.2d			Cal.App. P.2d			Cal.App. P.2d		
Page	Vol.	Page	Page	Vol.	Page	Page	Vol.	Page	Page	Vol.	Page
1	315	371	33	315	453	67	315	442	101	315	748
5	315	374	43	315	357	73	315	727	112	315	718
11	315	368	48	315	377	78	315	881	121	315	734
17	315	480	57	315	360	85	315	339	132	315	730
24	315	451	61	315	491	90	315	906	134	315	723
27	315	435	65	315	362	97	315	415	140	315	732

154 CALIFORNIA APPELLATE REPORTS, 2d SERIES—Continued

Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page
143	315 740	359	316 417	531	317 145	732	316 717
153	315 889	364	316 52	535	317 642	737	316 680
156	316 17	368	316 425	545	316 1019	745	316 700
164	315 896	371	316 410	553	316 1014	753	316 705
175	316 71	378	316 449	560	317 170	761	316 691
193	316 85	381	316 427	580	317 48	767	316 755
209	315 912	389	316 25	589	316 1010	773	316 725
214	315 905	395	316 366	592	316 445	785	316 776
215	315 910	401	316 405	598	317 121	789	316 742
218	315 924	406	316 23	601	317 40	797	316 721
230	316 83	410	316 31	614	316 420	803	316 773
233	316 14	413	316 351	620	316 390	808	316 710
239	315 887	422	316 438	624	317 57	813	317 91
242	316 29	431	316 3	631	316 435	817	317 24
244	315 902	438	316 8	636	316 1012	825	317 653
249	316 9	440	316 414	640	316 653	829	317 139
256	316 55	444	316 49	642	316 408	835	316 1001
265	316 60	449	316 646	646	316 370	838	316 998
279	315 885	457	316 746	663	316 656	842	317 30
283	315 890	464	316 668	669	316 396	846	317 117
287	315 932	470	316 432	676	316 751	853	317 123
294	316 32	475	316 660	681	316 685	857	317 161
304	315 893	487	316 713	686	316 768	862	317 94
308	316 39	495	316 393	694	316 1006	872	316 84
315	315 919	501	316 763	700	316 678	873	316 733
321	315 916	508	316 688	703	316 759	877	315 755
326	316 401	513	316 641	710	316 673	881	316 779
332	316 381	520	316 639	717	316 672	883	316 781
345	316 43	523	316 697	720	317 33	888	316 784
350	316 94	528	316 654				



CALIFORNIA REPORTER

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321 P.2d—322 P.2d

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PACIFIC REPORTER
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Thus:

321 P.2d 1

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Pacific Reporter, Second Series, Vol. 321, Nos. 1-3;
Vol. 322, Nos. 1-4.

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TABLE OF CONTENTS

Judges and Officers -----	Page V
Table of Cases Reported -----	XIII

*

JUDGES AND OFFICERS

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JUDGES AND OFFICERS

APPELLATE DEPARTMENT, SUPERIOR COURT
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APPELLATE DEPARTMENT, SUPERIOR COURT
—Continued

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■

CASES REPORTED

Vols. 321-322 P.2d

	P.2d	
	Vol.	Page
Aguirre; People v., App.	322	478
Alameda; Vasquez v., Sup.	321	1
Allie's Estate, In re, App.	322	532
Alonzo; People v., App.	322	42
Alpine County v. Tuolumne County, Sup.	322	449
Alvidrez; People v., App.	322	557
American Photocopy Equipment Co.; Fairfield v., App.	322	93
Anglo California Nat. Bank of San Francisco; Jones v., App.	322	991
Argonaut Ins. Exchange v. Industrial Acc. Commission of State of California, Sup.	321	460
Armstrong v. City of Belmont, App.	322	999
Ashe; Gombos v., App.	322	933
Ashland Oil & Refining Co.; Signal Oil & Gas Co. v., Sup.	322	1
Aspeitia v. California Trust Co., App.	322	265
Atchison, T. & S. F. Ry. Co.; Blundell v., App.	322	66
Atchison, T. & S. F. Ry. Co.; Lazzarotto v., App.	321	29
Ballard; Pagel v., App.	321	38
Baker v. Waite, App.	322	512
Barron; Phillips v., App.	322	506
Basalt Rock Co.; Darlington v., App.	321	490
Baxter v. Krieger, App.	321	879
Baxter v. Prescott, App.	322	1008
Baxter Co. v. Krieger, App.	321	879
Beavers v. Security-First Nat. Bank, App.	322	1011
Beckett v. Kaynar Mfg. Co., Sup.	321	749
Bein, Inc. v. Berg Elec. Corp., App.	321	753
Bein, Inc. v. Housing Authority of City of Los Angeles, App.	321	753
Berg Elec. Corp.; Maurice L. Bein, Inc. v., App.	321	753
Bixby v. Chickering, App.	322	956
Bixby's Estate, In re, App.	322	956
Blinks; People v., App.	322	466
Bliss; Lucientes v., App.	321	526
Blundell v. Atchison, T. & S. F. Ry. Co., App.	322	66
Board of Fire Com'rs of City of Los Angeles; Braly v., App.	321	504
Board of Fire Com'rs of City of Los Angeles; Marina Associates v., App.	321	504
Board of Trustees of Montecito Union School Dist.; Paterson v., App.	321	825
Bolger; Gray v., App.	321	485
Bordenave v. Franchise Tax Bd. of State of Cal., App.	322	260
Braly v. Board of Fire Com'rs of City of Los Angeles, App.	321	504
Brenneman v. Weeks, App.	321	86
Brenneman's Estate, In re, App.	321	86
Broadhurst; Morgan v., App.	321	75
Broadhurst; Prudential Ins. Co. of America v., App.	321	75
Brown; Jamison v., App.	322	246
Brown v. Memorial Nat. Home Foundation, App.	322	600
Brown v. Terra Bella Irr. Dist., App.	321	835

CASES REPORTED

P.2d

	Vol.	Page
Bryant; People v., App.	321	45
Buck v. Standard Oil Co. of Cal, two cases, App.	321	67
Budd's Brake Shop; Reeder v., App.	321	793
Buehler v. Reilly, App.	321	128
Burgeson; Hughes v., App.	321	55
Burrows; Jorgensen v., App.	321	465
Byrne; Gomes v., App.	321	495
California Gasoline Retailers v. Regal Petroleum Corp. of Fresno, App.	322	945
California Hotel v. Culinary Workers, Bartenders and Hotel Service Emp., Local 535, AFL-CIO, App.	321	799
California Trust Co.; Aspeitia v., App.	322	265
Campbell v. Campbell, App.	321	133
Cash; Marquardt v., App.	322	532
Chalmers; West Covina Enterprises, Inc. v., Sup.	322	13
Chapman; Oakes v., App.	322	241
Charles L. Harney, Inc.; Kalash v., App.	322	488
Chavez v. Industrial Acc. Commission of State of California, Sup.	321	449
Chickering; Bixby v., App.	322	956
Choate; People v., App.	321	815
City and County of San Francisco; Hughes v., App.	322	623
City Council of City of Seal Beach; Heller v., App.	321	97
City of Belmont; Armstrong v., App.	322	999
City of Los Angeles; Youngblood v., App.	322	274
City of Roseville v. Terry, App.	322	44
Civil Service Commission of City and County of San Francisco; Matthews v., App.	322	234
Claretian Theological Seminary; Greenstone v., App.	322	482
Cole; People v., App.	322	29
Comunale v. Traders & General Ins. Co., App.	321	768
Coots v. Southern Pac. Co., Sup.	322	460
Cornette; People v., App.	322	1001
Coronet Const. Co.; Rackliff v., App.	321	50
Crumley; Haskins v., App.	321	19
Culinary Workers, Bartenders and Hotel Service Emp., Local 535, AFL- CIO; California Hotel v., App.	321	799
Culinary Workers, Bartenders and Hotel Service Emp., Local 535, AFL- CIO; Gentry v., App.	321	799
Cummings; People v., App.	321	78
Daily; People v., App.	321	469
Danielson; Obolensky v., App.	321	25
Darlington, Application of, App.	321	490
Darlington v. Basalt Rock Co., App.	321	490
Dean; People v., App.	322	929
Department of Alcoholic Beverage Control; Pesce v., App.	322	995
Dow v. Holly Mfg. Co., Sup.	321	736
Eagans v. Key System Transit Lines, App.	321	891
Eames; Hazel Hurst Foundation v., Sup.	321	741
Eastteam v. Hull, App.	322	577
Elliott; People v., App.	322	1029
Elsis v. Evans, App.	321	514
Enos v. Harmon, App.	321	810
Enos v. Montoya, App.	322	472
Estes v. Estes, App.	322	238
Estrada v. Indemnity Ins. Co. of North America, App.	322	294
Evans; Elsis v., App.	321	514
Fairfield v. American Photocopy Equipment Co., App.	322	93

CASES REPORTED

P.2d

	Vol.	Page
Felix; Schmitt v., App.	321	473
Fernstrom's Estate, In re, App.	321	25
Foster v. Masters Pontiac Co., App.	322	592
Fox; People v., App.	321	103
Franchise Tax Bd. of State of Cal.; Bordenave v., App.	322	260
Fresno County; Sladovich v., App.	322	565
Freytas; People v., App.	321	782
Gardner v. Trevaskis, App.	322	545
Gayton v. Lebedina, App.	322	285
Gayton & Sons v. Lebedina, App.	322	285
Gentry v. Culinary Workers, Bartenders and Hotel Service Emp., Local 535, AFL-CIO, App.	321	799
Goetz v. Superior Court In and For Los Angeles County, Sup.	322	217
Goldstein; People v., App.	322	253
Gombos v. Ashe, App.	322	933
Gomes v. Byrne, App.	321	495
Gomez v. Superior Court In and For Mendocino County, App.	322	292
Gonzalez v. Southern Pac. Co., App.	321	865
Gonzalez & Blanco v. Southern Pac. Co., App.	321	865
Gonzalves; People v., App.	322	255
Gordon v. Landau, Sup.	321	456
Gorg; People v., App.	321	143
Gray v. Bolger, App.	321	485
Greenstone v. Claretian Theological Seminary, App.	322	482
Griffin v. Marin County, App.	321	148
G. T. Gayton & Sons v. Lebedina, App.	322	285
Guerrieri v. Severini, App.	322	561
Halldin v. Usher, Sup.	321	746
Hall's Estate, In re, App.	322	1011
Harmon; Enos v., App.	321	810
Haskins v. Crumley, App.	321	19
Hawbaker; Moreno v., App.	321	538
Hayutin v. Rudnick, App.	322	1023
Hazel Hurst Foundation v. Eames, Sup.	321	741
Hazelwerdt v. Industrial Indem. Exchange, App.	321	831
Heckenkamp v. ZIV Television Programs, Inc., App.	321	137
Hedrick; Miller v., App.	322	231
Heggy; Rice v., App.	322	53
Heller v. City Council of City of Seal Beach, App.	321	97
Hendershott v. Macy's, App.	322	596
Henry v. Weinman, App.	321	117
Hoag; Reeder v., App.	321	793
Holland; People v., App.	322	983
Holly Mfg. Co.; Dow v., Sup.	321	736
Holzer; Trapani v., App.	321	803
Horace; People v., App.	321	64
Horning v. Ladd, App.	321	795
Housing Authority of City of Los Angeles; Maurice L. Bein, Inc. v., App.	321	753
Howard; Smith v., App.	322	1034
Hudson; Steed v., App.	322	987
Hudson's Estate, In re, App.	322	987
Hughes v. Burgeson, App.	321	55
Hughes v. City and County of San Francisco, App.	322	623
Hull; Eastteam v., App.	322	577
Hunter v. Mohawk Petroleum Corp., App.	322	551
Hunter; People v., App.	322	942

CASES REPORTED

P.2d

	Vol.	Page
Hurst Foundation v. Eames, Sup.	321	741
Ice-Kist Packing Co. v. J. F. Sloan Co., App.	321	840
Indemnity Ins. Co. of North America; Estrada v., App.	322	294
Independent Home Supply Co. v. Landau, Sup.	321	456
Industrial Acc. Commission; Johnson v., App.	321	856
Industrial Acc. Commission; Transport Indem. Co. v., App.	321	21
Industrial Acc. Commission; United Air Lines, Inc. v., App.	322	535
Industrial Acc. Commission of State of California; Argonaut Ins. Ex- change v., Sup.	321	460
Industrial Acc. Commission of State of California; Chavez v., Sup.	321	449
Industrial Indem. Exchange; Hazelwerdt v., App.	321	831
Isbrandtsen Co. v. Producers Cotton Oil Co., App.	322	1005
Jamison v. Brown, App.	322	246
Jamison Steel Corp., In re, App.	322	246
Jennings; People v., App.	322	19
J. F. Sloan Co.; Ice-Kist Packing Co. v., App.	321	840
Johnson v. Industrial Acc. Commission, App.	321	856
Johnson; People v., App.	321	35
Jones v. Anglo California Nat. Bank of San Francisco, App.	322	991
Jorgensen v. Burrows, App.	321	465
Kalash v. Charles L. Harney, Inc., App.	322	488
Kaplan v. Nalpak Corp., App.	322	226
Kaynar Mfg. Co.; Beckett v., Sup.	321	749
Kellogg; Lathrop v., App.	322	572
Key System Transit Lines; Eagans v., App.	321	891
Key System Transit Lines; Tellefsen v., App.	322	469
Krieger; Baxter v., App.	321	879
Krieger; L. M. Baxter Co. v., App.	321	879
Kukura; Whyatt v., App.	321	860
Ladd; Horning v., App.	321	795
Landau; Gordon v., Sup.	321	456
Landau; Independent Home Supply Co. v., Sup.	321	456
Landau v. Moore, App.	322	222
Landau's Estate, In re, App.	322	222
Lassen County v. Superior Court In and For Nevada County, App.	322	49
Lathrop v. Kellogg, App.	322	572
Lawndale School Dist.; Titus v., App.	322	56
Lazzarotto v. Atchison, T. & S. F. Ry. Co., App.	321	29
Lebedina; Gayton v., App.	322	285
Lebedina; G. T. Gayton & Sons v., App.	322	285
Lewis v. Muntz Car Co. of Cal., App.	321	81
Lewis; Napa Union High School Dist. of Napa County v., App.	322	39
Lewis; People v., App.	321	859
L. M. Baxter Co. v. Krieger, App.	321	879
Lockwood v. Sheedy, App.	321	862
Lockwood v. Sheedy, App.	321	863
Loma Vista Inv., Inc. v. Roman Catholic Archbishop of Los Angeles, two cases, App.	322	35
Los Angeles County v. State Dept. of Public Health, two cases, App.	322	968
Lucientes v. Bliss, App.	321	526
McCullough; People v., App.	322	289
McDaniel; People v., App.	321	497
McDonell; Northridge Park County Water Dist. v., App.	322	25
MacLeod v. Tribune Pub. Co., App.	321	881
McShann; People v., App.	321	533
Macy's; Hendershott v., App.	322	596

CASES REPORTED

P.2d

	Vol.	Page
Magdaleno; People v., App.	322	89
Maggiora; Pasadena Hudson, Inc. v., App.	321	852
Marina Associates v. Board of Fire Com'rs of City of Los Angeles, App.	321	504
Marin County; Griffin v., App.	321	148
Marquardt v. Cash, App.	322	532
Martin v. Roman Catholic Archbishop of Los Angeles, App.	322	31
Martz v. Ruiz, App.	322	981
Mason v. Ochinero, App.	321	467
Mason v. Russell, App.	322	486
Masters Pontiac Co.; Foster v., App.	322	592
Matthews v. Civil Service Commission of City and County of San Francisco, App.	322	234
Maurice L. Bein, Inc. v. Berg Elec. Corp., App.	321	753
Maurice L. Bein, Inc. v. Housing Authority of City of Los Angeles, App.	321	753
Maxwell v. Maxwell, App.	322	1018
Maxwell's Estate, In re, App.	322	1018
Memorial Nat. Home Foundation; Brown v., App.	322	600
Mendoza v. Small Claims Court of Los Angeles Judicial Dist., Sup.	321	9
Miller v. Hedrick, App.	322	231
Mills v. Ruppert, App.	322	257
Miracle Adhesives Corp. v. Peninsula Tile Contractors' Ass'n of San Mateo, Santa Clara and San Benito Counties, App.	321	482
Mishkin v. Sanvidotti, App.	322	526
Mitchell v. Superior Court In and For City and County of San Francisco, App.	321	106
Mitton v. State Bar of Cal., Sup.	321	13
Mohawk Petroleum Corp.; Hunter v., App.	322	551
Montoya; Enos v., App.	322	472
Moore; Landau v., App.	322	222
Moore v. Zimmerman, App.	321	161
Moreno v. Hawbaker, App.	321	538
Morgan v. Broadhurst, App.	321	75
Morgan; People v., App.	321	873
Muntz Car Co. of Cal.; Lewis v., App.	321	81
Nalpak Corp.; Kaplan v., App.	322	226
Napa Union High School Dist. of Napa County v. Lewis, App.	322	39
Nelson v. Reisner, App.	322	491
Nelson; Rivett v., App.	322	515
Neubauer's Estate, In re, Sup.	321	741
Newhall v. Newhall, App.	321	818
Newman; Whiston v., App.	322	262
Northridge Park County Water Dist. v. McDonell, App.	322	25
Oakes v. Chapman, App.	322	241
Obolensky v. Danielson, App.	321	25
Ochinero; Mason v., App.	321	467
O'Connell v. Zimmerman, App.	321	161
O'Connor v. Rumiano Bros. Co., App.	321	122
O'Connor's Estate, In re, App.	322	616
Oken; Wilkins v., App.	321	876
One 1955 Chevrolet Bel Air; People v., App.	321	870
Oppenheimer v. Smith, App.	322	499
Pacific Pipeline Const. Co. v. State Bd. of Equalization, Sup.	321	729
Pagel v. Bailard, App.	321	38
Parrella; People v., App.	322	83
Pasadena Hudson, Inc. v. Maggiora, App.	321	852
Paterson v. Board of Trustees of Montecito Union School Dist., App.	321	825

CASES REPORTED

P.2d

	Vol.	Page
Patterson; Vick v., App.	322	548
Peer v. Superior Court In and For Los Angeles County, App.	322	529
Peninsula Tile Contractors' Ass'n of San Mateo, Santa Clara and San Benito Counties; Miracle Adhesives Corp. v., App.	321	482
People v. Aguirre, two cases, App.	322	478
People v. Alonzo, App.	322	42
People v. Alvidrez, App.	322	557
People v. Blinks, App.	322	466
People v. Bryant, App.	321	45
People v. Choate, App.	321	815
People v. Cole, App.	322	29
People v. Cornette, App.	322	1001
People v. Cummings, App.	321	78
People v. Daily, App.	321	469
People v. Dean, App.	322	929
People v. Elliott, App.	322	1029
People v. Fox, App.	321	103
People v. Freytas, App.	321	782
People v. Goldstein, App.	322	253
People v. Gonzalves, App.	322	255
People v. Gorg, App.	321	143
People v. Holland, App.	322	983
People v. Horace, App.	321	64
People v. Hunter, App.	322	942
People v. Jennings, App.	322	19
People v. Johnson, App.	321	35
People v. Lewis, App.	321	859
People v. McCullough, App.	322	289
People v. McDaniel, App.	321	497
People v. McShann, App.	321	533
People v. Magdaleno, App.	322	89
People v. Morgan, App.	321	873
People v. One 1955 Chevrolet Bel Air, App.	321	870
People v. Parrella, App.	322	83
People v. Poindexter, App.	322	607
People v. Porter, App.	322	932
People v. Ramos, App.	322	51
People v. Rixner, App.	321	91
People v. Rubin, App.	321	114
People v. Scott, App.	322	269
People v. Thompson, two cases, App.	322	489
People v. Torres, App.	322	300
People v. Weems, App.	321	884
People v. Wilburn, Sup.	321	452
People v. Wilson, App.	322	966
People v. Woods, App.	321	477
Pesce v. Department of Alcoholic Beverage Control, App.	322	995
Pete; Spector v., App.	321	59
Phillips v. Barron, App.	322	506
Poindexter; People v., App.	322	607
Ponzi v. Ponzi, App.	321	847
Porter; People v., App.	322	932
Potter; Solk v., Super.	322	627
Prescott; Baxter v., App.	322	1008
Preston; Wyoming Pac. Oil Co. v., App.	321	154
Producers Cotton Oil Co.; Isbrandtsen Co. v., App.	322	1005

CASES REPORTED

P.2d

	Vol.	Page
Prudential Ins. Co. of America v. Broadhurst, App.	321	75
Rackliff v. Coronet Const. Co., App.	321	50
Ramos; People v., App.	322	51
Redlinger v. Youle, App.	321	509
Reeder v. Budd's Brake Shop, App.	321	793
Reeder v. Hoag, App.	321	793
Regal Petroleum Corp. of Fresno; California Gasoline Retailers v., App.	322	945
Reilly; Buehler v., App.	321	128
Reinfeld v. San Francisco City and County Emp. Retirement System, App.	322	508
Reisner; Nelson v., App.	322	491
Rice v. Heggy, App.	322	53
Riddle v. Yosemite Creek Co., App.	322	538
Rivett v. Nelson, App.	322	515
Rixner; People v., App.	321	91
Robb; Tibbets v., App.	322	585
Rodrigues v. San Jose Unified School Dist., App.	322	70
Roman Catholic Archbishop of Los Angeles; Loma Vista Inv., Inc. v., App.	322	35
Roman Catholic Archbishop of Los Angeles; Martin v., App.	322	31
Roseville, City of, v. Terry, App.	322	44
Rubin; People v., App.	321	114
Rudnick; Hayutin v., App.	322	1023
Ruiz; Martz v., App.	322	981
Rumiano Bros. Co.; O'Connor v., App.	321	122
Ruppert; Mills v., App.	322	257
Russell; Mason v., App.	322	486
San Francisco City and County Emp. Retirement System; Reinfeld v., App.	322	508
San Jose Unified School Dist.; Rodrigues v., App.	322	70
Sanvidotti; Mishkin v., App.	322	526
Schmitt v. Felix, App.	321	473
Schreyer; Tellez v., App.	322	259
Scott; People v., App.	322	269
Security-First Nat. Bank; Beavers v., App.	322	1011
Sellar v. Sellar, App.	322	219
Severini; Guerrieri v., App.	322	561
Sheedy; Lockwood v., App.	321	862
Sheedy; Lockwood v., App.	321	863
Shierry; Stanley v., App.	322	502
Signal Oil & Gas Co. v. Ashland Oil & Refining Co., Sup.	322	1
Silvagni v. Superior Court In and For Los Angeles County, App.	321	15
Sladovich v. Fresno County, App.	322	565
Small Claims Court of Los Angeles Judicial Dist.; Mendoza v., Sup.	321	9
Smith v. Howard, App.	322	1034
Smith; Oppenheimer v., App.	322	499
Smith v. Smith, App.	321	886
Solk v. Potter, Super.	322	627
Sonleitner v. Superior Court In and For Los Angeles County, App.	322	496
Southern Pac. Co.; Coots v., Sup.	322	460
Southern Pac. Co.; Gonzalez v., App.	321	865
Southern Pac. Co.; Gonzalez & Blanco v., App.	321	865
Spector v. Pete, App.	321	59
Standard Acc. Ins. Co.; Williams v., App.	322	1026
Standard Oil Co. of Cal.; Buck v., App.	321	67
Stanley v. Shierry, App.	322	502
State Bar of Cal.; Mitton v., Sup.	321	13
State Bd. of Ed.; Tringham v., App.	321	41
State Bd. of Equalization; Pacific Pipeline Const. Co. v., Sup.	321	729

CASES REPORTED

P.2d

	Vol.	Page
State Dept. of Public Health; Los Angeles County v., App.	322	968
Steed v. Hudson, App.	322	987
Stephens; Vaell v., App.	322	579
Sunlight Stations Co. v. Superior Court In and For Los Angeles County, App.	322	496
Superior Court In and For City and County of San Francisco; Mitchell v., App.	321	106
Superior Court In and For Los Angeles County; Goetz v., Sup.	322	217
Superior Court In and For Los Angeles County; Peer v., App.	322	529
Superior Court In and For Los Angeles County; Silvagni v., App.	321	15
Superior Court In and For Los Angeles County; Sonleitner v., App.	322	496
Superior Court In and For Los Angeles County; Sunlight Stations Co. v., App.	322	496
Superior Court In and For Mendocino County; Gomez v., App.	322	292
Superior Court In and For Nevada County; Lassen County v., App.	322	49
Taormina v. Taormina, App.	322	46
Tellefsen v. Key System Transit Lines, App.	322	469
Tellez v. Schreyer, App.	322	259
Terra Bella Irr. Dist.; Brown v., App.	321	835
Terry; City of Roseville v., App.	322	44
Thompson; People v., App.	322	489
Tibbets v. Robb, App.	322	585
Titus v. Lawndale School Dist., App.	322	56
Torres; People v., App.	322	300
Traders & General Ins. Co.; Comunale v., App.	321	768
Transport Indem. Co. v. Industrial Acc. Commission, App.	321	21
Trapani v. Holzer, App.	321	803
Trepanier v. University of North Dakota, App.	322	616
Trevaskis; Gardner v., App.	322	545
Tribune Pub. Co.; MacLeod v., App.	321	881
Tringham v. State Bd. of Ed., App.	321	41
Tuolumne County; Alpine County v., Sup.	322	449
United Air Lines, Inc. v. Industrial Acc. Commission, App.	322	535
University of North Dakota; Trepanier v., App.	322	616
Usher; Halldin v., Sup.	321	746
Vaell v. Stephens, App.	322	579
Vaell's Estate, In re, App.	322	579
Valdez; Westwood Bldg. Materials Co. v., App.	322	79
Vangel v. Vangel, App.	322	76
Vasquez v. Alameda, Sup.	321	1
Vick v. Patterson, App.	322	548
Waite; Baker v., App.	322	512
Weaver's Estate, In re, App.	322	522
Weeks; Brenneman v., App.	321	86
Weems; People v., App.	321	884
Weinman; Henry v., App.	321	117
West Covina Enterprises, Inc. v. Chalmers, Sup.	322	13
Westwood Bldg. Materials Co. v. Valdez, App.	322	79
Whiston v. Newman, App.	322	262
Whiston's Estate, In re, App.	322	262
Whyatt v. Kukura, App.	321	860
Wilburn; People v., Sup.	321	452
Wilkins v. Oken, App.	321	876
Williams v. Standard Acc. Ins. Co., App.	322	1026
Wilson; People v., App.	322	966
Woods; People v., App.	321	477

CASES REPORTED

P.2d

	Vol.	Page
Wyoming Pac. Oil Co. v. Preston, App. -----	321	154
Yosemite Creek Co.; Riddle v., App. -----	322	538
Youle; Redlinger v., App. -----	321	509
Youngblood v. City of Los Angeles, App. -----	322	274
Zimmerman; Moore v., App. -----	321	161
Zimmerman; O'Connell v., App. -----	321	161
ZIV Television Programs, Inc.; Heckenkamp v., App. -----	321	137

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49 Cal.2d 674

Jesus VASQUEZ, Plaintiff and Appellant,
v.

Robert ALAMEDA; Martin Produce Co., a corporation; Adam E. Rutkowski; Gilboy Transportation Company, a copartnership; and Daniel L. Greenley, Defendants and Respondents.

S. F. 19767.

Supreme Court of California,
In Bank.
Jan. 28, 1958.

Rehearing Denied Feb. 26, 1958.

Action by party, who participated in moving nonoperable automobile onto highway at night and sustained injuries when automobile, which had stopped to push nonoperable automobile, was struck by another automobile and shoved into nonoperable automobile, which was moved forward by impact, and party came to his senses as he lay beneath wheel of truck which had passed to right of the automobiles, against driver and owners of truck and operable automobiles. The Superior Court, Monterey County, Stanley Lawson, J., rendered judgment for defendants and plaintiff appealed. The Supreme Court, Schauer, J., held that evidence sustained implied finding that plaintiff's conduct was proximate contributing cause of accident.

Affirmed.

Traynor, J., Gibson, C. J., and Carter, J., dissented.

Opinion, 308 P.2d 857, vacated.

1. Automobiles ⇨244(58)

In action by party, who participated in moving nonoperable automobile onto

321 P.2d—1

Cal.Rep. 321-322 P.2d—1

highway at night and sustained injuries when automobile, which had stopped to push nonoperable automobile was struck by another automobile and shoved into nonoperable automobile, which was moved forward by impact and party came to his senses as he lay beneath wheel of truck, which had passed on right side of automobiles, against driver and owners of truck and operable automobiles, evidence sustained implied finding that plaintiff's conduct was proximate contributing cause of accident.

2. Automobiles ⇨226(1)

Where plaintiff helped to push nonoperable automobile from place of safety on private property to place of danger on public highway where it constituted an obstruction to traffic and such action was proximate contributing cause of injuries sustained when automobile, which had stopped to push nonoperable automobile was struck by another automobile and shoved into nonoperable automobile, which was moved forward by impact, and plaintiff came to his senses as he lay beneath wheel of truck which had passed on right side of automobiles, plaintiff was not entitled to recover for injuries from driver and owners of truck and operable automobiles.

3. Nuisance ⇨1

If plaintiff's action, in deliberately and actively participating in moving a nonoperable automobile from place of safety on private property to place of danger on public highway so that it constituted an obstruction to traffic, created a nuisance, plaintiff's liability to others for damages

proximately caused by it would be in so far as his own act was concerned; absolute, and anyone injured by his unlawful act could, unless barred by such other's own contributory negligence, recover from plaintiff as from an insurer. West's Ann. Civ. Code, §§ 3479, 3480; West's Ann. Pen. Code, § 370.

4. Nuisance 43

If conduct of plaintiff, in deliberately and actively participating in moving non-operable automobile from place of safety on private property to place of danger on public highway where it obviously constituted an obstruction to traffic, was regarded as creating a nuisance, plaintiff could not recover against anyone for injuries to the causation of which the nuisance proximately contributed, even though a defendant's negligence may have also contributed proximately to the accident. West's Ann. Civ. Code, §§ 3479, 3480; West's Ann. Pen. Code, § 370.

Boccardo, Blum, Lull & Niland, Malcolm K. Campbell and Edward J. Niland, San Jose, for appellant.

Hoge, Fenton & Jones, Lewis L. Fenton, Monterey, Campbell, Custer, Warburton & Britton, Alfred B. Britton, Jr., San Jose, W. R. Dunn, Burlingame, Low & Duryea and Remington Low, San Francisco, for respondents.

SCHAUER, Justice.

Plaintiff appeals from an adverse judgment entered pursuant to a jury's verdict in his action to recover for personal injuries suffered in a highway accident. We have concluded that plaintiff's claims of error in the jury instructions are immaterial and need not be discussed because the uncontradicted evidence overwhelmingly supports the jury's implied determination that plaintiff's own conduct at the least constituted negligence which proximately contributed to his injuries. Hence, no miscarriage of justice is shown and the judgment should be affirmed.

At about 1 o'clock on a March morning in 1954 plaintiff met one Vargas in a parking lot near the city of Santa Clara. On the parking lot was a Plymouth automobile owned by Vargas. The automobile was not in operable condition; its engine could not be started. Rain was falling at the time. Plaintiff, Vargas, and a third man joined in pushing the non-operable automobile from its position of safety on the private property onto the highway, which at that point had three lanes, plus hard shoulders, and flat areas of dirt or gravel beyond the shoulders. The highway was straight for at least a half mile in each direction, and the posted speed limit was 45 miles an hour. The three men pushed the Plymouth, with its lights on, into the right hand, east bound, lane of the highway where they allowed it to come to rest.

Plaintiff thereupon walked a short distance to the rear of the Plymouth and flagged down a car driven by defendant Greenley. Greenley stopped in the center lane, to the left of the Plymouth, and then started to back into the right hand lane behind the Plymouth in order to push it. While backing Greenley saw a truck driven by defendant Rutkowski coming from behind on the outer shoulder. Afraid that the truck was so wide it could not clear vehicles or objects in the right hand lane, Greenley stopped his car partly in the center lane and partly in the lane to the right. Rutkowski, who had seen the two cars occupying the right hand and center lanes, had decided to pass them on the shoulder. As he passed the Plymouth he saw plaintiff standing behind it in the roadway to the right.

Defendant Alameda, driving in the same direction behind Rutkowski, saw red tail lights in the right hand lane ahead of him and other lights off to the right. He moved into the center lane to pass and did not see Greenley's car, partly in that lane, until it was too late to stop. He struck the side of Greenley's car, shoving it into the Plymouth, which was in turn moved forward by the impact. When Rutkowski heard the crash, he stopped his truck a

short distance ahead of the Plymouth. Plaintiff testified that as he was standing on the shoulder next to the Plymouth after Greenley had started to back, he saw the lights of an approaching vehicle about 15 to 20 feet away in the right hand lane of the highway. The next thing he remembered was coming to his senses as he lay on his stomach with part of the left rear wheel of Rutkowski's truck pressing on his left side and shoulder.

[1,2] As grounds for reversal plaintiff complains of various asserted errors of the court in instructing the jury, and urges in particular that the plaintiff's burden of proof was improperly and prejudicially overemphasized. However, the basic facts recited hereinabove make it altogether clear that plaintiff deliberately and actively participated in moving an inert object—Vargas' non-operable automobile—from a place of safety on private property to a place of danger on the public highway where it obviously constituted an obstruction to traffic. Whether, as has been suggested, plaintiff thereby aided and abetted in creating a public nuisance (see Civ. Code, §§ 3479, 3480; Pen.Code, § 370) we need not determine because, on any reasonable view of the evidence, the implied finding of the jury that his conduct was a proximate contributing cause of the accident which barred recovery, is amply supported.

[3,4] If his conduct be regarded as creating a nuisance plaintiff's liability to others for damages proximately caused by it would be, insofar as his own act is concerned, absolute (*Stockton Automobile Co. v. Confer* (1908), 154 Cal. 402, 405, 97 P. 881; *Curtis v. Kastner* (1934), 220 Cal. 185, 188-191 [3, 4], 30 P.2d 26; *Calder v. City etc. of San Francisco* (1942), 50 Cal.App.2d 837, 839 [1]), 123 P.2d 897; i. e., anyone injured by plaintiff's unlawful act could, unless barred by such other's own contributory negligence, recover from plaintiff as from an insurer. It is, therefore, manifest that such plaintiff, if we take the view that he participated in creating a nuisance, may not recover against

anyone for injuries, to the causation of which the nuisance proximately contributed, even though a defendant's negligence may have also contributed proximately to the accident. The result, of course, must be the same if plaintiff's conduct be regarded as mere negligence which contributed proximately to cause the accident.

Considering the entire record we are satisfied that the jury's implied finding—that plaintiff was at the least guilty of negligence which contributed proximately to cause his injuries—is clearly and overwhelmingly supported. It follows that, even if we assume the errors urged by plaintiff, no miscarriage of justice is shown and a reversal is not permissible under the limitations of section 4½ of article VI of the California Constitution. (See *People v. Watson* (1956), 46 Cal.2d 818, 836, 299 P.2d 243; *Vallejo etc. R. R. Co. v. Reed Orchard Co.* (1915), 169 Cal. 545, 554, 147 P. 238.)

The judgment is affirmed.

SHENK, SPENCE and McCOMB, JJ., concur.

TRAYNOR, Justice.

I dissent on the ground that numerous seriously erroneous instructions operated to deny plaintiff a fair trial in a fact-context so complicated that the jury could have as plausibly found for plaintiff as against him. The pile-up of erroneous instructions matched the pile-up on the highway, and their total effect was bound to be prejudicial when the facts themselves invited so many possibilities of conjecture as to negligence and causation.

Even in fact situations less obscure than this one the court need not find that it was more probable than not that errors influenced the jury to deem them prejudicial. It must deem them prejudicial if it finds it not improbable that had they been absent another result would have been reached. Otherwise it would be declaring errors harmless in the face of a substantial chance that they were not, thereby depriving the appellant of the trial to which he was entitled. "[T]he fact that there exists at

least such an equal balance of reasonable probabilities [as to leave the court in serious doubt as to whether error influenced the jury] necessarily means that the court is of the opinion 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" *People v. Watson*, 46 Cal.2d 818, 837, 299 P.2d 243, 255.

Obviously we must assume that juries conscientiously heed instructions given them by the trial court. Were we to assume the contrary, appellate review of instructions would be meaningless, since no instructions could then be deemed prejudicial.

It also bears emphasis that except when the evidence compels only one conclusion, it is for the jury to determine the issues of negligence and causation. In ruling on the prejudicial effect of error, we do not determine how we would have decided these issues had the decision been ours. We do not hold error harmless merely because we would have reached the same conclusion as that reached by the jury, for we are not the triers of fact. Our task is to review the whole record and to determine in that context whether there was a substantial chance that error influenced the jury in reaching its verdict.

The determination of the majority that it is unnecessary to consider errors in the instructions on issues other than contributory negligence necessarily rests on the conclusion either that it is improbable that the jury decided the case on any issue other than contributory negligence, or that the evidence on that issue so overwhelmingly supported the result as to make any other result improbable.

1. These cases also make clear that the nonnegligent use of the highway to start a car by pushing it does not constitute the creation or maintenance of a public nuisance. Penal Code section 370 provides that "Anything which * * * unlawfully obstructs the free passage or use * * * of * * * any * * * highway, is a public nuisance." See also Civ.Code §§ 3479, 3480. The key word in this definition is, of course, the word "unlawfully." Neither the Shannon nor Wright cases expressly referred to nuisance, but there is no magic in that

I find neither of these conclusions tenable. There was substantial evidence to support a verdict for plaintiff on other issues. On the issue of contributory negligence, the jury could reasonably have concluded that plaintiff was not contributively negligent. It is therefore impossible to determine whether the jury reached a verdict based solely on that issue or whether it followed erroneous instructions on the issues of negligence and causation. Where the uncertainty surrounding the result looms so large, errors perforce also loom large. Any one of them might have influenced the jury in reaching a verdict that cannot be clearly related to any single issue, whether of contributory negligence, negligence, or causation.

To begin with contributory negligence, how can we be sure that a jury has found anything unreasonable in the conduct of pushing a disabled vehicle on a highway to start it when the traffic is light, the road straight, and the visibility good enough to reveal lights of all the vehicles involved? To push a car along a highway, even at night, does not constitute negligence as a matter of law (*Shannon v. Thomas*, 57 Cal. App.2d 187, 194-195, 134 P.2d 522; *Wright v. Ponitz*, 44 Cal.App.2d 215, 220, 112 P.2d 25), and the jury and the trial court, in the first and second of the foregoing cases respectively, determined that such conduct is not negligence.¹ A comparable determination in this case would be at least a reasonable probability, not a mere possibility.

This probability is not diminished by the possible inference that plaintiff aided and abetted Vargas in violating section 582 of the Vehicle Code. Although we can

word. Since contributory negligence was not found in those cases, the conduct involved was necessarily found to be a reasonable and therefore lawful use of the highway. As the court in the Shannon case pointed out, "It certainly cannot be said as a matter of law that the conduct of an automobile driver in pushing his vehicle along the highway and toward the right-hand curb in an effort to start it when his battery failed is not a *legitimate and prudent* use of the highway." (57 Cal.App.2d at page 195, 134 P.2d at page 526, italics added.)

only conjecture, it is reasonable to assume that the jury was concerned with the total conduct of plaintiff, not simply with the isolated act of stopping the car. It is questionable that it created greater hazard when stopped than when pushed. Nothing in the evidence would compel a jury to infer that plaintiff aided and abetted Vargas in violating the statute. While at the wheel of his own car, Vargas directed where it should go. Plaintiff was only pushing, and when the car stopped, the other man who had also been pushing went back to the restaurant. Plaintiff could not remove the car from the highway without Vargas's cooperation. The burden of proof on contributory negligence was on defendants; yet they made no effort to establish that plaintiff and Vargas planned to stop or leave the car on the highway if they could not get it started or that Vargas wanted plaintiff to assist him in moving his car onto the shoulder or was willing that he should do so. The jury could thus reasonably conclude that defendants did not sustain their burden of proving that plaintiff violated section 582, and that plaintiff had no alternative to acquiescing in Vargas's decision to stop the car on the highway to await additional help. We cannot ignore this probability.

We are then bound to consider whether error was prejudicial in the instructions on the other issues of negligence and causation on which the verdict could turn. The evidence was sufficient to support findings against Greenley, Rutkowski, and Alameda on the issues of negligence and proximate cause. It was for the jury to determine whether Greenley was negligent in stopping alongside Vargas's car, thereby blocking both lanes available for east-bound traffic, or in attempting to back into the right lane in the face of the oncoming truck. In any event, plaintiff had no reason to foresee that Greenley might be negligent in the aid he rendered. "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." Cardozo, J. in *Glanzer v. Shepard*,

233 N.Y. 236, 239, 135 N.E. 275, 276, 23 A.L.R. 1425; *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 384, 240 P.2d 580; *Perry v. D. J. & T. Sullivan, Inc.*, 219 Cal. 384, 390, 26 P.2d 485; *Janofsky v. Garland*, 42 Cal. App.2d 655, 657, 109 P.2d 750. Whether Rutkowski should have passed on the shoulder and whether Alameda should have seen Greenley's car before it was too late to stop were also questions for the jury. As to the cause of plaintiff's injuries, the jury could reasonably have concluded that plaintiff had been hit by Rutkowski's truck, thrown against or under it by the collision of the other vehicles, or injured by a combination of circumstances.

The trial court gave the following instruction on assumption of risk:

"One is said to assume a risk when he freely, voluntarily and knowingly manifests his assent to dangerous conduct or to the creation or maintenance of a dangerous condition, and voluntarily exposes himself to that danger, or when he knows that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself, or remains within the area of danger.

"One who thus assumed a risk is not entitled to recover for damage caused him without intention and which resulted from the dangerous condition or conduct to which he thus exposed himself.

"Distinction should be noted between the assumption of risk just described, which bars recovery, and the ordinary and necessary acceptance of common risks such as surround us all and that lie in the possibility that other persons will not perform their duties toward us. As to this latter kind of everyday risk, one will not be barred from recovery for damage by the fact, if it be a fact, that while he, himself, is exercising ordinary care, and when there is nothing in the circumstances that either cautions him, or would caution a reasonably prudent person in

like position, to the contrary, he assumes that others will perform their duties toward him and acts on that assumption."

The last sentence of this instruction confuses the defenses of contributory negligence and assumption of risk. It erroneously suggests that if in the exercise of due care the plaintiff would have known of the danger of the defendant's negligence, he has assumed the risk of such conduct. "The defenses of assumption of risk and contributory negligence are based on different theories. Contributory negligence arises from a lack of due care. The defense of assumption of risk, on the other hand, will negative liability regardless of the fact that plaintiff may have acted with due care. [Citation.] It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk. [Citation.] Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of risk, but where it merely appears that he should or could have discovered the danger by the exercise of ordinary care, the defense is contributory negligence and not assumption of risk." *Prescott v. Ralph's Grocery Co.*, 42 Cal.2d 158, 161-162, 265 P.2d 904, 906.

Moreover, an instruction on assumption of risk would not be proper in any event, for in the circumstances of the case, the defense was not available to defendants. "While a person, if fully informed, may assume the risk even though the dangerous condition is caused by the negligence of others. *Prescott v. Ralph's Grocery Co.*, supra, 42 Cal.2d 158, 162, 265 P.2d 904. 'The plaintiff does not assume the risk of any negligence which he has no reason to anticipate, but once he is fully informed of it, it is well settled that the risks arising from such negligence may be assumed.' (Prosser on Torts, p. 385.)" *Rogers v. Los Angeles Transit Lines*, 45 Cal.2d 414, 419, 289 P.2d 226, 228. Plaintiff may have been aware of hazards that would attend

any attempt to start the car by pushing it onto the highway, and he may have been negligent in exposing himself to these hazards. There is no evidence, however, that he knew or must have known of the danger of negligent driving on the part of defendants, and that he thereby assumed the risks created by such conduct.

Plaintiff's most serious objections go to the trial court's instructions on causation. He contends that the trial court erred in instructing the jury on burden of proof by over-emphasizing the burden on him and by refusing to instruct adequately on the doctrine of *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 21. In that case two defendants negligently discharged shotguns in the direction of the plaintiff, who was injured by a shot from one of the guns. He could not determine from which gun the shot came. We held that it was not reasonable under these circumstances to require plaintiff to show the cause of his injury. The burden fell on each defendant to show that his negligence had not caused it. If neither defendant could show that he had not caused the injury, both were liable.

The rule of *Summers v. Tice* applies to the facts of the present case. The jury could have found that defendants Greenley, Rutkowski, and Alameda were all negligent, or that any one of them was negligent. It might well have been unable to determine, however, which defendant's negligence caused plaintiff's injuries. They might have been caused by Rutkowski's negligently running into him, or by the collision between the vehicles of Greenley and Alameda. As in the *Summers* case, plaintiff could not identify the cause of his injuries.

The trial court gave the following instruction:

"When two or more persons by their acts are possibly the sole cause of a harm, and the plaintiff has introduced evidence that one of the two or more persons is culpable, then the defendant has the burden of proving that the other person or persons were the sole cause of the harm.

"The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all; let them be the one to apportion it among themselves. Since, then, the difficulty of proof is the reason, the rule should apply whenever the harm has plural causes, and not merely when they acted in conscious concert." 2

Other instructions, however, foreclosed the application of the Summers rule. The trial court repeatedly instructed the jury on plaintiff's burden of proof and categorically stated that if the conflicting probabilities are equal or the evidence is equally balanced on the issue of negligence or proximate cause, plaintiff failed to fulfill his burden of proof. These instructions served to nullify the single instruction on the rule of the Summers case. There is no merit in defendants' contention that plaintiff invited the error by offering instructions, which were refused, similar to those offered by defendants. Plaintiff's refused instructions on burden of proof were not phrased in categorical terms, and their apt reference to the other instructions would have enabled the jury to interpret them as subject to the Summers exception.

The trial court also erred in giving the following instruction on intervening cause:

"As you have been instructed, one of the questions we must decide in finding whether or not one person is liable for injury to another, is whether or not the conduct in question was a prox-

imate cause of the injury in question. This inquiry may involve the conduct of two or more persons acting independently and at different times. To explain the problem presented by such a situation, I shall refer to the person whose conduct came first in point of time as the first actor and to the other person as the second actor. If the first actor foresaw, or by exercising ordinary care would have seen, that a second actor probably would conduct himself as the second actor actually did, and also that the combination of the first actor's conduct and the second actor's conduct probably would cause injury to a third person, and if the combined conduct did so result, then each actor's conduct was a concurring proximate cause of the injury—although, of course, neither would be liable unless his conduct was negligent. But if the first actor's conduct alone did not cause the injury, and if a combination of results such as I have mentioned was not foreseen by him as a probability, and was not so foreseeable in the exercise of ordinary care, then the first actor may not be held liable for any injury of which the second actor's conduct was a proximate cause or which may now appear to have resulted from the combined conduct of both." (Substantially identical with *BAJI*, 4th ed., No. 104-C.2.)

This instruction is riddled with error. It begins innocently enough to speak of the foreseeability of conduct that may combine with antecedent negligence to produce injury. It then lurches violently into what the actors actually did, thus stating the er-

2. It should be noted that this instruction erroneously suggests that when one of several defendants is known to have caused the plaintiff's injury, but it cannot be determined which, the burden of proof on the issue of causation is on all the defendants whether or not their negligence has been established. The Summers rule is based on the policy that it is preferable to hold liable a negligent defendant who did not in fact cause the

injury than to deny an innocent plaintiff any remedy when it cannot be determined which of the defendants is responsible for the harm but it appears that one of them was. This policy obviously compels the plaintiff first to show that a defendant who may have caused the injury was negligent, and this instruction failed to make this clear. The error bears noting even though it could not have prejudiced plaintiff in this case.

roneous rule that the identical consequences must have been foreseeable as a probability. *Werkman v. Howard Zink Corp.*, 97 Cal. App.2d 418, 425, 218 P.2d 43. Nor is the concept of probability rescued from limbo by definition. The jury could infer from the instruction that the injury must be foreseeable as more probable than not or that there must be at least a substantial chance of injury. It may be negligence, however, to create the risk of even a slight possibility of injury if a reasonably prudent man would not do so. One may be negligent in not looking before crossing a railroad track even though trains are infrequent. The rule extends to foreseeable risks arising out of possible intervening conduct of third persons. Thus, in the present case, if Greenley was negligent in blocking the highway, it would be because a reasonably prudent man would foresee the risk of injury from the intervening conduct of other motorists. The occurrence of injury from intervening conduct that should have been foreseen, whether as a probability or as a possibility, would not insulate Greenley from liability. *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 299, 195 P.2d 783; see *Restatement, Torts*, § 449.

The instruction, however, could lead the jury to suppose that the conduct of Rutkowski or Alameda served to relieve Greenley of any liability for placing his car partially across two lanes of the highway even if they found he was negligent in so doing. The jury may have concluded that a reasonably prudent man would not have incurred the risks that Greenley incurred on the ground that the possibility of harm from the intervening conduct of other motorists, even though unlikely, should have been avoided. They may also have concluded, however, that it was unlikely that Rutkowski and Alameda would act as they did and absolved Greenley of liability for negligence solely because the conduct of Rutkowski or Alameda or both was also a cause of plaintiff's injury. Under these circumstances an instruction on intervening cause had no place in the case. Greenley was either negligent in failing to an-

ticipate and guard against the conduct of other motorists or he was not. If he was, the occurrence of that conduct, even if improbable, would not defeat liability, and by inviting the jury to find otherwise, the instruction gave Greenley the benefit of a defense to which he was not entitled.

It is also contended that it was error to give an instruction on unavoidable accident. That question is pending in another case, and it is not necessary to consider it here in view of the errors that have already been discussed.

There was enough evidence in the present case to support a verdict for plaintiff. There is no way of knowing whether the verdict was based on a finding that his own negligence contributed to his injuries, on findings that none of the defendants were negligent, on findings that plaintiff had not established that the negligence of any defendant caused his injury, or, in the case of Greenley, on a finding that the conduct of Rutkowski or Alameda or both prevented Greenleys' negligence from being a proximate cause of the injury. The error in giving repeated instructions on plaintiff's burden of proof that foreclosed the application of the rule of *Summers v. Tice*, *supra*, coupled with the fact that there was no direct evidence as to how plaintiff was injured, could have led to erroneous findings that plaintiff had not sustained his burden of proof on the issue of causation. The instruction permitting the jury to find for Greenley on the defense of intervening cause, although there was no evidence to support this defense, coupled with the fact that the instruction erroneously suggested to the jury that the issue should be resolved in Greenley's favor, could also have led to the verdict in his favor. Accordingly, it is impossible to determine whether the verdict was based on correct instructions on the issues of negligence and contributory negligence, on erroneous instructions on the burden of proof on causation or, in the case of Greenley, on the erroneous determination of a question of law improperly left to the jury. Under these circumstances it has heretofore been settled that the

error is prejudicial. *Miller v. Peters*, 37 Cal.2d 89, 95, 230 P.2d 803; *Clement v. State Reclamation Board*, 35 Cal.2d 628, 644, 220 P.2d 897; *Edwards v. Freeman*, 34 Cal.2d 589, 594, 212 P.2d 883; *Huebotter v. Follett*, 27 Cal.2d 765, 770-771, 167 P.2d 193; *Oettinger v. Stewart*, 24 Cal.2d 133, 140, 148 P.2d 19, 156 A.L.R. 1221.

I would reverse the judgment.

GIBSON, C. J., and CARTER, J., concur.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



49 Cal.2d 668

Pat P. MENDOZA, Plaintiff, Petitioner
and Respondent,

v.

SMALL CLAIMS COURT OF LOS AN-
GELES JUDICIAL DISTRICT, Cal-
ifornia, Defendant and Appellant.

Mary Ariza, Real Party In Interest.
L. A. 24776.

Supreme Court of California,
In Bank.

Jan. 28, 1958.

Rehearing Denied Feb. 26, 1958.

Proceeding in unlawful detainer for default in rent. The Small Claims Court dismissed action on its own motion on ground that statute was unconstitutional. The Superior Court of Los Angeles County, Edward T. Bishop, Frank G. Swain and Julius V. Patrosso, JJ., entered judgment that writ of mandate issue to compel Small Claims Court to entertain proceedings and Small Claims Court appealed. The Supreme Court, Traynor, J., held that since there was no right to appear by counsel before small claims court and stay of proceeding on appeal to superior court was discretionary, amendment giving jurisdiction of unlawful detainer proceedings to small claims court was unconstitutional

as authorizing dispossession of tenant without a hearing.

Reversed.

Opinion, 314 P.2d 780, vacated.

1. Constitutional Law ⚡42

Generally, only person who is a member of the class whose rights are invaded by statute may question its constitutionality, but this rule is not absolute or all inclusive.

2. Courts ⚡39

Rule that only a member of class whose rights are invaded by statute may question its constitutionality, does not preclude a court from inquiring into its own jurisdiction or compel it to enter a judgment that it lacks jurisdiction to enter.

3. Constitutional Law ⚡45

Statutes ⚡63

If statute on which court's jurisdiction in proceeding depends is unconstitutional court has no jurisdiction in proceeding, and since it may determine whether or not it has jurisdiction it may inquire into constitutionality of statute.

4. Landlord and Tenant ⚡291(18)

Granting stay of proceedings on appeal from small claims court in unlawful detainer action is discretionary with the trial judge. West's Ann.Code Civ.Proc. §§ 117, 117g, 117j, 945, 946, 976, 978, 979, 1176.

5. Constitutional Law ⚡309(1)

When public necessity demands, there may be action followed by hearing, but otherwise due process requires that no person shall be deprived of a substantial right without notice and hearing.

6. Landlord and Tenant ⚡291(16)

Public necessity does not demand action before hearing in lawful detainer action by landlord to regain possession of leased premises

7. Constitutional Law ⚡305

Right to a hearing includes the right to appear by counsel.

8. Landlord and Tenant ⚡289

Since there can be no representation by counsel in small claims court and a stay

pending appeal to superior court is discretionary with trial judge, amendment to statute giving small claims court jurisdiction of unlawful detainer proceedings is unconstitutional as authorizing dispossession of tenant without a hearing. West's Ann.Code Civ.Proc. §§ 117, 117j, 978, 979, 1176.

9. Statutes ⇌ 64(2)

Unconstitutionality of amendment to statute respecting jurisdiction of small claims court in so far as it grants jurisdiction of unlawful detainer proceeding, does not invalidate entire statute. West's Ann.Code Civ.Proc. § 117.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for appellant.

Ardy V. Barton, Los Angeles, for respondent.

TRAYNOR, Justice.

In November, 1955, plaintiff brought a proceeding in unlawful detainer for default of rent in defendant small claims court. On December 6, 1955, the court dismissed the action upon its own motion on the ground that the 1955 amendment to section 117 of the Code of Civil Procedure, upon which its jurisdiction was predicated, was unconstitutional. From a judgment of the superior court that a writ of mandate issue compelling defendant to entertain the proceeding, defendant appeals.

Section 117 of the Code of Civil Procedure gives justice court and municipal court judges jurisdiction to sit as small claims courts in cases for the "recovery of money only where the amount claimed does not exceed one hundred dollars (\$100), *except that a municipal court judge sitting as a small claims court shall also have jurisdiction in proceedings in unlawful detainer after default in rent for residential property where the term of tenancy is not greater than month to month, and where the whole amount claimed is one hundred dollars (\$100) or less.*" (Italics added.)

The unlawful detainer provision was added in 1955. The jurisdictional amounts were increased to one hundred fifty dollars in 1957.

[1-3] The first issue to be decided is whether defendant court can question the constitutionality of the statute. Plaintiff contends that defendant is not a member of a class whose rights are invaded by the statute and invokes the general rule that only such a member may question its constitutionality. California State Automobile Ass'n Inter-Insurance Bureau v. Downey, 96 Cal.App.2d 876, 907, 216 P.2d 882. The rule invoked by plaintiff is not absolute or all inclusive. Pacific Indemnity Co. v. Myers, 211 Cal. 635, 644, 296 P. 1084; People v. Globe Grain & Milling Co., 211 Cal. 121, 128, 294 P. 3; Quong Ham Wah Co. v. Industrial Accident Commission, 184 Cal. 26, 31-34, 192 P. 1021, 12 A.L.R. 1190; see Golden Gate Bridge and Highway District v. Felt, 214 Cal. 308, 316-317, 5 P.2d 585. Nor does it preclude a court from inquiring into its own jurisdiction or compel it to enter a judgment that it lacks jurisdiction to enter. If a statute on which a court's jurisdiction in a proceeding depends is unconstitutional, the court has no jurisdiction in the proceeding, and since it may determine whether or not it has jurisdiction, it necessarily follows that it may inquire into the constitutionality of the statute (People ex rel. Smith v. Judge of Twelfth District, 17 Cal. 547, 551; State ex rel. Coarsey v. Harrison, 107 Fla. 20, 144 So. 316, 317; State ex rel. Turner v. Hocker, 36 Fla. 358, 18 So. 767, 768; New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 N.E. 410, 412; State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242, 248; State ex rel. Tod v. Court of Common Pleas of Fairfield County, 15 Ohio St. 377, 379, 381) and appeal from a judgment compelling it to proceed. (Simpson v. Police Court of City of Riverside, 160 Cal. 530, 532, 117 P. 553; Modern Loan Co. v. Police Court, 12 Cal.App. 582, 584, 108 P. 56.)

[4] One of the alleged grounds of unconstitutionality of the amendment to sec-

tion 117 of the Code of Civil Procedure is that it deprives a defendant of due process of law in that he may be deprived of possession of his residence without ever having had a hearing with the right to be represented by counsel, since he has no right to counsel in a small claims court (Code Civ.Proc. § 117g) and a stay of proceedings pending appeal is discretionary with the small claims court even though an appeal bond is filed. Code Civ.Proc. § 1176. Plaintiff contends, however, that there is an automatic stay on appeal when a proper undertaking is filed (citing sections 117j, 978, and 979 of the Code of Civil Procedure) and that on appeal the defendant will have a trial de novo in the superior court with the right to be represented by counsel. Code Civ.Proc. § 976. Sections 978 and 979, however, which govern appeals from justice courts and from small claims courts, as provided in section 117j, are essentially similar to sections 945 and 946, which govern appeals from superior courts. It has been held in numerous cases that in unlawful detainer actions sections 945 and 946 are subject to section 1176, which provides that a stay of proceedings on appeal is discretionary with the trial judge. The reasoning in those cases also applies to sections 978 and 979. *Jameson v. Chanslor-Canfield Midway Oil Co.*, 173 Cal. 612, 617, 160 P. 1066; *Sarthou v. Reese*, 151 Cal. 96, 97, 90 P. 187; *Bateman v. Superior Court*, 139 Cal. 140, 143, 72 P.

922; *Cluness v. Bowen*, 135 Cal. 660, 661-662, 67 P. 1048; *Gross v. Kelleher*, 73 Cal. 639, 640-641, 15 P. 362; *McDonald v. Hanlon*, 71 Cal. 535, 536, 12 P. 515; *Woods-Drury, Inc., v. Superior Court*, 18 Cal. App.2d 340, 349, 63 P.2d 1184; see Code Civ.Proc. § 1174; 3 Cal.Jur.2d, p. 702; *Witkin, California Procedure*, Vol. 3, pp. 2197-2198; *Hunt, Manual of Unlawful Detainer Law in Calif.*, pp. 132-133. Moreover, the Legislature has specifically precluded the application of section 979 to stay proceedings in unlawful detainer actions. The 1955 amendment to section 117ha of the Code of Civil Procedure added the words "and the judgment may be enforced in the manner provided in Section 1174 of the Code of Civil Procedure of the State of California." The applicable part of section 1174 provides that under certain limited circumstances the court may, within its discretion, permit the tenant to be restored to his estate upon payment. In all other cases the judgment may be enforced immediately and there is no provision for an automatic stay on appeal.¹ Section 1176, which is complementary to section 1174, provides: "An appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge before whom the same was rendered so directs." Section 1178 provides that the unlawful detainer sections are controlling over "Part 2" of the Code of Civil Procedure.² Part 2 in-

1. The applicable part of section 1174 reads as follows:

"When the proceeding is for unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, and the notice required by Section 1161 has not stated the election of the landlord to declare the forfeiture thereof, the court may * * * order that execution upon the judgment shall not be issued until the expiration of five days after the entry of judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into the court, for the landlord, the amount found due as rent, with interest thereon, and the

amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon the judgment shall be satisfied and the tenant be restored to his estate.

"But if payment as here provided be not made within five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately."

2. "The provisions of Part 2 of this code, relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this chapter or with rules adopted by the Judicial Council, apply to the proceedings mentioned in this chapter." Code Civ.Proc. § 1178.

cludes section 979 and the sections relating to appeals from justice courts.

Under the foregoing statutes a stay of proceedings on a judgment in unlawful detainer by the small claims court is discretionary with that court, and there is no automatic stay of proceedings whether or not an undertaking is filed.

[5, 6] When public necessity demands, there may be action followed by a hearing. *Financial Indemnity Co. v. Superior Court*, 45 Cal.2d 395, 401, 289 P.2d 233; *Rhode Island Insurance Co. v. Downey*, 95 Cal. App.2d 220, 235-237, 212 P.2d 965. Otherwise due process requires that no person shall be deprived of a substantial right without notice and hearing. *McClatchy v. Superior Court*, 119 Cal. 413, 418-421, 51 P. 696, 39 L.R.A. 691; *Havemeyer v. Superior Court*, 84 Cal. 327, 400-401, 24 P. 121, 10 L.R.A. 627; *People v. Lawrence*, 140 Cal.App.2d 133, 136-137, 295 P.2d 4. Public necessity does not demand action before hearing in this proceeding by a landlord to regain possession of leased premises. Nor can there be any doubt that possession of a tenant is a substantial right. "The right to retain property already in possession is as sacred as the right to recover it, when dispossessed." *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 41 N.E. 263, 265, 29 L.R.A. 386. In *Modern Loan Co. v. Police Court*, 12 Cal.App. 582, 587, 108 P. 56, 58, it was conceded that the person from whom personal property was taken could immediately maintain an action of claim and delivery, but the statute was nevertheless held unconstitutional. "This statute, however, does at least purport to authorize the magistrate to determine the right of actual possession of the property, and actual possession is a most valued right, and is an essential part of property, and no one, consistent with constitutional safeguards, can be deprived of the possession or title to property, or any other substantial right, without reasonable notice and opportunity to be heard."

[7] The right to a hearing includes the right to appear by counsel. *Chandler v.*

Fretag, 348 U.S. 3, 9-10, 75 S.Ct. 1, 99 L.Ed. 4; *Powell v. State of Alabama*, 287 U.S. 45, 68-70, 53 S.Ct. 55, 77 L.Ed. 158; *Cooke v. U. S.*, 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767; *Steen v. Board of Civil Service Commissioners*, 26 Cal.2d 716, 727, 160 P.2d 816; *Roberts v. Anderson*, 10 Cir., 66 F.2d 874, 876; *Prudential Insurance Co. of America v. Small Claims Court*, 76 Cal.App.2d 379, 381-382, 173 P.2d 38, 167 A.L.R. 820. In its consideration of the right to counsel in *Powell v. State of Alabama*, supra, 287 U.S. at pages 68-69, 53 S.Ct. at page 64, the United States Supreme Court declared: "What, then, does a hearing include? Historically and in practice, in our country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law * * * If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

In *Prudential Insurance Co. of America v. Small Claims Court*, supra, 76 Cal. App.2d at pages 381-382, 173 P.2d at page 39, upholding the small claims court act, it was stated: "It is urged that depriving a litigant of the right of counsel is a violation of due process. There can be little doubt but that in both civil and criminal cases the right to a hearing includes the right to appear by counsel, and that the arbitrary refusal of such right constitutes a deprivation of due process." The requirements of due process were met, however, since a plaintiff need not elect to sue in a small claims court and a defendant has a right to appeal to the superior court where he may have a trial de novo and be represented by counsel and the automatic stay precludes a deprivation of property

until the appeal is determined. Code Civ. Proc. §§ 117j, 978, 979. In the present case the right to counsel on appeal cannot save the amendment, for there is no automatic stay and the defendant may be dispossessed prior to the trial de novo. Code Civ. Proc. § 1176.

[8,9] The 1955 amendment to section 117 of the Code of Civil Procedure is therefore void insofar as it purports to give jurisdiction to small claims courts in unlawful detainer proceedings. The invalidity of this amendment does not invalidate the entire section. *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 47-48, 172 P.2d 867; *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 555, 171 P.2d 885.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.



49 Cal.2d 686

Patrick S. MITTON, Petitioner,
v.
STATE BAR OF CALIFORNIA,
Respondent.
S. F. 19746.

Supreme Court of California,
In Bank.
Feb. 7, 1958.

Proceeding to review recommendation of board of bar governors that petitioner be sustained from practice of law for period of three months. The Supreme Court held that board properly sustained charges of improper solicitation by attorney of professional employment.

Suspension from practice of law for period of three months ordered.

1. Attorney and Client ☞53(2)

Board of bar governors properly sustained charges of improper solicitation of professional employment by attorney. Rules

of Professional Conduct, rules 2, 7, 10, West's Ann.Bus. & Prof.Code, following § 6076.

2. Attorney and Client ☞32

An attorney may not initiate the organization of prospective litigants to provide employment for himself as their attorney. Rules of Professional Conduct, rules 2, 7, 10, West's Ann.Bus. & Prof.Code, following § 6076.

3. Attorney and Client ☞58

Suspension from practice of law for period of three months was not excessive discipline for attorney who solicited professional employment. Rules of Professional Conduct, rules 2, 7, 10, West's Ann.Bus. & Prof.Code, following § 6076.

Patrick S. Mitton, Novato, in pro. per., and Julius H. Selinger, San Rafael, for petitioner.

Garrett H. Elmore, San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Bar Governors of the State Bar that petitioner be suspended from the practice of law for a period of three months.

The local administrative committee found in one count a violation of Rule 7 (representing conflicting interests) and Rule 10 (improperly advising on a case without being consulted in reference thereto) of the Rules of Professional Conduct. In other counts the local committee also found three solicitations in violation of Rule 2 and recommended that petitioner be disbarred. The Board of Bar Governors dismissed all counts except two, each of which charged a solicitation. The Board found each of the two counts to be true and recommended that petitioner be suspended from the practice of law for three months on each count, the suspension on each count to run concurrently.

It appeared in the proceedings that a former associate of petitioner was involved. After a lengthy investigation, the local administrative committee concluded that the associate was "a reluctant and ignorant participant in the activities" and was "far less culpable" than petitioner. The local committee also concluded that there were not sufficient facts to warrant disciplinary proceedings against the associate. Accordingly, the matter concerning the associate is closed.

On one count of solicitation, the Board found that on or about May 30, 1954, petitioner wilfully solicited professional employment from Mr. and Mrs. Rob R. Middleton; that neither Mr. nor Mrs. Middleton was a client or former client of petitioner; that they did not get in touch with him or request anyone else to do so on behalf of either of them; and that petitioner was unknown to them prior to his solicitation of them. The essential elements of the solicitation are admitted by petitioner. The evidence indicates that Mrs. Middleton was involved in an accident about 2 a. m. on Sunday, May 30, 1954. She was taken by ambulance to the Palo Alto Hospital. Petitioner learned of the accident by seeing a police accident report. That same day petitioner got in touch with his associate and they went to the hospital sometime during the afternoon. Mrs. Middleton was not talking at that time, so petitioner and his associate conversed with Mrs. Middleton's sister, Marion J. McElhiney. Later that evening petitioner and his associate returned to the hospital and urged Mr. Middleton to retain them as counsel. At that time Mr. Middleton signed an attorney's retainer agreement. Both Mr. and Mrs. Middleton and Marion McElhiney testified that they were given to understand that petitioner and his associate were eye-witnesses to the accident. Petitioner admits that he was not an eye-witness but denied that he ever stated otherwise.

[1] Petitioner contends that he went to the hospital to offer his services as an investigator, and that this is proper and is

not a solicitation under Rule 2. Petitioner's contention is without merit, for he urged retention as an attorney the very same day that he claims to have offered his services as an investigator, and he admitted that he had it in mind to ask them for their business as an attorney before he originally called on them. Moreover, any investigation service he might perform would be as an attorney, for he was not licensed as an investigator as required by section 7520 of the Business and Professions Code. The exemption from the license requirement in section 7522 is for "(f) An attorney at law in performing his duties as such attorney at law." In *Libarian v. State Bar*, 21 Cal.2d 862, 865, 136 P.2d 321, 323, the petitioner sought to excuse advertisements on the basis that they related only to his services as an income tax accountant and his notary fees. The court there stated: "If the petitioner should choose to continue as a practitioner at the bar of this state, he must comply with the standards of the legal profession. He should appreciate that when he is licensed to practice as an attorney at law, the professional services that he thus performs are performed by him as an attorney, whether or not some of the services could also be rendered by one licensed in a different profession. One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter." We conclude that the Board properly sustained the charge of an improper solicitation of Mr. and Mrs. Middleton.

[2] On the second charge of solicitation, the Board found that in July, 1954, petitioner wilfully solicited professional employment with respect to the rezoning of property from John Waters and Carrol Waite; that neither John Waters nor Carrol Waite, nor Mission Engineers, Inc., their principal, was a client or former client of petitioner; that neither they nor any other agent of Mission Engineers, Inc., got in touch with petitioner or requested anyone else to do so on behalf of any of

Cite as 321 P.2d 15

them; and that petitioner was unknown to them prior to his solicitation of them. Petitioner also admitted the essential elements of this solicitation. Petitioner seeks to justify his solicitation of Mission Engineers on the ground that a Mr. Aspes, a farmer from whom petitioner had purchased eggs, owned land related to the land that Mission Engineers was subdividing, and that Mr. Aspes indicated that he would be interested in discussing the matter with petitioner if other property owners involved were to seek another presentation of the rezoning matter before the planning commission. Such an interest of Mr. Aspes', however, would not justify petitioner's solicitation of Mission Engineers to employ him in their rezoning matter. An attorney may not initiate the organization of prospective litigants to provide employment for himself as their attorney. *Sawyer v. State Bar*, 220 Cal. 702, 711-712, 32 P.2d 369. Mr. Aspes did not testify. Mr. Waite testified that petitioner did not mention Mr. Aspes to him. Mr. Waters testified that petitioner said that he was preparing an appeal for rezoning for a client who owned land related to that being subdivided by Mission Engineers and proposed that Mission Engineers retain him as an advocate for the rezoning. Mr. Aspes did not retain petitioner and, in fact, later refused to do so. Mission Engineers also refused to retain petitioner. We conclude that the second count of solicitation was properly sustained by the Board.

[3] Petitioner urges in mitigation that he was admitted to practice in January, 1954, and had been in practice only a few months when the violations occurred. He also urges consideration of the fact that the charges have been pending for over two years. In the light of previous decisions and the circumstances involved here, it does not appear that the recommended discipline is excessive. *Tonini v. State Bar*, 46 Cal.2d 491, 497, 297 P.2d 1; *Higgins v. State Bar*, 46 Cal.2d 241, 246-

247, 293 P.2d 455; *Friday v. State Bar*, 23 Cal.2d 501, 504-505, 144 P.2d 564.

It is ordered that Patrick S. Mitton be suspended from the practice of law for a period of three months, commencing 30 days after the filing of this opinion.



157 Cal.App.2d 287

Victor SILVAGNI, Petitioner,

v.

SUPERIOR COURT of the State of California
In and for the COUNTY OF LOS
ANGELES, Respondent,

N. E. Youngblood, and Anthony T. Carsola,
Real Parties in Interest.

Civ. 22762.

District Court of Appeal, Second District,
Division 2, California.

Jan. 30, 1958.

Proceeding on writ of prohibition to restrain superior court from taking any further proceedings in connection with enforcement of order directing issuance of warrant of attachment to bring petitioner before court. The District Court of Appeal, Richards, J. pro tempore, held that where oral pronouncement of court directed petitioner to return to court in person to show cause why assignment of stock had not been executed, if not executed by certain time, and petitioner's attorney appeared on behalf of petitioner, petitioner could not be held in contempt for failure to appear in person.

Peremptory writ issued.

I. Contempt ⌘56

Witnesses ⌘17

A "bench warrant" is a process issued by court itself, or from the bench, for

attachment of a person to compel his attendance before court to answer a charge of contempt or for failure of a witness to attend in response to a subpoena which has been duly served. West's Ann.Code Civ. Proc. §§ 1211, 1212, 1993.

See publication Words and Phrases, for other judicial constructions and definitions of "Bench Warrant".

2. Contempt ⚡20

Oral pronouncement ordering defendant to make, execute, and deliver forthwith an assignment of shares of stock to plaintiffs before entry of judgment was not a decision or judgment in view of fact that written and signed findings of fact and conclusions of law were not made, and defendant could not be in contempt for failure to assign stock until judgment containing such provision was entered. West's Ann.Code Civ.Proc. § 632.

3. Contempt ⚡20

When oral pronouncement of court directed defendant to return to court in person to show cause why assignment of stock had not been executed, if not executed by certain time, and defendant's attorney appeared on behalf of defendant, defendant could not be held in contempt for failure to appear in person. West's Ann. Code Civ.Proc. § 632.

4. Motions ⚡32

An appearance in response to an order to show cause need not be in person but may be by attorney even though order to show cause expressly directs an appearance in person, and an order to appear in person is in excess of court's power.

5. Contempt ⚡21

Disobedience of any lawful order of court is a contempt of authority of court, but disobedience of a void order made in excess of jurisdiction of court does not constitute contempt.

6. Trial ⚡21

Trial court in civil litigation has no inherent power to order physical presence of a party before it other than as a witness at any stage or stages of litigation. West's Ann.Code Civ.Proc. § 1209, subd. 5.

7. Arrest ⚡1

Civil arrest is designed to secure presence of a party until final judgment. West's Ann.Code Civ.Proc. § 478.

Robert H. Powsner, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Assistant County Counsel, Los Angeles, for respondent.

N. E. Youngblood and Anthony T. Carsola, Beverly Hills, for real party in interest.

RICHARDS, Justice pro tem.

Petitioner seeks a writ of prohibition to restrain the respondent court from taking any further proceedings in connection with the enforcement of an order directing the issuance of a warrant of attachment to bring him before the respondent court.

Petitioner is one of the defendants in an action for declaratory relief concerning a written contract of employment of plaintiffs for legal services. At the conclusion of the trial on September 5, 1957, and while petitioner was personally present, the court orally announced its decision, in part as follows: "It is the judgment of this Court that the plaintiffs, N. E. Youngblood and Anthony T. Carsola, be and they are hereby awarded the sum of 3,750 shares of stock of the Silvagni Estate Company in that corporation standing in the name of Victor Silvagni or deposited in the First National Bank of Nevada, Las Vegas, Nevada, for his account. * * * and that the defendant Victor Silvagni make, execute, and deliver forthwith an assignment of said 3,750 shares of capital stock of the Silvagni Estate Company, a Nevada corporation, to the plaintiffs, N. E. Youngblood and Anthony T. Carsola, and that pending the said execution of said documents, you are instructed, Victor Silvagni, not to sell, assign, transfer, or encumber in any manner the said 3,750 shares of the said stock. * * * You [petitioner] are ordered to return to this Court to this department at 9:15 a. m., the 20th of September, to show

cause, if any you have, why the documents as ordered by the Court have not been executed, provided the same have not been executed at that time." As part of its oral pronouncement of decision the court directed that the counsel for plaintiffs prepare the findings, conclusions and judgment.

Thereafter on September 20, 1957, counsel for the petitioner appeared before respondent court and announced that he was appearing on behalf of the petitioner who did not appear at that time in person. Counsel for the plaintiffs advised the court that no assignment of the stock had been made and the record discloses the following proceedings: "The Court: May I hear from you, Mr. Powsner? Mr. Powsner: I am appearing for Mr. Silvagni. The Court: Did you hear the Court order him to appear in person? Mr. Powsner: Well, I was aware that the Court ordered him to appear and show cause, if any, why he hadn't complied with the order if he had not, but I believe that under the law, your Honor, on an Order to Show Cause I am entitled to appear. The Court: Let a bench warrant issue for his appearance." On October 10, 1957, the findings, conclusions of law and judgment were signed and filed and thereafter entered.

We have concluded that the court acted in excess of its jurisdiction in ordering the issuance of the warrant of attachment and that the commendability of the court's purpose to maintain control over the person of the petitioner to insure the performance of a judgment to be entered cannot evoke an otherwise nonexistent authority.

We are hampered in approaching the problem presented by this proceeding in determining the ground upon which the court ordered the issuance of the warrant of attachment, as the record is devoid of any recital of facts purporting to support the warrant for a direct contempt (Code Civ. Proc. § 1211; Paddon v. Superior Court, 65 Cal.App. 34, 39, 223 P. 91), nor is there any showing in the record before us of any affidavit setting forth facts essential to justify the issuance of a warrant to answer for a constructive contempt. Code Civ. Proc. §

1211; In re Pillsbury, 69 Cal.App. 784, 788, 232 P. 725; Ex parte Ah Men, 77 Cal. 198, 200-201, 19 P. 380.

[1] The term "bench warrant" is not defined in our codes but as applied to civil actions is generally understood to mean a process issued by the court itself, or from the "bench," for the attachment or arrest of a person to compel his attendance before the court to answer to a charge of contempt (Code Civ. Proc. § 1212), or for the failure of a witness to attend in response to a subpoena which has been duly served. Code Civ. Proc. § 1993.

There is no contention, and there can be none, that the order for the warrant in the matter at bar was predicated upon petitioner's failure to appear as a witness, inasmuch as the trial was completed at the time of the court's direction that he return to court in person at a future date. Hence we rule out Code of Civil Procedure, section 1993, as a possible support of the challenged order.

[2] Manifestly the court lacked jurisdiction to issue a warrant of attachment to compel petitioner's presence to answer to a charge of constructive contempt growing out of his failure to "make, execute, and deliver forthwith an assignment of said 3,750 shares of capital stock" to the plaintiffs before the entry of judgment. The oral pronouncement by court on September 5, 1957, was not a decision or judgment as written and signed findings of fact and conclusions of law were required. Code Civ. Proc. § 632; Fuhrman v. Superior Court, 2 Cal.2d 250, 253, 39 P.2d 802; McConville v. Superior Court, 78 Cal.App. 203, 208, 248 P. 553. The petitioner could not be in contempt for a failure to assign the stock until a judgment containing such provision was entered. Cosby v. Superior Court, 110 Cal. 45, 52, 42 P. 460; Neblett v. Superior Court, 86 Cal.App.2d 64, 66, 194 P.2d 22; Gideon v. Superior Court, 141 Cal.App.2d 640, 642, 297 P.2d 84.

[3,4] As part of the court's oral pronouncement there was a purported order directing the petitioner to return to court

in person on September 20, 1957, to show cause why the assignment of stock had not been executed, if not executed at that time. Assuming, *arguendo*, the authority of the court to so direct the petitioner to show cause, nevertheless he could not be held in contempt for failure to appear in person in response thereto, as it has uniformly been held that an appearance in response to an order to show cause need not be in person but may be by attorney even though the order to show cause expressly directs an appearance in person, and that an order to appear in person is in excess of the court's power. 12 Cal.Jur.2d 87; *Foley v. Foley*, 120 Cal. 33, 39, 52 P. 122; *Ex parte Gordan*, 92 Cal. 478, 480, 28 P. 489; *In re Claasen*, 36 Cal.App.2d 155, 156, 97 P.2d 254; *Bakeman v. Superior Court*, 37 Cal. App. 785, 787, 174 P. 911.

[5,6] It is contended on behalf of the respondent court and by the real parties in interest that the trial court had inherent power to order the petitioner to be personally present at the date set by the court, and that petitioner's failure so to appear in person was in and of itself disobedience of a lawful order of the court and constituted a direct contempt and thus authorized the issuance of the warrant of attachment to answer therefor. As we have previously pointed out, the record does not disclose that the warrant was issued upon the ground of such failure to appear, disassociated from petitioner's omission to perform some act required by the terms of a valid order. Disobedience of any lawful order of court is, of course, a contempt of the authority of the court. Code Civ.Proc., § 1209, subd. 5. On the other hand, it is equally elemental that disobedience of a void order made in excess of the jurisdiction of the court does not constitute a contempt. *Kreling v. Superior Court*, 18 Cal. 2d 884, 885, 118 P.2d 470; *McLaughlin v. Superior Court*, 128 Cal.App.2d 62, 65, 274 P.2d 745; *Uhler v. Superior Court*, 117 Cal.App.2d 147, 153, 255 P.2d 29, 256 P.2d 90. This contention presents the question whether a trial court in civil litigation has inherent power to order the physical pres-

ence of a party before it, other than as a witness, at any stage or stages of the litigation. We are of the opinion that the court has no such power. As the Supreme Court said in *Ex parte Gordan*, *supra*, 92 Cal. 478, at page 480, 28 P. 489, at page 490: "In civil proceedings, and even in many criminal proceedings not involving a felony, a party may appear in person or by counsel. Of course, in proper cases, he may be taken under attachment or warrant of arrest; and, within certain territorial limits, a person may be compelled to attend court as a witness by the process of subpoena. But in the case at bar, Gordan was merely summoned to appear in court on a certain day, and show cause why a certain thing should not be done. He appeared on said day by counsel, and offered to show cause. This he had a right to do, and the court should have proceeded to hear and determine the issue before it. That part of the order which commanded him to appear in person the court had no power to make; and the subsequent order for his arrest for not appearing personally had no jurisdictional basis." This rule appears never to have been questioned in this state, and neither has counsels' nor our own exhaustive research disclosed any authority supporting the power of the court to compel a civil litigant to be present in person, other than the unquestioned power of the court to compel his presence as a witness.

[7] It is suggested by the real parties in interest that the court was empowered to exercise jurisdiction over the person of the petitioner in order to keep him from leaving the state, thus to insure a complete determination of the controversy. Civil arrest is the recognized procedure designed to secure the presence of a party until final judgment. *Mattoon v. Eder*, 6 Cal. 57.

We are unable to discover that petitioner disobeyed any valid order of the court so as to constitute either a direct or constructive contempt, and therefore the order for the issuance of the warrant of attachment was invalid and in excess of the jurisdiction of the court. Code of Civil Procedure, sec-

tion 478, declares that "No person can be arrested in a civil action, except as prescribed in this Code." In re Mulford, 73 Cal.App.2d 453, 456, 166 P.2d 890, 892, thus states the fundamental rule: "There is no inherent power in the court to place citizens in jail. The legislature makes the law on that subject within constitutional limitations. Jurisdiction of courts in the matter of arrest is limited by the Constitution and statutory enactments." We are unable to find that the order for petitioner's arrest conformed to any authorized statutory procedure.

Let the peremptory writ issue.

FOX, Acting P. J., and ASHBURN, J., concur.



157 Cal.App.2d 524

John Earl HASKINS, Plaintiff and Respondent,

v.

John W. CRUMLEY and Crumley, Inc., Defendants and Appellants.

Civ. 22196.

**District Court of Appeal, Second District,
Division 1, California.**

Feb. 10, 1958.

Rehearing Denied March 3, 1958.

Action by real estate broker against contractor based on two transactions between parties and other matters. The Superior Court of Los Angeles County, Morton L. Barker, J., entered judgment for broker and contractor appealed. The District Court of Appeal, Doran, J., held that trial court did not abuse its discretion in permitting broker to file an amended complaint alleging that broker had sold to contractor all interest in certain lots which broker was purchasing in escrow and amount owing thereon which sum had been

included in total amount as claimed in original complaint.

Judgment affirmed.

See also 312 P.2d 276.

1. Pleading ⚡229

Courts should be liberal in allowing amendments to pleadings so that substantial justice may be done.

2. Appeal and Error ⚡959(1)

Since the granting or denial of a proposed amendment to pleadings is a discretionary matter, a reviewing court is not warranted in reversing, where an amendment has been permitted over objection, unless there has been a manifest abuse of discretion, even though judge might have been justified in making a contrary ruling.

3. Brokers ⚡82(3)

In action by real estate broker against real estate contractor for commissions, on open account and on account stated, trial court did not abuse its discretion in allowing broker to amend complaint to allege that broker had sold contractor all interest in certain lots which broker was purchasing in escrow and that the amount owing thereon had been included in total amount claimed in original complaint.

4. Pleading ⚡53(1)

Causes of action arising out of one transaction may be separately stated in different ways, even though inconsistent with each other.

5. Appeal and Error ⚡1010(1)

Where substantial evidence exists in support of findings and judgment, no appellate interference is called for.

6. Vendor and Purchaser ⚡219

In action by real estate broker against contractor, conclusions of trial court to effect that broker offered to sell contractor all of broker's interest in an escrow arrangement with respect to two lots, that contractor was substituted as purchaser for one of lots but he had built a house on the other lot, that both escrow company and contractor had been notified immedi-

ately of irregularity in handling of escrow and that appropriate demands had been made were supported by evidence.

Walter W. Faner, Canoga Park, for appellants.

Howard W. Hunter, Los Angeles, for respondent.

DORAN, Justice.

Plaintiff Haskins is a licensed real estate broker, and also a real estate operator, buying and selling on his own account. The appellant John W. Crumley is a licensed building contractor and real estate developer. In late 1952 plaintiff agreed to conduct a selling campaign for defendant in respect to houses defendant was building for speculation. An "open listing" authorization for one year was first signed; in March, 1954, a second "exclusive right to sell" was signed, and on June 23, 1954, at defendants' request, plaintiff relinquished this exclusive right. It is claimed that at the time of this cancellation, defendants were indebted to plaintiff in respect to various matters.

The present controversy is particularly concerned with two of the transactions between the parties. One of these relates to what is known as the "Wise transaction", in which plaintiff negotiated a sale for defendants to Wise, earning a commission of \$462.50. By a written addenda to a letter plaintiff inadvertently acknowledged payment in full of all commissions covering a group of houses of which the Wise transaction was a part. A few days later, upon discovery of the error plaintiff by letter advised defendants of the error, and at the trial, after proper foundation, a carbon copy of this letter was admitted in evidence. It is appellants' contention that the Wise commission has been paid in full.

In reference to the "Cantlay lots transaction", it appears that on January 26, 1954, plaintiff had entered into an escrow agreement to purchase Lots 225 and 239 of

Tract 8197, depositing \$100 in escrow, the transaction being handled by Dorothy Casier, plaintiff's saleswoman. Defects in title showed up, and about April 14, 1954, plaintiff was notified that merchantable title was available as to lot 225, and that it would be some time before the other lot title was cleared up. During this escrow period, plaintiff had received a cash offer of \$2,500 for lot 225.

The trial court found that in April, 1954, plaintiff offered to sell to defendant Crumley all interest in the escrow for \$875 for each lot; Crumley was thereupon substituted as purchaser of lot 225, and the escrow refunded to plaintiff \$50 of the original deposit, and retained the \$50 balance on account of lot 239 which still remained in escrow. About October 5, 1954, plaintiff discovered that the defendant had built a house upon the other lot, namely lot 239, and an investigation disclosed that this lot had been conveyed to defendant. The escrow company and defendant were notified immediately of the irregularity in handling the escrow, and appropriate demands made.

It further found that John W. Crumley had severed all business relationship with plaintiff on June 23, 1954, and that Crumley obtained title to said lots about July 12, 1954, unbeknown to plaintiff; that the value of lot 239 was \$3,000. The court found that Crumley was indebted to plaintiff in the amount of \$875 for each lot in accordance with the original understanding. It is appellants' position that "The Cantlay properties were merchandised by plaintiff as trustee for John W. Crumley * * * and plaintiff cannot claim an interest adversely to his principal".

On February 3, 1955 plaintiff filed the present complaint in four counts; Count I seeking recovery of \$3,871.93 for agreed commissions; Count II alleged that defendants "became indebted" in the same amount; Count III alleged an "open book account"; and Count IV was framed on the theory of an "account stated". There was a general denial of all liability.

At the opening of trial, plaintiff advised the court and the defendants that it would be necessary to file an amendment to cover what is known as the Cantlay lots transaction. Over defendants' objection, plaintiff was permitted to file an amended complaint alleging that plaintiff had sold to defendant all interest in certain lots which plaintiff was purchasing in escrow, and that the amount of \$1,750 was owing thereon, which sum had been included in the total amount of \$3,871.93 claimed in the original complaint. Plaintiff had judgment in the sum of \$1,710 with interest.

It is appellants' contention that the findings and judgment are not supported by the record, and that the trial court should not have permitted the amendment to the complaint hereinbefore mentioned.

[1,2] As said in *LeCyr v. Dow*, 30 Cal.App.2d 457, 463, 86 P.2d 900, 903, and elsewhere, "the whole subject of amendment to pleadings is addressed to the sound discretion of the trial court". Courts should be and are liberal in this matter so that substantial justice may be done. Since the granting or denying of a proposed amendment is a discretionary matter, a reviewing court is not warranted in granting a reversal unless there has been a manifest abuse of discretion, even though the judge might have been justified in making a contrary ruling.

[3,4] In the instant case there has been no showing of an abuse of the trial court's discretion, nor does it appear that appellants have suffered any prejudicial error in the allowance of the amendment. The amended complaint contains several counts, and it has long been established that causes of action arising out of one transaction may be separately stated in different ways, even though inconsistent with each other. Further, it may be noted that the trial court offered to grant a continuance to meet the issues presented by the amendment but that the appellants elected to proceed with the trial.

[5,6] The appellants' contentions as to the validity and effect of the escrow agree-

ment concerning the Cantlay lots and whether plaintiff should be regarded as agent or principal relate largely to disputed questions of fact which were presented for the trial court's decision. It appears that these matters were thoroughly canvassed and argued in respect to matters of both law and fact. A survey of the record discloses substantial evidence in support of the trial court's findings on all of these matters, and that these findings adequately dispose of all material issues. It is true that there is a conflict in the evidence in respect to various matters but this fact in no manner interferes with the well-established rule that where substantial evidence exists in support of the findings and judgment, no appellate interference is called for. The conclusions of law are adequate and are supported by the findings and evidence. No reversible error has been pointed out.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



157 Cal.App.2d 542

TRANSPORT INDEMNITY COMPANY,
Petitioner,
v.
INDUSTRIAL ACCIDENT COMMISSION of
the State of California and James E.
Cooper, Respondents.
Civ. 17813.

District Court of Appeal, First District,
Division 1, California.

Feb. 11, 1958.

Workmen's compensation proceedings in which commission entered finding that employee's injury resulted in temporary total disability and carrier petitioned for review. The District Court of Appeal,

Fred. B. Wood, J., held that evidence sustained finding that employee, a truck driver who was unable to return to former heavy type of work, was temporarily totally disabled.

Award affirmed.

1. Workmen's Compensation ☞1653

In workmen's compensation proceeding by employee, a truck driver, who sustained injuries to back while lifting 100 pound bags of cement from truck and was still wearing brace at time of hearing, where testimony showed that employee was unable to return to former work requiring heavy lifting but was willing to try lighter work which employer had failed to offer him, evidence sustained finding that employee was temporarily totally disabled and that consideration had been given to ability of injured employee to compete in an open labor market. West's Ann.Labor Code, §§ 4653, 4654, 4657, 5953.

2. Workmen's Compensation ☞1377

Where capacities left to workman fit him for special uses only, employer has burden of showing that suitable work is available for him.

3. Workmen's Compensation ☞1755

Finding of ultimate fact of temporary total disability is sufficient without also finding the probative facts upon which it is based. West's Ann.Labor Code, § 5953.

4. Workmen's Compensation ☞1173

In workmen's compensation proceeding involving question of temporary total disability of employee, where employer although informed of prior nonindustrial injury did not convey this information to its doctor when it requested the doctor to make an examination of employee and the employer had received physician's report several weeks before date of hearing, employer could not complain of referee's action in denying carrier's request for continuance for further examination at close of hearing.

Mullen & Filippi, San Francisco, for petitioner.

Everett A. Corten, Daniel C. Murphy, Emily B. Johnson, San Francisco, for respondent Industrial Accident Commission.

FRED B. WOOD, Justice.

The employer's insurance carrier claims the evidence does not support the respondent commission's finding that the employee's injury resulted in temporary total disability.

The employee, a truck driver, sustained an injury to his lower back on May 10, 1956, when attempting to lift the tailgate of his truck preparatory to picking up a load of gravel. He had been hauling sacks of cement with the tailgate down.

He received compensation and medical treatment until November, and, in December, 1956, applied to the commission for adjustment of his claim. At the hearing in March, 1957, he testified that he had not returned to work yet. He was put first into a cast, then into a truss belt for a while and then into a chairback brace which he was still wearing pursuant to Dr. Jaskiewicz' instructions. The doctor told him he could return to light duty, that he could drive a truck. He went and drove with a friend of his three or four times (the last time was in December) but each time he rode on the truck he would get a backache and quite a bit of discomfort. After two to three hours he would have to get out of the truck in order to get comfort.

He had been trying to locate other jobs but had not been able to find them as yet. He went to his employer, Pacific Coast Aggregates, to see if he could get a job when released for light work but they would not put him back to work at light work because they did not have it. Asked if there is no work available right now, he said "right now there happens to be 350 men sitting in the union hall."

He felt he could perform a little more than light work but not that he could go

back and lift those hundred pounds bags of cement all day, the kind of work he was doing when the injury occurred. He was unable to bend over to the floor to pick up the sacks. Due to the pain at the belt line and the catch in the back he was unable to bend clear over.

He said he felt he could drive a dump truck now; dump truck work is light when one is hauling nothing but gravels or fills.

There was medical testimony that he could now do light work. On September 17, 1956, Dr. Jaskiewicz was of the opinion that the employee could perform "light work" commencing September 1 and "regular work" commencing October 1. October 31 this doctor reported that the employee's return to work was delayed because of a recent accident (nonindustrial in origin) but that he was then "available for light work." On November 29, Dr. Jaskiewicz reported that the employee was "able to return to his regular work," but the doctor expressed the desire that the employee be examined by another orthopedist because he "would rather have another opinion before such determination is made." Accordingly, Dr. Eisenberg examined the employee on January 7, 1957. He expressed the opinion that the employee could do a "very light type of work, if such were available." Dr. Walker made an examination on January 4 and reported that the employee "could be gainfully employed" but should not "undertake any type of heavy work which would involve excessive stooping, bending or lifting of objects over 75 pounds in weight."

[1] Of this evidence, the referee, in his report recommending denial of the carrier's petition for reconsideration, said: "I believe petitioner's contention that the finding of temporary total disability is contrary to all of the evidence is untrue. On the contrary, the medical reports indicate applicant is still wearing a chairback brace and is unable to return to his regular employment, handling 100# sacks of cement in loading and unloading his truck. The fact that he states his willingness to try lighter work is not proof that he would be able to do it. The employer has not offered him any work

and he has been unable to find any." Those are inferences a factfinder reasonably could draw. We see no basis for substituting other inferences for those which the factfinders in this case have drawn.

As to whether dump truck driving was "light work" of the type contemplated by the doctors, the commission in its answer to the petition says: "It is a rare, almost nonexistent, job as a truck driver that does not require the driver to lift, stoop, carry, load and unload, because, of course, the purpose of a truck is to transport material from one place to another which involves getting material on and taking it off the truck. This is the work of the driver as a general rule. Applicant stated that he would be willing to try to drive a dump truck if the dump truck were hauling gravel and fills. This is 'light work.' Dump trucks carry things other than gravel and fills such as cement bags which the driver is to load and unload. (This is the work he was doing at the time of his injury.)" That does not impress us as an unwarranted view of the situation. In this very case, it would appear, the employee had been driving a dump truck to carry heavy sacks of cement and he was about to use it for the hauling of gravel. In the face of that can this court take judicial notice, as the carrier would have us do, that there is in fact a well defined class of dump truck drivers who are never called upon to bend low or lift heavy articles? In the face of this record we perceive no basis for "refreshing the judicial recollection" to any such effect.

The carrier argues that the very fact that 350 truck drivers are waiting for jobs, at the union hall, demonstrates that the employee's inability to get "light work" stems from economic conditions, not from his back injury. As to that, the commission in its answer significantly comments: "There are about 350 truck drivers seeking work in Oakland. Petitioner has apparently misunderstood applicant's testimony in this regard. There are not 350 dump truck drivers seeking employment driving dump

trucks but 350 truck drivers seeking employment driving various types of trucks."

[2] Both parties agree that California follows the "odd-lot" doctrine, enunciated in *Meyers v. Industrial Accident Comm.*, 39 Cal.App.2d 665, 103 P.2d 1025, and that where the capacities left to the workman fit him for special uses only the employer has the burden of showing that suitable work is available for him. They differ on the question whether the evidence here would warrant a finding that this employee is temporarily fitted for special uses only.

In support of the view that this employee is fitted for special uses only, the commission in its answer says: "Is applicant an 'odd-lot'? He could probably drive a dump truck hauling gravel and fills. He could not drive a dump truck carrying anything else. He could not replace a driver who is absent in order to make an urgent delivery, if any loading or unloading were involved. He could never aid in loading or unloading any trucks. He would have to stop driving at frequent intervals so that he could get out and move around. It would be an unusual employer indeed who would be willing to gamble on the applicant when there are 350 men available who could do all of these jobs. His own former employers (who use dump trucks) would not take him back. They can't use him on their dump trucks. Applicant's capacities for work fit him for special purposes only and the employer has not shown any suitable work to be available."

[3] We conclude that the evidence supports the finding of "temporary total disability," and that "consideration * * * [has been] given to the ability of the injured employee to compete in an open labor market." Labor Code, § 4653. The finding of the ultimate fact of "temporary total disability" is sufficient without also finding the probative facts upon which it is based. Labor Code, § 5953; *Lumbermen's Mutual Casualty Co. v. Industrial Accident Comm.*, 29 Cal.2d 492, 498-499, 175 P.2d 823, and cases there cited. This is quite different from California Compensa-

tion Ins. Co. v. Industrial Accident Comm., 128 Cal.App.2d 797, 276 P.2d 148, 277 P.2d 442, where the commission had found temporary *partial* (not total) disability. That finding immediately brought into play the provisions of sections 4654 and 4657 of the Labor Code which require computation of wage losses during the period of partial disability.

[4] The carrier also claims that the award for further medical treatment was improper because assertedly based upon the report of a physician who had the improper history. This report did not indicate that Dr. Walker was aware of and gave consideration to the history of a non-industrial injury which the employee incurred November 5, 1955, some six months prior to the injury here involved.

Toward the close of the hearing held on March 8, the carrier's counsel requested continuance for further examination by Dr. Walker to enable the doctor to give consideration to the injury of November 5, 1955. The referee denied this request upon the ground that the carrier, though informed of this prior injury, did not convey this information to Dr. Walker when it requested the doctor to make the examination and had received the Walker report several weeks before the date of the hearing.

In this connection the carrier additionally alludes to the fact that the forepart of the hearing dealt with a proposed compromise and settlement and that the referee somewhat narrowly restricted the scope of the hearing to the consideration of that question, saying that "if the compromise and release is not going to be approved, you have an opportunity for a further hearing and you can put on whatever evidence you want." Counsel did not accept that tender. Instead, he said: "I did want to avoid the further proceedings." In response, the referee reopened the case and the direct examination of the employee started anew. Under such circumstances the carrier is in no position to complain. Moreover, an early medical report in possession of the

carrier before Dr. Walker's examination, specifically mentioned the auto accident of November, 1955, and indicated that its results had already cleared up.

The award is affirmed.

PETERS, P. J., and BRAY, J., concur.

only child of decedent and had been born in France, after her mother had procured interlocutory decree of divorce from testator, but before rendition of final decree, was not entitled to share in decedent's estate even though testator never knew of her existence.

Affirmed.



157 Cal.App.2d 380

**In the Matter of the ESTATE OF Fritz
O. FERNSTROM, Deceased.**

**Marta Fernstrom OBOLENSKY, Appellant
and Constantant,**

v.

**Walter G. DANIELSON and Britta Linne,
Petitioners and Respondents,**

**The American Scandinavian Foundation,
Erik (Karl) Holm, Olle Fernstrom, Britta
Linne, Nils Fernstrom and Birgit Fern-
strom, Legatees and Respondents,**

**The Regents of the University of California,
Legatees and Respondents,**

**Helge Holm, Glenna Holm, E. G. Swanberg,
Ingrid Swanberg, Charles Fernstrom, Ber-
till Neljber and Max Ortey, Legatees and
Respondents.**

Civ. 22740.

**District Court of Appeal, Second District,
Division 1, California.**

Feb. 3, 1958.

Hearing Denied April 2, 1958.

Proceedings wherein petitioner sought determination that she was pretermitted daughter of testator. The Superior Court of Los Angeles County, Newcomb Condee, J., rendered judgment against petitioner, and she appealed. The District Court of Appeal, Herndon, J. pro tem., held that where will stated that testator, except as otherwise provided in will, intentionally and with full knowledge omitted to provide for his heirs who might be living at time of his death, petitioner, who was not provided for in will and who alleged that she was

1. Descent and Distribution 47(2)

In determining whether testator intentionally omitted to provide for a person who might establish that he or she was child of testator, intent of testator must be determined solely by reference to will itself and extrinsic evidence is not admissible.

2. Descent and Distribution 47(2)

A testator's declaration in his will that he has intentionally omitted to provide for his heirs is a sufficient expression of his intentional omission of provision for children. West's Ann.Prob.Code, § 90.

3. Descent and Distribution 47(2)

When a testator has declared in his will that he intends to omit all heirs not therein provided for, such declared intention and purpose will be given effect and it is immaterial whether testator knew of existence of the particular claimant or whether the particular claimant was in testator's mind. West's Ann.Prob.Code, § 90.

4. Descent and Distribution 47(2)

Where will provided that testator, except as otherwise provided, intentionally and with full knowledge omitted to provide for his heirs who might be living at time of his death, it would be presumed that such provision was included for express purpose of foreclosing possibility of claims by persons, known or unknown, who might be, or claim to be, testator's issue. West's Ann.Prob.Code, § 90.

5. Descent and Distribution 47(2)

Where will stated that testator had, except as otherwise provided in will, intentionally and with full knowledge omitted to provide for his heirs who might be living at time of his death, petitioner, who was not provided for in will and who

alleged that she was only heir of decedent, and had been born in France, after her mother had procured interlocutory decree of divorce from testator, but before rendition of final decree, was not entitled to share in testator's estate, even though testator never knew of her existence. West's Ann. Prob.Code, §§ 90, 1080 et seq.

Frederick W. Mahl, Jr., Los Angeles, for appellant.

H. Spencer St. Clair, Los Angeles, for respondents Walter G. Danielson and Britta Linne, coexecutors of the estate of Fritz O. Fernstrom, deceased, and legatees and respondents, Erik (Karl) Holm, Olle Fernstrom, Britta Linne, Nils Fernstrom and Birgit Fernstrom, and the American Scandinavian Foundation, and others.

Thomas J. Cunningham, John P. Sparrow, and R. Bruce Hoffe, Berkeley for legatee and respondent, Regents of the University of California.

HERNDON, Justice pro tem.

In proceedings instituted pursuant to Sections 1080 et seq. of the Probate Code, appellant sought a determination that she was the pretermitted daughter of Fritz O. Fernstrom, the decedent. In her petition she alleged that she was the only child of the decedent; that she was born in France in 1922 after her mother had procured an interlocutory decree of divorce from the decedent, but before rendition of the final decree; that decedent's will made no provision for her; that she had received no portion of decedent's property by way of advancement; and that decedent's omission to provide for her in his will was unintentional. On these allegations appellant sought to invoke the benefit of Section 90 of the Probate Code:

"§ 90. Rights of children and grandchildren. When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testa-

tor, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate."

The trial court found "that it appears from the Last Will and Testament of the above named decedent that he intentionally omitted to make provision in said Will for any child, including Marta Fernstrom Obolensky even if it were to be determined that she was his daughter". The court thereupon rendered its decree to the effect that the estate should be distributed in accordance with the terms of the will.

The provisions of the will pertinent to our present inquiry are found in two articles thereof, reading as follows:

"Article II.

"I declare that I was once married, but have been for a long time divorced; that I have had no children; that I have four brothers, namely, Charles, Erik, Frans and John, and one sister, Frida Holm. In making this Will I have considered the economic circumstances of my brothers and sister. My brothers in Sweden, Erik, Frans and John are quite well situated and therefore do not need to be considered financially in my will, and my sister, Frida Holm is not in need of any financial assistance. I have at the present time certain funds on deposit in Sweden. By this Will I intend to dispose of all of my property wheresoever situated. During my life, I have acquired certain items of personal property which I believe should have value to and remain in the Fernstrom family. For this reason I have expressed certain of my desires with respect to such property."

"Article XI.

"I have, except as otherwise provided in this Will, intentionally and with full knowledge omitted to provide for my heirs who may be living at the time of my death."

[1] The determinative question on this appeal is whether it appears from the provisions of the will that the testator intentionally omitted to provide for any person who might establish that he or she was a child of the testator. Both precedent and reason require that this question be answered in the affirmative. All parties to this appeal accept the well settled rule that, for the purpose of the present inquiry, the intent of the testator must be determined solely by reference to the will itself and that extrinsic evidence is not admissible for this purpose. In re Estate of Trickett, 197 Cal. 20, 22, 23, 239 P. 406; In re Estate of Cochems, 112 Cal.App.2d 634, 637, 247 P.2d 131; In re Estate of La Brie, 130 Cal.App. 2d 235, 237, 278 P.2d 760.

[2] The courts of California have held repeatedly and consistently that a testator's declaration in his will that he has intentionally omitted to provide for his heirs is a sufficient expression of his intentional omission of provision for children. In re Estate of Hassell, 168 Cal. 287, 142 P. 838; In re Estate of Lindsay, 176 Cal. 238, 168 P. 113; In re Estate of Lombard, 16 Cal. App.2d 526, 60 P.2d 1000; In re Estate of Doell, 113 Cal.App.2d 37, 247 P.2d 580.

In a number of California cases it has been held that nominal testamentary provisions for "heirs" were effective to preclude children from taking as pretermitted heirs, even though such children were not named. Van Strien v. Jones, 46 Cal.2d 705, 299 P.2d 1; In re Estate of Lindsay, supra; In re Estate of Minear, 180 Cal. 239, 180 P. 535; In re Estate of Talmage, 114 Cal.App. 2d 18, 249 P.2d 345; In re Estate of Allmaras, 24 Cal.App.2d 457, 75 P.2d 557. As stated in the recent decision of Van Strien v. Jones, supra, 46 Cal.2d at page 707, 299 P.2d at page 2: "It is well settled that where in a will a testator's child is intentionally omitted or given \$1 or any other sum, section 90 of the Probate Code is satisfied although the child is not mentioned by name."

In Estate of Hassell, supra, three children petitioned the court as alleged preter-

mitted heirs. The will of the decedent contained the following provision: "Those of my heirs not herein mentioned has been omitted by me with full knowledge thereof." In holding that the petitioners were not entitled to take, the Supreme Court stated at page 289 of 168 Cal., at page 839 of 142 P.: "It is argued by appellants that the language subsequently quoted to the effect that 'heirs not herein mentioned have been omitted with full knowledge,' should not be construed to mean and to include his children, since if he had designed or intended to exclude his children, he would have used the precise word. But this is asking the court to put an unpermissible construction upon a word of well-defined meaning both at law and in popular parlance. At law, while the word may include others, it always includes the children of a decedent. In popular parlance it not only has the same meaning, but, if there be any difference, it is more frequently used as a synonym of 'children.' Thus, in common speech, a man will frequently speak of his heirs, meaning thereby his children and his children alone. *No natural sympathy for the disinherited (the reason for which disinherison we cannot know) can be allowed so grossly to pervert the meaning of a well-understood word as to permit us to hold, as here under appellant's contention we would be obliged to hold, that the word 'heirs' did not include and was not used to include a class universally embraced within its significance.*" (Emphasis added.)

A testamentary provision almost identical with that involved in the instant case was presented in Estate of Lombard, supra. In that case the testator had declared that he had no children or grandchildren and stated: "I have, except as otherwise in this will specified, intentionally and with full knowledge omitted to provide for my heirs living at the time of my demise." In holding that the children of the testator were effectively disinherited, the court stated at page 528 of 16 Cal.App.2d, at page 1001 of 60 P.2d: "It is argued by petitioners that the language of section eight of the will to the effect that the testator had 'inten-

tionally and with full knowledge omitted to provide for my heirs living at the time of my demise' should not be construed to mean and to include the testator's children, since if he had intended to exclude his children he would have used the precise word. We cannot put such a strained construction upon the word 'heirs.' 'At law, while the word may include others, it always includes the children of a decedent.'" (Citing *Estate of Hassell*, supra.)

Again, in *Estate of Doell*, supra, there was presented the following substantially identical provision: "Except as otherwise provided in this will, I have intentionally, with full knowledge, omitted to provide for my heirs and the heirs of my predeceased husband." In rejecting the contention that this language did not sufficiently identify an omitted child of testator's deceased child, the court quoted from the decision in *Estate of Hassell*, supra, the following: "At law, while the word (heirs) may include others, it always includes the children of a decedent" and held that by the same token it necessarily included the children of a deceased child. Appellant's efforts to distinguish this, and other decisions to the same effect, are strained and unconvincing.

[3] Appellant urges that the will involved in the instant case shows that the testator did not have her in mind at the time he executed his will. Indeed, appellant's preferred hypothesis is that the testator never knew of her existence. This contention is unavailing because the rule is settled that when a testator has declared in his will that he intends to omit all heirs not therein provided for, such declared intention and purpose will be given effect and it is immaterial whether the testator knew of the existence of the particular claimant or whether the particular claimant was in the testator's mind. In the *Allmaras*, *Lombard* and *Minear* cases, it appeared from the wills involved that the testators did not have the unsuccessful claimants in mind, for, in each of those cases, as in the instant case, the testator declared that he had no children. Paraphrasing the language of the *Minear* decision, (180 Cal. 239, at page

240, 180 P. 535) the testator has said in effect, "I have no children, but if any persons other than those named in my will appear claiming that they are my heirs, either as children or otherwise, I hereby declare my intention to exclude them from sharing in my estate."

Appellant urges that since the *Fernstrom* will was drafted by a skilled attorney, the presumption is all but conclusive that legal terms embodied in the will are used in their legal sense. Again, proceeding upon the hypothesis that the testator was unaware of appellant's existence, appellant argues that by the use of the word "heirs" in Article XI, testator must have referred only to his brothers and sister. The essence of appellant's argument is that under testator's conception of his family situation as revealed by his will the term "heirs", used in a legal sense, could refer only to the brothers and sister.

The fallacy in this argument is easily demonstrated. Indeed, the cutting edge of the sword which appellant has thus raised is against her. The skilled attorney who drafted the *Fernstrom* will presumably was aware of the law that no declaration of intention is necessary to effectuate a disinheritance of brothers and sisters not mentioned or provided for. The attorney presumably was aware, also, of the law that a declaration of intent to disinherit "heirs" would not effectively bar the claim of a person claiming to have been married to the testator subsequent to the execution of the will.

It follows that Article XI can be given legal effect only by applying it to appellant who, assuming the truth of her allegation that she is a daughter, is a member of the only class of heirs legally subject to the effect of such a clause, to wit, lineal descendants. Furthermore, the testator named his brothers and his sister in Article II and gave his reason for not providing for some of them. There being no legal necessity for such a statement it would appear to have been intended quite naturally as a personal explanation designed only to negate any possible supposition that he

entertained some feeling of animosity toward these relatives. However, if there had been any thought in the mind of the testator or his attorney that it was necessary to mention his brothers and sisters in order to disinherit them, Article II would have sufficed.

[4] In short, we think it must be presumed that the attorney who drafted the instant will included Article XI therein for the express purpose of foreclosing the possibility of claims by persons known or unknown who might be, or claim to be, the testator's issue. In view of the California precedents above cited testator's attorney would have been justified in advising his client: "You say you have had no children. Nevertheless, I have included Article XI in your will as insurance against the possibility that after your death some person may come forward and demand distribution of your estate on the basis of a claim that he or she is your child or your grandchild. Article XI will bar any such possible claim."

[5] Appellant makes much of quoted statements of the trial judge to the effect that he regarded this as a "hard" case and that he followed the controlling California decisions most reluctantly, feeling that they placed California "out of step with all other jurisdictions". Our research convinces us, on the contrary, that California's position is not out of harmony with the weight of authority dealing with the same type of preemption statute. See Article on Wills, 57 Am.Jur., 406, sec. 90; 152 A.L.R. 723, 735. We agree, of course, that the learned trial judge was correct in following the controlling decisions, but we do not share his reluctance to do so. We do not regard this as a "hard" case. Our conclusion would be the same even were this a case of first impression. We would regard it as most unreasonable and palpably wrong to nullify this testator's entire testamentary plan in favor of a child who, according to her own preferred theory of the case, had never made her existence known to the testator during the thirty-four years she had lived prior to his death. In the nature of

things, we think it questionable whether she or any other person in like position would generally be regarded as the natural object of the testator's bounty.

The decree is affirmed.

WHITE, P. J., and FOUNT, J., concur.
Hearing denied; CARTER, J., dissenting.



157 Cal.App.2d 455

Aurileo LAZZAROTTO, Plaintiff and Appellant,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., a corporation, Defendant and Respondent.

Civ. 22388.

District Court of Appeal, Second District, Division 3, California.

Feb. 5, 1958.

Rehearing Denied March 4, 1958.

Hearing Denied April 2, 1958.

Action by motorist against railroad for personal injuries sustained when automobile struck side of freight train. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., after verdict in favor of motorist, entered judgment for railroad notwithstanding verdict and granted motion for new trial and motorist appealed from both orders. The District Court of Appeal, Shinn, P. J., held that where motorist had traveled road across which railroad tracks were located more than 250 times in both directions and knew of reflectorized warning signs and where, if his headlights had been on high beam, he would have been able to see train crossing at a distance greater than 200 or 250 feet, but motorist observed nothing, anticipated nothing and did nothing to save himself from collision with train until he was so near train that he was unable to stop in time, motorist was guilty of contributory negligence with respect to collision.

Judgment in favor of railroad entered pursuant to order granting railroad's motion therefor affirmed. Appeals from that order and from order granting railroad a new trial dismissed.

1. Railroads ⚡329

Where motorist had traveled road across which railroad tracks were located more than 250 times in both directions and knew of reflectorized warning signs, and where, if his headlights had been on high beam, he would have been able to see train crossing at a distance greater than 200 or 250 feet, but motorist observed nothing, anticipated nothing and did nothing to save himself from collision with train until he was so near train which was crossing road that he was unable to stop in time, motorist was guilty of contributory negligence with respect to collision.

2. Negligence ⚡69

Although momentary forgetfulness is not necessarily negligence and it may be in accord with conduct of a reasonably prudent person, forgetfulness cannot be urged as an excuse for conduct that could not be expected of a reasonably prudent person.

3. Automobiles ⚡208, 209

Forgetfulness of a driver of an automobile to look for approaching traffic before entering an intersection or in attempting to pass a vehicle ahead amounts to negligence.

4. Railroads ⚡327(1)

Failure to look for trains when approaching a railroad track, the location of which is well known, is negligence because it exhibits an extreme and unusual lack of prudence and caution.

5. Automobiles ⚡204

A motorist whose negligence has placed him in such a position that an accident is unavoidable cannot excuse his negligence by belated effort to escape when it is too late.

6. Railroads ⚡350(13)

Where motorist was contributorily negligent with respect to collision with

train in that he did nothing to save himself from collision until he was so near train that he was unable to stop in time, fact that motorist allegedly applied his brakes after he saw train did not entitle motorist to submission of question of sufficiency of his exercise of due care to jury, in action for damages sustained in accident.

Robertson, Harney, Drummond & Dorsey, Los Angeles, for appellant.

Robert W. Walker, William F. Brooks, Louis M. Welsh, Los Angeles, for respondent.

SHINN, Presiding Justice.

At about 1:10 in the morning of January 22, 1955, plaintiff drove his sedan into the side of defendant's freight train, wrecking the automobile and causing plaintiff severe injuries. In this action for damages upon a complaint charging negligence, defendant denied negligence and pleaded the contributory negligence of plaintiff. The cause having been submitted to a jury a verdict was rendered in favor of plaintiff for \$30,000; judgment on the verdict was entered and in due time defendant made a motion for judgment notwithstanding the verdict and a motion for a new trial. The motions were heard at the same time and both were granted. Plaintiff has appealed from both orders. Under the procedure of section 629 of the Code of Civil Procedure, the order granting defendant's motion for a new trial would be operative only in the event the judgment notwithstanding the verdict should be reversed. Plaintiff seeks a reversal of both orders and reinstatement of the judgment on the verdict. Defendant defends both orders. Our attention will be directed first to the order granting judgment notwithstanding the verdict. We shall assume for the purpose of our discussion that no bell was rung and no whistle was blown and that the defendant was therefore guilty of negligence which was a proximate cause of the accident. Under the rule of law that is so well-established and familiar to all practicing lawyers as to

need no elaboration the sole question is whether under an interpretation and application of the evidence and inferences most favorable to plaintiff it could have been determined upon any reasonable theory that plaintiff was free from contributory negligence. We shall consider the evidence in the light of that rule.

Defendant's railroad extends northwesterly and southeasterly. At a point approximately 5 miles east of Blythe in Imperial County, the tracks are crossed by Lovekin Avenue, a two lane paved road. Lovekin Avenue extends easterly and westerly and the angle of its intersection with the tracks is about 60 degrees. Plaintiff's sedan was traveling westerly. To the north of Lovekin Avenue, easterly of the intersection, there is a high bluff which is located beyond the tracks but which would prevent a train from being silhouetted against the sky. In this vicinity, between Lovekin Avenue and the tracks, there is sparse desert brush, but the tracks themselves are not obscured from view. At a point about 475 feet east of the intersection Lovekin Avenue curves slightly towards the south. From a distance of 400 feet easterly on Lovekin, and in broad daylight, one would be able to see the track to the north of the crossing for a distance of 600 or 700 feet from the crossing. On the left from a point 400 feet easterly of the tracks one would be able to see them for a distance of 150 or 200 feet. The tracks there curve toward the west. There were some 38 cars in the freight train; it was about one-half mile in length and plaintiff's sedan struck the seventeenth or eighteenth car. At that time the caboose was about one-fourth of a mile from the crossing and the locomotive was about one-fourth of a mile beyond it. There was no artificial illumination of the crossing nor any wig-wag, flashing lights, gates or automatic signal devices to give warning to motorists of the approach of trains. One approaching from the east would have a clear view of the tracks from a point 475 feet distant from the intersection. Lovekin Avenue slopes slightly upward toward the west but the tracks at the

intersection are on the same level as the road; 475 feet east of the intersection there was a post with a round reflectorized warning sign indicating a railroad crossing. It had a cross with numerous reflectors and two large letters "R." At about 375 or 400 feet east of the crossing there was a white painted sign on the pavement consisting of two white lines extending across the right half of the road and between the lines, a large white cross within which are two large white letters "R." About 15 feet east of the crossing there was a crossarm 7 feet tall with reflectors and with the words "railroad crossing" painted in black upon a white background; adjacent to the crossarm was a post, with 2 red glass reflecting buttons.

Lazzarotto was 42 years of age; he lived at Midland in the vicinity of the accident, and was employed by U. S. Gypsum Company as a miner; he had been using Lovekin Avenue for 6 years and had crossed the railroad tracks at the intersection 250 or more times. On the day preceding the accident he had arisen at 5:15 a. m., had started work at 5:30, was through at 2:30; he went to his home, had a shower, had something to eat and drove to Blythe, arriving there about 5 p. m. Between 7:30 and 12:30 p. m., he was drinking and playing poker. During this time he drank 5 or 6 bottles of beer. After he left the poker game he ate a meal and then started home. He had his driving lights on high beam; at a point some 500 feet easterly of the crossing he observed an automobile coming from a side road; he dimmed his lights and did not thereafter put them on high beam. When he was at the curve some 500 feet from the tracks he might have been going 50 or 55 miles per hour, but he slowed down to 40, 45 or 50 miles per hour. When he was about 250 feet from the tracks he noticed the wheels of the train and put on his brakes; the car left skid marks for 108 feet, which extended up to the point where he collided with the train. He testified he had seen the warning signs on former occasions but that he did not look at them or pay any attention to them

on the night in question. He testified further that when he first saw the train at a distance of some 250 feet he could have stopped his car but that he tried to stop, applied his brakes, and that he did not know why he had been unable to stop before striking the train. He was not sleepy and was not intoxicated. He was paying attention only to the driving of his car. All the windows of his car were closed; he heard no whistle or bell and saw no light of the train, nor did he hear the noise it was making. In view of his speed of 50 miles per hour and the speed of the train of 25 miles per hour, Lazzarotto would have been half a mile away when the locomotive reached the crossing. He was not listening for any warning nor expecting one. There was expert testimony that plaintiff's car was traveling about 5 miles per hour at the time it struck the train and it was dragged about 72 feet.

In their briefs the parties have cited some 40 decisions of the Supreme Court and District Courts of Appeal to enlighten us with respect to the applicable principles of law. Upon the question of contributory negligence plaintiff strongly relies upon the decision in *Peri v. Los Angeles Junction R. Co.*, 22 Cal.2d 111, 137 P.2d 441. He says: "The factual analogy between the *Peri* case, *supra*, and the instant case is striking." We do not find it so. It was said in that case (22 Cal.2d at page 116, 137 P.2d at page 444): "A heavy fog pervaded the atmosphere in the vicinity which, together with other circumstances, limited the field of visibility to from 5 to 10 feet for dark objects and from 35 to 50 feet for lighted objects. It was dark and there were no street lights or lights of any character burning in the entire vicinity. * * * Plaintiffs were passengers in an automobile driven by Mr. Guida. He was driving his car north on the highway in the lane next to the center line at a speed of 15 miles per hour. The lights of his car were illuminated. He was leaning over the steering wheel peering ahead as he approached the crossing. Guida observed the train on the crossing when about 15

feet therefrom. He swerved to the right and applied his brakes but nevertheless collided with the train." The court concluded that Guida was not guilty of contributory negligence as a matter of law. What is striking about the facts in *Peri* and those of the present case, with respect to the conduct of the two drivers and the surrounding conditions, is their dissimilarity. Upon the other hand defendant says that "the case of *Koch v. Southern California R. Co.*, 1906, 148 Cal. 677 [84 P. 176, 177, 4 L.R.A., N.S., 521], fully controls the case at bar." Plaintiff in that case, after dark, was driving a team attached to a light spring wagon at "a pretty fair trot" (about 6 miles per hour) when he collided with a train traveling at a slow speed, the engine of which "was laboring heavily to get under way on the up grade and 'was puffing very hard with a loud exhaust.'" The horses, of course, could have been brought to a halt abruptly, but the plaintiff made no effort to stop them nor did he see the train until "the noses of his horses were about on the railroad tracks." Obviously, these are not the facts of our case. There is, however, a fact common to the two cases, namely, the statement of Koch "My main idea was to get home. I was not paying any attention to anything." All the cases cited by plaintiff upon contributory negligence hinged upon some fact or facts with respect to the conduct of the one charged with negligence which was consistent with the exercise of ordinary care. There were as many different factual situations as there were accidents. The cases upon contributory negligence relied upon by defendant are merely those in which the conduct evidenced an entire absence of any precautions taken in view of immediate danger. In these two lines of cases the principles of law were the same; they differed only with respect to the controlling facts; and it is the special facts of each case that control. There is little to be gained in a comparison of the reasonableness of conduct of the parties in the case that is under review with the actions of the parties in a myriad of cases involving negligence, since there

are in every case important facts peculiar to that case alone. We have merely to decide whether there was evidence that plaintiff Lazzarotto took any precautions whatsoever which would have been taken by one of ordinary prudence to save himself from injury. We have been unable to discover that his conduct in any respect was that of a reasonably prudent person.

[1-6] We are of the opinion it was the duty of the court to grant defendant's motion for judgment notwithstanding the verdict. It appears to us to be an inescapable conclusion that plaintiff was guilty of contributory negligence: He argues that the evidence disclosed that he used some care and, therefore, it was a question for the jury whether the care he exercised was that of a reasonably prudent person. It would appear from his own testimony that he neglected to take any of the precautions which would have saved him from the accident. He knew where the crossing was located and he was familiar with the warning signs. We have mentioned that at a point 475 feet easterly of the tracks Lovekin Avenue curves slightly toward the south. Photographs of the scene show that the circular reflectorized sign we first mentioned was located at about the point where the road straightened out after the curve; due to its location one approaching the gradual curve and upon entering it could have seen the reflectorized sign directly in front of him. Plaintiff had been without sleep for 20 hours, during which he had spent 9 hours, less lunch time, working as a miner. Although he testified that he was not sleepy, he did not attempt to explain his failure to pay attention to the warning signs. He knew trains ran on the track, although he had never before met one at the intersection. He testified that he was thinking only of his driving and it is obvious that he was not thinking about the railroad crossing. But the signs were there for him to see; he was familiar with them and yet paid no attention to them. There was some wind and it was blowing some sand, but plaintiff did not testify that this interfered with his vi-

sion or distracted his attention. His only explanation of his failure to discover his danger until it was too late was that it was a dark night. The train was unlighted except at the front and rear ends, neither of which was in plaintiff's view. Everyone who is competent to travel the highway by motor knows that an unlighted train crossing a roadway in the nighttime creates an exceedingly dangerous situation. The danger, of course, is much greater to one who does not know of the crossing and comes upon it unexpectedly. It is for them primarily that the warning signs are maintained, but they are also maintained for the benefit of those who, while knowing of the proximity of the tracks, may be momentarily forgetful. Plaintiff was driving at a speed which would not have been unreasonable under normal conditions, and yet his speed directly contributed to the accident. The tire marks on the pavement, which extended for 108 feet, attest to the fact that plaintiff's failure to bring his car to a stop was not due to the faulty condition of his brakes. His headlights were on low beam, and this normally would not have constituted negligence, but if they had been on high beam he would have been able to see the train crossing at a distance greater than 200 or 250 feet, and could probably have stopped in time to avoid a collision. Apparently he did not realize that it would be safer to have his lights on high beam as he approached the railroad track. When we analyze his testimony for the discovery of some conduct consistent with the exercise of ordinary care we find that plaintiff thought of nothing, observed nothing, anticipated nothing and did nothing to save himself from an accident until he was so near the train that he was unable to stop in time. Momentary forgetfulness is not necessarily negligence. It may be in accord with the conduct of a reasonably prudent person. *Austin v. Riverside Portland Cement Co.*, 44 Cal.2d 225, 282 P.2d 69. But forgetfulness cannot be urged as an excuse for conduct that could not be expected of a reasonably prudent person. Forgetfulness of a driver of an automobile to look for ap-

proaching traffic before entering an intersection or in attempting to pass a vehicle ahead, amounts to negligence. Any other rule would be absurd. So, too, the failure to look for trains when approaching a railroad track, the location of which is well known, is negligence because it exhibits an extreme and unusual lack of prudence and caution. Indifference and a conscious disregard of familiar surroundings which spell danger cannot be called momentary forgetfulness. Moreover, plaintiff did not testify that he was mistaken as to the part of the highway he was on, or that he was forgetful of the signs or the proximity of the tracks. Having traveled the road more than 250 times in both directions he could not have failed to know that the tracks were located just beyond the curve. The reflectorized warning sign, as we have stated, would have been seen if he had looked straight ahead as he entered the curve. It is an inescapable fact that the state of plaintiff's mind was one of complete indifference to his surroundings. It is true that when he saw the train he endeavored to stop and could not, but it was his negligence which put him in that unfortunate position. Although plaintiff argues that he exercised *some* care and that the question whether it was sufficient was for the jury to decide, in his briefs he mentions nothing he did to avoid an accident except to apply his brakes when he saw the train. Until that time he was completely indifferent to his surroundings. It did not occur to him that he might encounter a train. And yet he contends that this was the exercise of care for his own safety. A motorist whose negligence has placed him in such a position that an accident is unavoidable cannot excuse his negligence by a belated effort to escape when it is too late.

To permit a recovery by plaintiff upon the facts of this case would set a precedent

which would allow any motorist to recover damages when he had driven into an unlighted train at a crossing, with which he was familiar, without taking any precautions whatsoever to save himself from injury until it was too late to avoid an accident. Such, of course, has never been the law.

We cannot pass unnoticed statements in plaintiff's brief that are highly improper. They refer to the orders as "a wanton abuse of discretion" and as "arbitrary, intemperate, flagrant and capricious." There are other statements which impugn the motives of the trial judge. Counsel for plaintiff say they believe it to be their duty to "strongly attack the trial court," and that a failure to do so would be an injustice to their client. This proffered excuse would have been more plausible had they been able to conceal their rancor. The fact is that the trial judge, far from acting arbitrarily, filed a memorandum opinion in which he made a fair and comprehensive statement of the evidence and gave his reasons for granting the motions. It was his duty to rule as his judgment and conscience dictated. The criticism to which he has been subjected is inexcusable. And we may add that counsel who wrote plaintiff's briefs should not have assumed that we would be influenced by their epithets.

The judgment in favor of defendant entered pursuant to the order granting defendant's motion therefor is affirmed. The appeals from that order, and from the order granting defendant a new trial are dismissed.

PARKER WOOD and VALLÉE, JJ.,
concur.

Rehearing denied; VALLÉE, J., dissenting.

Hearing denied; CARTER, J., dissenting.

157 Cal.App.2d 555

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ernest JOHNSON, Defendant and
Appellant.

Cr. 5978.

District Court of Appeal, Second District,
Division 1, California.

Feb. 11, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, Le Roy Dawson, J., for illegal possession of heroin, and he appealed. The District Court of Appeal, Fournier, J., held that officer-witness giving negative response to inquiry as to whether his informant had been known to him by a nickname such as "Snake" had not been required to volunteer the name of such informant, and that defendant, who had pursued inquiry no further, could not successfully complain that court had erred in not requiring officer to disclose name of his informer.

Affirmed.

1. Arrest § 63(4)

Where informant, who had given reliable information to officer during last four years, gave officer a description of a man who was selling narcotics at hotel known by officer as a common place for narcotics to be peddled, and officer went to hotel and found man answering description, officer had reasonable and probable cause for believing that felony had or was being committed, and was justified in making arrest without warrant. West's Ann.Pen. Code, § 836.

2. Witnesses § 216

In prosecution for possession of heroin, officer-witness giving negative response to inquiry as to whether his informant had been known to him by a nickname such as "Snake" was not required to volunteer the name of such informant; and defendant, who had not pursued inquiry further, could not successfully complain that court had

erred in not requiring officer to disclose name of his informer. West's Ann.Health and Safety Code, § 11500.

3. Arrest § 71

Criminal Law § 395

Where police officer had reasonable cause for arresting defendant without warrant, he was also justified in making reasonable search; and heroin disclosed by such search was admissible in evidence. West's Ann.Health and Safety Code, § 11500.

Lionel Richman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOURT, Justice.

The defendant herein was charged, in an information filed in Los Angeles county, with a violation of section 11500, Health and Safety Code, in that on or about January 2, 1957, he had in his possession a preparation of heroin. The information further set forth that the defendant had been convicted of a felony in January, 1950, in Alameda county and had served a term in prison therefor, and that he had been convicted of the crime of violation of section 11500, Health and Safety Code, a felony, in Los Angeles county in April, 1952, and had served a term in prison therefor. The defendant pleaded not guilty and denied the prior convictions. A trial by jury was waived, and by stipulation of counsel the plaintiff's case in chief was submitted on the transcript of the testimony taken at the preliminary hearing and the exhibits referred to therein. At the trial the defendant testified in his own behalf and stated under oath that he had been convicted of the prior felonies charged in the information, in fact, that he had just been released from prison on the prior narcotics charge.

After the trial the judge found the defendant guilty as charged and found that it was true that he had twice previously

been convicted of a felony. Defendant made an application for probation and a probation officer's report was ordered. At the time of sentence defendant's counsel requested the judge, "in the interest of justice," to strike the priors, to the end as he said, "give your Honor more discretion if he wants to give him County Jail time. If not, it will give the Department of Corrections a greater discretion in handling it. * * * He of course only had one bundle. * * *" The judge then struck the first prior felony conviction, denied the defendant's application for probation, and sentenced the defendant to the state prison.

This appeal is from the judgment of conviction.

The facts are substantially as follows: G. W. Beckman, a member of the Los Angeles police department, at about 8:20 o'clock p. m. on January 2, 1957, talked with an informer he had known for about four years. The informant, a user of narcotics, had been used by the officer previously and had given the officer reliable information upon which arrests had been made. The informant gave the officer the description of a man who was "dealing narcotics" a few minutes before their conversation. The informant stated that the man, who became the defendant herein, was wearing a grey hat with a black band and an orange shirt, that he limped, and that he was standing in front of the Morris Hotel, which was about a block away. The officer saw the defendant a few minutes thereafter in front of the hotel where he stayed for a short time and then started to walk away. The officer followed the defendant until he went into an alley-way, and then the officer maneuvered the police car with the bright lights on the defendant, got out of the car and told the defendant he was under arrest "for suspicion of narcotics."

The defendant was searched at once and in his right-hand coat pocket was found a white paper bundle. When shown the bundle the defendant was asked if he had any "more stuff" and the defendant replied that he did not have anything more, and said,

"It is not anything anyway. It is a burn." The contents of the paper bundle contained a preparation of heroin. On cross-examination, the officer was asked by defendant's counsel if he knew that the Morris Hotel was "a very common place for narcotics to be peddled," and the officer replied, "Yes."

Appellant contends that (1) the arrest was without a warrant and was not based upon reasonable cause; (2) the court erred in not requiring the officer to disclose the name of his informer, and (3) the court committed error in not excluding the evidence obtained at the time of the arrest.

Section 836, Penal Code, provides in part:

"A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person: * * * 5. At night, when there is reasonable cause to believe that he has committed a felony."

This court appropriately said, in *Trowbridge v. Superior Court*, 144 Cal.App.2d 13, at pages 17-18, 300 P.2d 222, at page 225:

"It is settled that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would necessarily be admitted at the trial on the issue of guilt. (Citing cases.)

"It was said in *People v. King*, 140 Cal. App.2d [1, 6] 294 P.2d 972, 975:

" "The term, reasonable or probable cause, has been defined: 'By "reasonable or probable cause" is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.' In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568.

" "The term, 'probable,' has been defined as meaning 'having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt.' Ex parte Heacock, 8 Cal. App. 420, 421, 97 P. 77." *People v. Novell*, 54 Cal.App.2d 621, 623-624, 129 P.2d 453, 454.'

"Penal Code, section 836, provides as follows:

"A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

* * * * *

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. * * *

"In the instant case there is nothing to indicate that the informer was unreliable, in fact, the exact opposite appears, namely, that the informer was reliable insofar as information given to the police was concerned.

"The informer told the policeman, about an hour before the arrest, that the defendant (describing her accurately) lived at a certain address and that it was her habit to keep marihuana in her apartment, and that a day or two previously the informer had seen marihuana in the apartment. The policeman was acquainted with the informer and used information supplied by the informer on two or three other occasions. It is difficult to see how the officer could have had much more information at his disposal under the circumstances, unless he, the officer, had personally observed the marihuana in the apartment.

"We are of the conclusion that the search and seizure following the arrest were legal and proper."

[1] The informant in the present case had given reliable information to the officer during the last four years and had told the officer that a man wearing a grey hat with a black band, an orange shirt, and who limped, had been dealing in heroin a few minutes before while standing in front of the Morris Hotel which was about a block away, and which hotel was known by the officer as a common place for narcotics to be peddled. The officer went to the hotel where he saw the defendant and saw him limp when he walked. We believe the officer had reasonable and probable cause,

based upon the description and information given him by the informant, to believe that the defendant was committing, or had committed the felonies of possession and sale of heroin.

[2] In considering the appellant's second contention, a close reading of the transcript does not disclose that the defendant or his counsel ever asked or attempted to ask the officer the name of the informant. The only question asked of the officer with reference to the name of the informer was, "Was the informant known to you by a nickname such as Snake?", and the answer was, "No." Counsel for the defendant then said, "No further questions." It is self-evident that the officer was not asked the name of the informant, and the defendant cannot now be heard to complain because the name was not furnished him. Further, the informant did not participate in the crime as such, and the disclosure would not have aided the defendant.

[3] Next considering appellant's last contention to the effect that it was error to receive the heroin in evidence. From what has heretofore been stated, it is apparent that there is no merit to such contention. *Trowbridge v. Superior Court*, supra, 144 Cal.App.2d 13, 18-22, 300 P.2d 222.

It was said in *People v. Winston*, 46 Cal. 2d 151, at page 162, 293 P.2d 40, at page 46:

"* * * While the Cahan case held that evidence obtained by police officers in violation of federal and state constitutional prohibitions 'against unreasonable search and seizure is inadmissible,' it did 'not purport to inhibit the right of law enforcement officers to conduct a reasonable search and seizure incident to a valid arrest.' *People v. Coleman*, 134 Cal.App.2d 594, 599, 286 P.2d 582. * * * It is further said in the *Coleman* case, 134 Cal.App.2d at pages 599-600, 286 P.2d at page 585 [586]: 'It is well settled that a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure, during such a

search, of evidence related to the crime is permissible. (Citing cases.) * * *

Judgment affirmed.

WHITE, P. J., and HERNDON, J. pro tem., concur.



157 Cal.App.2d 502

Betty PAGEL, Administratrix of the Estate of Brenda Pagel, Deceased, also known as Muriel Marden, Hayes Pagel, Betty Pagel and Mary Pagel Henderson, Plaintiffs,

Hayes Pagel, Betty Pagel and Mary Pagel Henderson, Appellants,

v.

Willis R. BAILLARD, Eleanor F. Ballard, Louis T. Cramer, John Largamarcino, and John Morton Roth, Defendants and Respondents.

Civ. 22250.

District Court of Appeal, Second District,
Division 3, California.

Feb. 7, 1958.

Hearing Denied April 2, 1958.

Action for judgment declaring that plaintiffs had right to construct a motel and stores on lot which was purchased from defendant and for damages allegedly caused by defendants in prosecuting an action against plaintiffs to reform deed and to enjoin them from constructing motel and stores on lot, which was in area set aside for a "business" area but which had been shown on a subdivision map to be in single-family residential area. From that portion of a judgment of the Superior Court of Los Angeles County, Lloyd S. Nix, J., denying plaintiffs a recovery of damages, the plaintiffs appealed. The District Court of Appeal, Parker Wood, J., held that evidence was sufficient to support findings to effect that there was probable cause for commencing and maintaining reformation and

injunction action, and that there was no malice.

Judgment affirmed.

Malicious Prosecution §64(2)

In action for a judgment declaring that plaintiffs had right to construct a motel and stores on lot which was purchased from defendants and for damages allegedly caused by defendants in prosecuting action against plaintiffs to reform deed and to enjoin them from constructing motel and stores on lot, which was in area set aside for a "business area" but which had been shown on subdivision map to be in single-family residential area, evidence was sufficient to support findings to effect that there was probable cause for commencing and maintaining reformation and injunction action, and that there was no malice.

Hiram T. Kellogg, Los Angeles, for appellants.

Howard D. Hanson, Los Angeles, for respondents.

PARKER WOOD, Justice.

Plaintiffs sought a declaration that they have the right to construct a motel and stores on a lot which was purchased from defendants; and they also sought damages allegedly caused by defendants in prosecuting an action against plaintiffs to reform a deed and to enjoin them from constructing a motel and stores on the lot. In a non-jury trial, the judgment was that plaintiffs have the right to construct a motel and stores, and they are not entitled to recover damages. Plaintiffs appeal from the portion of the judgment which denies recovery of damages.

Appellants contend that the evidence is insufficient to support the findings that defendants commenced the action for reformation and injunction in good faith; that there was no malice; and that there was probable cause for commencing the action.

There was a prior appeal in this action. That appeal was by plaintiffs from a judg-

ment of dismissal after a demurrer to their third amended complaint had been sustained with leave to amend, and after they had refused to amend. Upon that appeal, the judgment was reversed. *Marden v. Bailard*, 124 Cal.App.2d 458, 268 P.2d 809. The allegations of the complaint are stated in detail in that action.

A general statement of the alleged basis for the present action is as follows: In 1943 Muriel Marden purchased Lot 21 of certain real property from defendants Mr. and Mrs. Bailard, and she received a grant deed which stated that the conveyance was subject to building restrictions which had been placed upon the lot by the Marblehead Land Company. About December 1, 1946, Mrs. Marden (and her children to whom she had conveyed an interest in the lot) started to excavate the lot for the purpose of constructing a motel and stores thereon. On December 5, 1956, the Bailards commenced an action against Mrs. Marden (and other owners of Lot 21), alleging that by mutual mistake the restrictions, referred to in Mrs. Marden's deed, did not limit the use of Lot 21 to residential purposes; and the Bailards, as plaintiffs in that action, asked that the deed be reformed, and that defendants be enjoined from constructing a motel and stores. The trial court rendered judgment on February 4, 1949, reforming the deed and enjoining the defendants. The judgment was reversed on March 12, 1951. *Bailard v. Marden*, 36 Cal.2d 703, 227 P.2d 10. On July 12, 1951, upon motion of the Bailards, the trial court dismissed the action.

On August 10, 1951, Mrs. Marden and the other owners of Lot 21 commenced the present action against the Bailards, seeking, as above stated, a declaration that the plaintiffs have the right to construct a motel and stores on the lot, and also seeking damages allegedly resulting from the injunction which deprived them of the use of the lot, and resulting from the prosecution of that action.

Appellants argue that the Bailards had no probable cause for commencing the action for reformation and injunction; there was

no mutual mistake in the sale of the lot to Mrs. Marden; the only mistake was one made by the Bailards in subdividing the tract in that they did not intend to include in the subdivision certain land where Lot 21 and eight other lots are located; that the reversal of the judgment in the reformation and injunction action (*Bailard v. Marden*, supra) shows that there was no probable cause for commencing that action; and that malice should be presumed as a matter of law.

Respondents argue that since there is no evidence that the judgment in the reformation and injunction action was obtained by fraud, the judgment therein is conclusive proof of probable cause for commencing that action; and that, in the present action, the evidence supports the findings.

There was evidence that in May, 1941, the Bailards purchased 434 acres of land from the Marblehead Land Company; the deed to the Bailards restricted the use of the land, except a strip 3,000 feet long and 1,300 feet wide, to single-family residences; the restrictions also provided that, within the excepted area (referred to herein as the "business area"), one motel could be constructed and certain businesses could be maintained; the Bailards employed surveyors to prepare a subdivision map of a certain part of the property and instructed them to include in the map only property which was restricted to single-family residences; by a mistake of the surveyors, a part of the business area was shown on the subdivision map; the map was recorded; Lot 21, which Mrs. Marden purchased, is in the part of the business area which was included in the subdivision map; she purchased the lot through an agent of the Bailards.

Mr. Bailard testified that he did not know, prior to the time the excavating was started on Lot 21, that a part of the business area was shown on the subdivision map or that Lot 21 was in the business area; after the excavating was started, he learned that the deed to Mrs. Marden did not restrict the use of the lot to a single-family

residence; thereafter he discussed the matter with a salesman who represented the Bailards when the sale was made to Mrs. Maren; the salesman told Mr. Bailard that prior to the sale he told Mrs. Marden that the lot was restricted to single-family residential purposes, and that he had shown the restrictions to her; thereafter Mr. Bailard told his attorney all the facts regarding the transaction; his attorney advised him that he had a meritorious action.

Mr. Bailard also testified that at the time he commenced the action for reformation and injunction he acted in good faith and without malice; that his purpose in commencing the action was to rectify a mistake which he believed had been made; and that since the dismissal of the reformation action he had not objected to the defendants proceeding with any kind of construction that they wanted on the property.

The court found, among other things, that defendant Mr. Bailard acquired title to the land (the 434 acres) as trustee for himself and the other defendants Cramer, Largamarcino, and Roth as beneficiaries; that all the acts of Mr. and Mrs. Bailard were done as agents for the defendants who were beneficiaries; that in filing and maintaining the action for reformation and injunction, including the obtaining of the judgment therein, the defendants acted in good faith and without malice; that they had probable cause for filing and maintaining that action and in obtaining the judgment therein; that before commencing that action, the defendants stated all the facts and circumstances connected with the matter to their attorney; that they were advised by their attorney that they had a valid cause of action for reformation and injunction; they believed they had such a valid cause of action; and that in commencing and maintaining that action and in obtaining the judgment therein, the defendants relied upon the opinion of their attorney. The court also found that defendants in filing and maintaining the reformation and injunction action, and in ob-

taining the judgment therein enjoining plaintiffs, were only invoking ordinary judicial process and there was no slander of title; that the acts of defendants in filing and maintaining such action, and obtaining the judgment therein, constituted acts taken in a judicial proceeding and the acts were privileged and did not constitute slander of title; that by reason of the foregoing findings the defendants sustained no damages by the acts of defendants in the reformation and injunction action, and that plaintiffs are not entitled to an award of damages.

The evidence above referred to was sufficient to support the findings to the effect that there was probable cause for commencing and maintaining the reformation and injunction action; and there was no malice.

Appellants argue further that for every wrong there is a remedy, and that the evidence shows that appellants were prevented from using the property for a motel and stores by the acts of the defendants, and that appellants sustained damages thereby; that the defendants should be liable to appellants for such damages on the theory of slander of title, or breach of contract, or equitable relief. In *Asevado v. Orr*, 100 Cal. 293, at page 298, 34 P. 777, 778, it was said: "It is only when the process of the court is abused, or when the plaintiff seeks to avail himself of its power to harass or injure another by suing him upon a charge in which he is conscious of having no right of action, that he become amenable in damages for bringing such suit. Such an action is, however, in the nature of a malicious prosecution, and in any action to recover damages therefor want of probable cause and malice are essential ingredients to the complaint, and must be clearly alleged and proved in order to sustain the action."

The portion of the judgment appealed from is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

James Alexander TRINGHAM,
Respondent,

v. **State Board of Education**

STATE BOARD OF EDUCATION of The
State of California, etc., Appellant.*
Civ. 5736.

District Court of Appeal, Fourth District,
California.
Jan. 31, 1958.

Hearing Granted March 26, 1958.

Proceedings on an amended petition for writ of mandate to annul order of State Board of Education revoking petitioner's school credentials. The Superior Court of Orange County, John Shea, J., entered judgment commanding State Board of Education to vacate its order of revocation and to reinstate petitioner's credentials. The State Board of Education appealed. The District Court of Appeal, Waite, J. pro tem., held that where trial court merely found there was no substantial evidence to support findings of state board and thereby necessarily rejected in toto all of testimony given under oath by three teachers and five pupils, trial court acted in appellate rather than a trial capacity and cause would be remanded with directions to trial court to consider and weigh all of evidence to be submitted in a new trial.

Reversed and cause remanded with directions.

I. Administrative Law and Procedure Civ. 744, 746

Under statute relating to scope of court's review of decisions of state-wide administrative agencies, a trial de novo is required and trial court must weigh all of the evidence before it and pass upon the weight of that evidence in its capacity as a trier of fact. West's Ann.Code Civ.Proc. § 1094.5.

2. Schools and School Districts Civ. 132

Where, in proceedings to review determination of State Board of Education revoking petitioner's school credentials, trial court merely found there was no substantial evidence to support findings of

State Board and thereby necessarily rejected in toto all of testimony given under oath by three teachers and five pupils, trial court acted in appellate rather than a trial capacity and cause would be remanded with directions to trial court to consider and weigh all of evidence to be submitted in a new trial. West's Ann.Code Civ.Proc. § 1094.5; West's Ann.Education Code, § 12752.

3. Schools and School Districts Civ. 127

State Board of Education is the constitutional agency charged with the duty of passing upon the fitness and eligibility of those persons seeking to become and remain teachers and administrators in the public school system, and certain powers of decision, within the necessary limits fixed by law, must be given to such Board. West's Ann.Code Civ.Proc. § 1094.5.

4. Schools and School Districts Civ. 127

Only those persons whose moral integrity and whose discretion in handling children are of the highest degree should be permitted to function in the public school system. West's Ann.Code Civ.Proc. § 1094.5.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for appellants.

Joseph Scott, A. H. Risse, and G. L. McFarland, Los Angeles, for respondent.

WAITE, Justice pro tem.

In an amended accusation filed by appellant State Board of Education, respondent was charged with certain acts alleged to constitute immoral conduct. After hearing, his credentials, consisting of a General Elementary Credential, an Elementary School Administration Credential, and a General Secondary School Credential, were revoked. Thereafter, respondent filed this action in mandamus to compel appellants to cancel and set aside the order revoking said credentials. A demurrer to the petition was sustained without leave to amend, judgment was entered, and upon appeal was reversed by this court. Tringham v. State

Board of Education, 137 Cal.App.2d 733, 290 P.2d 890. Respondent then filed an amended petition for writ of mandate, appellants filed their answer thereto, and the trial court entered judgment annulling the order revoking respondent's credentials. Said judgment also commanded the State Board of Education to vacate its order of revocation and to reinstate forthwith all of respondent's credentials. This appeal is taken from the judgment, the State Board of Education contending (1st) That the trial judge erred in finding that appellants did not produce substantial evidence; and (2nd) That good cause existed for the revocation of respondent's credentials.

The amended accusation filed with the State Board charged immoral and unprofessional conduct and evident unfitness for service in the public schools as grounds for revocation under section 12752 of the Education Code. Paragraph III of said amended accusation sets forth 16 separate instances of alleged immoral and unprofessional conduct on the part of respondent. A hearing was held before a Hearing Officer, Division of Administrative Procedure, State of California, and after taking testimony for two days said officer, having taken the matter under submission, found a substantial number of charges to be true and rendered a proposed decision that respondent's credentials be suspended for a period of one year. Thereafter, the State Board of Education took the matter under submission on the record, including the transcript of testimony taken before the Hearing Officer, and found the following to be the true facts:

(1) "That on two occasions in October and December, 1952, respectively, petitioner, in an indecent manner, placed his hand on the private sexual parts of a male teacher in said school, through the latter's trousers."

(2) "That in or about the month of February 1953, in a class in said school then and there being taught by said male teacher in said school, the petitioner, as he passed by and behind a female pupil in said class and who was

bending over a table with her arms resting thereon, did wilfully, and in an indecent manner, make a patting gesture toward said pupil's posterior and grin at said male teacher."

(3) "That on two separate occasions in November 1952, on the school premises, petitioner told a vulgar joke to a male teacher in said school during school hours and while pupils were in the vicinity."

(4) "That in or about the month of March 1953 the petitioner and a male teacher in said school were talking in the hallway of said school and two female pupils were walking toward them; that the petitioner then and there did motion toward one of said female pupils and state to said male teacher: 'How would you like to have a little of that?' or words of similar import."

(5) "That on one occasion petitioner stated to a female teacher in a joking manner, 'Let's neck.' And on another occasion, upon observing said female teacher carrying a new handbag, stated to said female teacher that a school teacher could not afford a purse like that and that she must be shacking up with somebody. Said statements were made in a joking manner, but were embarrassing to said female teacher."

(6) "That on or about November 19, 1952, petitioner called two male pupils, aged thirteen and fourteen, from their class and asked them if they had been masturbating and if they had been having sexual intercourse with girls, and asked one of the boys if he was having intercourse with a specified girl pupil in the school, using the term 'screwing her'. That toward the latter part of said school year petitioner again asked the same boy if he was having intercourse with a named girl pupil, using the same term as above set forth. Said questioning was done in a vulgar and indecent manner."

(7) "That in or about the month of May, 1953, in the presence of a male teacher in said school, the petitioner was discussing with several male pupils in said school their absence from physical education classes; that petitioner asked one of said pupils whether he would like another year in the eighth grade, and said pupil replied that he would just quit school and go to Tia Juana; and that the petitioner then inquired of said pupil: 'What will you do down there; open a whore house?' or words of similar import."

(8) "That in or about the month of February 1953 the petitioner did, in an indecent manner, place his arms around the chest of a male pupil in said school, rub the chest of said pupil through the latter's clothing, and inquire of him: 'Is that the way you do it to the girls?' or words of similar import."

(9) "That in or about March 1953 petitioner inquired of a male pupil in said school if he was going steady with a named girl and when was he going to have intercourse with her, using the term 'Screw her'."

(10) "That sometime between January and April 1953, petitioner observed one of the male pupils, during play, jump on the back of another, and asked said boys if that was the way they did to the girls, or words of similar import."

Based on these facts, the board found that respondent, while acting as principal, had committed acts constituting immoral and unprofessional conduct and had demonstrated evident unfitness for service in the public school system, and respondent's credentials were revoked.

The amended petition for writ of mandate alleged that petitioner was possessed of additional relevant and material evidence by way of defense to the amended accusation which, in the exercise of reasonable diligence, could not have been

discovered or introduced at the hearing before the Board or the Hearing Officer. However, in the trial court no additional evidence was offered or considered, and the judge made his findings solely on the administrative record, including the transcript of testimony taken before the Hearing Officer. The trial court made a separate finding as to each of the incidents hereinbefore set forth, as found to be true by the State Board, and the finding of the court as to each of said incidents uniformly states: "* * * that there is *no substantial evidence* to support such finding of the respondent, State Board of Education, State of California * * *" (Emphasis ours.) The court even found in connection with incident No. (3), that respondent did not tell vulgar jokes to a male teacher as alleged and found by the Board, *or at any other time or at all*, whereas respondent admitted telling the jokes, maintaining only that no pupils were in the vicinity at the time. (Emphasis ours.)

[1,2] An inspection of the transcript reveals an abundance of substantial evidence to support the findings of the Board, which leads us to a discussion of appellants' first contention, that the trial court erred in finding that appellants did not produce substantial evidence. This necessitates a consideration of the proper scope of a court's review of administrative orders and decisions under the provisions of section 1094.5 of the Code of Civil Procedure. That section, enacted in 1945, codifies the procedure previously followed for reviewing the decisions of state-wide administrative agencies. *Temescal Water Co. v. Department of Public Works*, 44 Cal.2d 90, 105, 280 P.2d 1. Under the prior procedure it was held that such a review required a trial *de novo* in the Superior Court (*Laisne v. California State Board of Optometry*, 19 Cal.2d 831, 123 P.2d 457), and cases subsequent to 1945 have held to the same effect. *Moran v. Board of Medical Examiners*, 32 Cal.2d 301, 196 P.2d 20.

Section 1094.5 of the Code of Civil Procedure provides, among other things, that:

"(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

"(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

In this case the trial court apparently did not weigh all of the evidence before it and pass upon the weight of that evidence as it was required to do in its capacity as a trier of fact. Instead, it merely found that there was no substantial evidence to support the findings of the State Board, thereby necessarily rejecting *in toto* all of the testimony given under oath by the three teachers and five pupils who had testified to the acts which the Board found to have been committed. In so doing, the court acted in an appellate rather than a trial capacity. *Moran v. Board of Medical Examiners*, supra, 32 Cal.2d 301, 308, 196 P.2d 20.

[3] In view of the conclusion we have reached as to appellants' first point, it is perhaps unnecessary to dwell at length upon the second point, namely, that good cause existed for the revocation of respondent's credentials. Section 12752 of the Education Code provides:

"The State Board of Education shall revoke or suspend for immoral or un-

professional conduct, or for persistent defiance of, and refusal to obey, the laws regulating the duties of persons serving in the public school system, or for any cause which would have warranted the denial of an application for a certification document or the renewal thereof, or for evident unfitness for service, life diplomas, documents, or credentials issued pursuant to this code."

Under this statute, the State Board of Education is the constitutional agency charged with the duty of passing upon the fitness and eligibility of those persons seeking to become and remain teachers and administrators in the public school system, and certain powers of decision, within the necessary limits fixed by law, must be given to such Board. Otherwise, the effectiveness of many administrative agencies upon which we rely for the expert conduct of the complex affairs of state government will be vitally impaired.

In the case of *Board of Education of City of Los Angeles v. Swan*, 41 Cal.2d 546, 552, 261 P.2d 261, 265, the Supreme Court observes that a teacher, and more particularly a principal, in the public school system, is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the children coming under the teacher's care and protection. The case then proceeds to quote with approval the following language used by this court in *Johnson v. Taft School District*, 19 Cal.App.2d 405, 408, 65 P.2d 912:

"A board of education is entrusted with the conduct of the schools under its jurisdiction, their standards of education, and the moral, mental, and physical welfare of the pupils during school hours. An important part of the education of any child is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept. The example of a teacher who is continually insubordinate and who refuses to recognize

constituted authority may seriously affect the discipline in a school, impair its efficiency, and teach children lessons they should not learn. Such conduct may unfit a teacher for service in a school even though her other qualifications may be sufficient. "Book learning" is only a phase of the important lessons a child should learn in a school."

In *Goldsmith v. Board of Education*, 66 Cal.App. 157, 225 P. 783, 787, also quoted with approval in the *Swan* case, the court points out that:

"* * * the calling [of a teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous, that they are incapable of enumeration in any legislative enactment. * * * the teacher is entrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention."

As said in the *Johnson* case, *supra*, 19 Cal. App.2d 405, 408, 65 P.2d 912, 913:

"Primarily it should be the function of the board of education to determine the effect on a school of unprofessional conduct on the part of a teacher. It should hear evidence, make its findings and draw its conclusions from them. If its findings and conclusions are supported by substantial evidence it it would be a poor policy for a court to disturb them."

[4] Mindful of these guiding rules, it is apparent that the people of California demand that only those persons whose moral integrity and whose discretion in handling children are of the highest degree should be permitted to function in the public school

system. As pointed out by the attorney general, the language attributed to respondent and found by appellants to have been employed by him, as principal, in speaking to 13, 14 and 15-year-old pupils at the school, was deplorable, and assuredly is good cause for revocation of respondent's credentials if found to be true when weighed with all of the evidence in a trial properly conducted for that purpose.

The judgment is reversed and the cause remanded with directions to the trial court to consider and weigh all of the evidence to be submitted in the new trial.

BARNARD, P. J., and MUSSELL, J., concur.



157 Cal.App.2d 528

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ruffin BRYANT and Walter Webster Alexander, Defendants,

Walter Webster Alexander, Defendant and Appellant.

Cr. 6011.

District Court of Appeal, Second District,
Division 1, California.

Feb. 10, 1958.

Defendant was convicted of narcotics violation. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction, and defendants appealed therefrom and from order denying motion for new trial. The District Court of Appeal, White, P. J., held that direct testimony of officer that he purchased narcotic from defendant was sufficient to sustain conviction.

Affirmed.

1. Criminal Law Ⓒ670

In prosecution for narcotics violation, ruling sustaining objection to cross-examination questions as to reason for officer's termination of service with police department was not abuse of discretion where no argument or statement or offer of proof of facts intended to be proved was offered.

2. Witnesses Ⓒ267

The scope of cross-examination is committed to sound discretion of trial judge.

3. Criminal Law Ⓒ1153(4)

Rulings as to scope of cross-examination will not be disturbed on appeal in absence of clear abuse of discretion.

4. Poisons Ⓒ9

Direct testimony of officer that he purchased narcotics from defendant was sufficient to sustain conviction for narcotics violation. West's Ann. Health & Safety Code, § 11500.

5. Criminal Law Ⓒ260(11)

A conflict in the evidence is committed to duly constituted trier of the fact, and he is the sole and exclusive judge of credibility of witnesses.

6. Criminal Law Ⓒ260(11)

When the trier of fact has made his decision on the conflict presented by contradictory testimony of the witnesses, that decision is binding upon the appellate tribunal, unless the testimony relied upon by the trier of fact can be deemed inherently improbable.

7. Criminal Law Ⓒ330

Where there is positive direct testimony that defendant was one of perpetrators of crime, it is incumbent upon him to show that the testimony is inherently unbelievable in order to prevail.

H. Clay Jacke, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

The Grand Jury of Los Angeles County returned an indictment wherein the above named defendants were accused of the violation of Section 11500 of the Health and Safety Code of the State of California, in that on or about August 22, 1956, they sold a preparation of heroin. Both defendants pleaded not guilty. Trial by jury was duly waived and each defendant was adjudged guilty as charged. Defendant Alexander's motion for a new trial was denied and he was sentenced to State Prison. From the judgment of conviction and the order denying his motion for a new trial defendant Alexander prosecutes this appeal.

Concerning the factual background surrounding this prosecution, the record reflects that on August 26, 1956, Cherry L. Brown was a Los Angeles city police officer assigned to the narcotics detail. On that date he was working in an undercover capacity seeking an allegedly known user and peddler of heroin known as "Chalk". At 1:55 p. m. the officer approached a person seated in an automobile in the 700 block on Fifth Street, believing him to be the man he sought. The person in the automobile proved to be Ruffin Bryant, co-defendant herein, and a brother of the man known as "Chalk". Defendant Bryant told Officer Brown that "Chalk" didn't have anything but that he, Bryant, could help him. They walked to the Victor Hotel but Bryant could not find the man supposed to have the narcotics. Then they walked to the New Morris Hotel where they met the appellant.

He was seated in the rear seat of a parked automobile while the officer and Bryant stood beside it. Bryant told appellant that his companion was trying to "score". Appellant went into the New Morris Hotel and came out in about ten minutes with a small yellow rubber balloon containing a white powder. He got back into the automobile and then handed the balloon through the window to the officer. The latter gave him \$11 and left.

Officer Brown took the evidence to the Narcotics Department, put identifying marks on the envelope it was placed in, and had it booked.

Jay A. Allen, a qualified forensic chemist employed by the Los Angeles Police Department examined the contents of the balloon and found it to be heroin.

On November 14, 1956 appellant was interrogated by Police Officer Arthur Logue at the Police Building. Their conversation was substantially as follows:

"(Officer Logue) asked the defendant Alexander how long he had been selling narcotics prior to selling to Brown, and he stated he had only been in town since June and that it had taken him some time to get to know the fellows down there.

"(Defendant Alexander) stated that he felt that it was only for about two weeks and then he had gotten himself a job.

"(Officer Logue) asked him if he kept the narcotics in the car, and he stated no, that the narcotics were stashed in the hotel.

"(Officer Logue) asked him if he had gone to the car simply to remove the narcotics from his pocket, and he stated that was it.

"(Defendant Alexander) stated that although he was not down on the street much any more, he still knew pretty well what was going on down there."

On cross-examination Officer Logue was asked:

"Q. Do you recall specifically his language, what he said? A. He stated that he had only been in town since June. 'It took me some time to find out what was going on and know the fellows down there.' He further stated, 'Only about two weeks before I got my job.'

"Q. Well, the thing I am trying to determine, Officer is the exact language, because this is important. Did he say he was selling narcotics, or just

what did he say he was doing with them? A. Well, in response to my question, he said—

"Q. Did you ask him 'Have you been selling narcotics?' A. I asked him how long he had been selling narcotics prior to selling to Brown, and he stated he had only been in town since June, and it had taken him some time to get to know the fellows down there, and it had been about a period of about two weeks prior to getting his job.

"Q. Did he say how many sales he made or the quantity? A. No, sir."

Defendant Bryant was called as a witness in his own behalf and acknowledged meeting Officer Brown on August 22, 1957. That the officer inquired of him about his brother "Chalk", saying he wanted to see "Chalk" about "something important". The witness then went into a hotel, returned and informed the officer that "Chalk" was not in the hotel, but that the officer might see him "around the corner".

The witness testified that he then departed, that nothing was said about narcotics until he was about to leave the officer, when the latter stated, "he was trying to score", to which the witness replied that, "I didn't know where he could get any, where he could score at". The co-defendant Bryant further testified that on August 22, 1956 he did not see appellant Alexander, and was not present on that day or at any other time "when Alexander (appellant) and (Officer) Cherry were present together". That at no time did the witness "try in any way to get Officer Cherry Brown narcotics".

Appellant testified that he came to Los Angeles about June 3, 1956, and that during the month of August of that year he was employed as "a sort of houseboy and chauffeur, butler" in Beverly Hills; that his hours of work were from 7:30 or 8:00 a. m. "through the dinner hour until 6:30 or 7:00 at night". That he worked 5½ days each week. That during the month of August, 1956, he did not know his co-de-

fendant Bryant. That he first met Bryant when they made their initial appearance in court. Appellant further testified that he did not know or see Officer Brown on August 22, 1956. That he was then employed and working on his job. That he had no transaction with the officer and did not deliver any narcotics to him at any time, or receive any money from him.

Called as a witness in behalf of appellant, Marie Ann Ross testified that she was acquainted with him; that the latter worked at the same place where she was employed in August, 1956; that appellant worked every day except Thursdays and Sundays from 7:00 a. m. to 7:00 p. m., and commenced to live on the premises about the latter part of August. The witness admitted owning a black Mercury automobile which from time to time she permitted appellant, as well as other people, to drive.

[1] As his first ground for reversal, appellant contends that the trial court committed prejudicial error in unduly restricting his cross-examination of Officer Brown. In this regard appellant complains of the ruling of the trial judge in sustaining objections to his questions seeking to elicit the reason for the officer's termination of service with the Los Angeles Police Department. It is urged that these questions affected the credibility of the witness and that the reason for the officer's resignation, if shown, might reveal "that Mr. Brown (officer) was unreliable or that he was unfit for the detail which he was assigned to or that he had been fired for falsifying public records in obtaining his job as a police officer, or other likely and pertinent reasons indicative of his interests, bias or prejudice * * * Did he have a prior felony record? Was he a user of narcotics himself?"

The record reflects that at the outset of the cross-examination of Officer Brown the following occurred:

"Q. (By Mr. Avery, appellant's trial counsel) Are you presently with the Los Angeles Police Department? A. No, I am not.

"Q. When did you terminate your connection with the L. A. Police Department? A. On December 3rd last year.

"Q. What was the reason for your termination?

"Mr. Nathanson (Deputy District Attorney): Objected to as immaterial.

"The Court: Sustained.

"Q. By Mr. Avery: Did you resign?

"Mr. Nathanson: I object to that—

"The Witness: Yes.

"Mr. Nathanson:—as immaterial.

"The Court: Objection sustained and the answer stricken."

[2, 3] Appellant's counsel thereupon abandoned that subject. Neither argument nor any statement nor offer of proof of the facts intended to be proved was offered. It is well established that the scope of cross-examination is committed to the sound discretion of the trial judge, and in the absence of a clear abuse of such discretion, rulings in such matters will not be disturbed on appeal (*People v. Apodaca*, 132 Cal.App. 2d 340, 341, 282 P.2d 182). And, as was said in *People v. Monson*, 102 Cal.App.2d 308, 313, 227 P.2d 521, 524, " * * * In seeking a reversal of a judgment for exclusion of evidence an appeal is fruitless where the appellant did not fully state the purpose of his offer and facts sufficient to demonstrate its materiality unless the question shows on its face that it was material to the issue". As pertinently stated by respondent, "Although appellant in his opening brief conjectures as to various indications of bias that might have been disclosed if he had been able to pursue his inquiry as to why Mr. Brown left the police department, it would seem from the above authorities that it is not incumbent upon the trial judge to postulate the propriety of a question immaterial on its face and not indicative of any impeaching effect." The ruling of the trial judge sustaining objections to the foregoing questions propound-

ed by appellant on cross-examination of Officer Brown was therefore proper and did not exceed the bounds of sound discretion.

[4] Appellant's next contention that the evidence is insufficient to support a finding of guilt cannot be sustained. The direct testimony of Officer Brown that he purchased the narcotic from appellant is sufficient to sustain a conviction upon the charge contained in the indictment herein (*People v. Grijalva*, 48 Cal.App.2d 690, 691-693, 121 P.2d 32; *People v. Johnson*, 99 Cal. App.2d 559, 563, 222 P.2d 58; *People v. Gebron*, 124 Cal.App.2d 675, 676, 268 P.2d 1068; *People v. Jones*, 153 Cal.App.2d 41, 314 P.2d 93). The case of the prosecution is further strengthened by the testimony of Officer Logue regarding statements made to him by appellant and from which it can reasonably be inferred that appellant admitted he had been selling narcotics for some two weeks prior to his negotiations with Officer Brown; that he kept the contraband "stashed in the hotel"; and that "he had gone to the car simply to remove the narcotics from his pocket".

Appellant points out that his testimony and that of two other defense witnesses establishes that he was not in the area where the crime allegedly was committed on the date thereof, and that "* * * appellant Alexander's side of the case could not have under the reason advanced, have received the same or equal appraisal as that of the prosecution."

[5, 6] This argument merely presents a conflict in the evidence which is committed to the duly constituted trier of the facts who is the sole and exclusive judge of the credibility of witnesses. When the trial court has made its decision on the conflict presented by contradictory testimony of the witnesses, that decision is binding upon the appellate tribunal, as is any question of fact passed upon by it (*People v. Shaver*, 7 Cal. 2d 586, 593, 594, 61 P.2d 1170), unless the testimony relied upon by the trial court can be deemed inherently improbable. No such contention can be sustained in the instant

case. As was said in *People v. Jones*, supra, 153 Cal.App.2d 43, 314 P.2d 94, which presents a factual situation comparable to the case at bar, "The argument here goes solely to the weight to be given the testimony of Officer Means, a matter with which we have no concern. The only question before the trial court was one of fact. No question of law was presented. * * * The court chose to believe the officer. The fact that the officer's testimony was not corroborated is of no consequence on appeal. The evidence supports the judgments." See also *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778.

[7] Equally without merit is appellant's final contention, "That the court erred in its finding of guilt as to the appellant, since such findings could not be based on a doctrine of guilt beyond a reasonable doubt, but rather on suspicion, conjecture and a preponderance of evidence."

Appellant's assertion that the proof offered by the prosecution fails to establish guilt beyond a reasonable doubt because it rests upon "suspicion, conjecture and a preponderance of the evidence" is answered by what we have stated above in the consideration of appellant's challenge to the sufficiency of the evidence. He relies strongly upon the case of *People v. Draper*, 69 Cal.App.2d 781, 786, 160 P.2d 80, but because of the variance between the factual situation therein and the one with which we are here concerned, the cited case is not helpful. In the *Draper* case the only evidence involving the accused in the burglary of three Indio service stations was that the companion with whom he had driven to Indio was seen by a police officer leaving one of the stations and who upon being asked for identification fled; that the appellant Draper a short time later was seen by the officer standing beside a building 50 to 75 feet from the service station; that when the officer walked toward appellant he started to run away and had to be pursued; and that his testimony regarding his trip to Indio was contrary to the story he told the officer at the police station. In re-

versing the judgment, the court said, 69 Cal.App.2d at page 786, 160 P.2d at page 83:

"The foregoing evidence points the finger of suspicion at Draper, shows that he had an opportunity to participate in the commission of the crimes and proves that he was not a truthful witness. This is not sufficient to sustain the burden resting on the People of proving him guilty beyond a reasonable doubt * * *."

In contrast to the highly circumstantial evidence prevailing in the Draper case, supra, we have before us, in the case now engaging our attention, the positive direct evidence of Officer Brown that he actually made a purchase of narcotics from appellant. Pertinent to appellant's final contention, consisting in the main, of an attack upon the credibility of Officer Brown, is the following statement of our Supreme Court in the case of *People v. Braun*, 14 Cal.2d 1, 5, 92 P.2d 402, 405:

"It is a familiar rule that in reviewing the correctness of factual determinations, the function of an appellate court is limited to the question whether there is any substantial evidence in the record to support the judgment. To entitle a reviewing court to set aside a jury's finding of guilt, the evidence of identity must be so weak as to constitute practically no evidence at all. (Citing cases.) *In a case such as the present one, where there is positive direct testimony that the defendant was one of the perpetrators of the crime, it is incumbent upon him to show that the testimony is inherently unbelievable in order to prevail.* 'A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do.'

People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1108, 1114." (Emphasis added.)

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and FOURT, JJ., concur.



157 Cal.App.2d 419

Ray RACKLIFF, Plaintiff and Respondent,
v.
CORONET CONSTRUCTION CO., Inc., a
California corporation, Defendant
and Appellant.
Civ. 22535.

District Court of Appeal, Second District,
Division 1, California.
Feb. 4, 1958.

Rehearing Denied March 3, 1958.

Action for damages arising out of bailment of two rubber-tired motor scrapers. From adverse judgment of the Superior Court, Los Angeles County, Clarence M. Hanson, J., the defendant appealed. The District Court of Appeal, White, P. J., held that where bailment contract required defendant to return motor scrapers to plaintiff's yard and it could be implied that rental was to be from month to month, but defendant did not return scrapers to plaintiff's yard but only called and stated where plaintiff could get them, plaintiff was properly awarded rent for scrapers up to and including day of repossession by plaintiff.

Judgment affirmed.

I. Bailment 32

In action for damages arising out of bailment of two rubber-tired motor scrapers under alleged oral agreement of hire, which required defendant to return machines in

same condition in which they were received, reasonable wear and tear excepted, evidence sustained finding that plaintiff was damaged in sum of \$2,468.40 by reason of damage to machines.

2. Bailment ⇨32

In action for damages arising out of bailment of two rubber-tired motor scrapers under alleged oral agreement of hire, which required defendant to return machines to plaintiff's yard when he was through with them, evidence sustained finding that it cost plaintiff \$80 to return machines at his own expense after defendant had finished using them.

3. Bailment ⇨31(3)

In action for damages arising out of bailment of two rubber-tired motor scrapers under alleged oral agreement of hire, which prohibited use of scrapers in rock, evidence sustained finding that defendant agreed not to use equipment in rock and that he broke such agreement resulting in damage to equipment.

4. Principal and Agent ⇨177(1)

In determining whether bailor of motor scrapers waived restriction against use of scrapers in rock, knowledge of operators who were on bailee's payroll and took orders from bailee was not imputable to bailor, although bailor allegedly had insisted on employment of such operators.

5. Bailment ⇨33

Bailor of motor scrapers did not, as matter of law, waive restriction against use of scrapers in rock by leaving them with bailee instead of terminating bailment, where scrapers were removed from rock at bailor's insistence.

6. Bailment ⇨20, 22

Where bailment contract required bailee to return motor scrapers to bailor's yard and it could be implied that rental was to be from month to month, notice by bailee to bailor to come pick up the scrapers did not terminate the bailment and bailee was properly awarded rent for the

scrapers up to and including the day that bailor repossessed scrapers.

7. Bailment ⇨31(3)

In action for damages arising out of bailment of two rubber-tired motor scrapers under oral agreement of hire, which provided that machines were to be returned in same condition in which they were received, reasonable wear and tear excepted, evidence sustained implied finding that defect in machines, which were used for 28 days before they broke down, was not the cause for the need of repairs.

8. Bailment ⇨20

Where breakdown of equipment was not caused by defects in equipment at time of bailment, bailee was properly charged for rent during time repairs were being made.

9. Bailment ⇨31(3)

Even if repairs made on equipment by bailee were needed because of defect in equipment at time it was leased to bailee and even if bailee would have been justified in deducting time that was used in repairing equipment, bailee's action in proceeding to repair equipment without first giving bailor chance to do it and payment of full rent for first month of bailment, was evidence that bailee waived its right to be reimbursed for time that equipment was broken down.

Bromberg & Cravitz, Bennett J. Cravitz, Los Angeles, for appellant.

Gross & Svenson, Harold W. Svenson, Van Nuys, for respondent.

WHITE, Presiding Justice.

Defendant appeals from a \$5,000 judgment in favor of plaintiff in his action for damages arising out of the bailment of two DW-21s, rubber-tired motor scrapers, valued at about \$30,000 each. The agreement between the parties was admittedly a "bare rental" at \$2,000 monthly for each of the scrapers beginning June 13, 1955, defendant

to hire and pay certain operators, and to pay plaintiff's oiler for four hours daily for oiling the machines. After the end of the first month, \$4,000 rent was paid by defendant and the use of the scrapers was continued.

It is alleged in the complaint and found to be true that "by the terms of said oral agreement of hire * * * said motor scrapers were not to be used in rock * * * and were to be returned to plaintiff at his Lincoln and Manchester Yard in the same condition in which they were received, reasonable wear and tear excepted * * *"; that defendant "used said motor scrapers continuously, commencing on June 13, 1955, and continuing to and including July 26, 1955, and that on July 27, 1955, defendant * * * notified plaintiff that it no longer needed said motor scrapers and * * * tendered to plaintiff a check for the rental thereof in the approximate amount of \$1,300 as rental for the period from July 13, 1955 through July 26, 1955, and * * * told plaintiff the location of said motor scrapers and demanded that plaintiff call for them"; that plaintiff refused said tender and demanded that the motor scrapers be returned to his yard "in as good condition and repair as when received by the defendant * * * reasonable wear and tear excepted * * * that defendant * * * failed and refused to comply with any and all of said demands and that plaintiff took possession of said motor scrapers on or about August 1, 1955, caused them to be repaired on the first, second and third days of August, 1955, and that plaintiff returned said motor scrapers to its own use and service on August 4, 1955"; that plaintiff paid \$80.00 for transporting said scrapers to its own yard; that the agreed rental from July 13th to August 1st was \$2,451.60; that the reasonable value of the use of said motor scrapers for the period from August 1st to August 3rd, inclusive, was the further sum of \$387.10; that defendant "during the period July 13, 1955 to July 26, 1955 did not take proper care of said motor scrapers

and used the same on rock with the result that the water pumps thereon were damaged, the head on one of the two motor scrapers was cracked * * * the seals and gaskets on both motor scrapers were damaged, the cutting bits were completely worn down and ruined, the tires were badly cut and torn, the rotor bits were broken and worn, the motors were damaged, the step on one motor scraper was bent alongside the machine, the belly pan on one motor scraper was bent up to the crankcase, the engines were difficult to start and missed, the water line on one motor scraper was broken, both motor scrapers built up pressure in the cooling system, the lock washers were broken on top of the transmissions, and other damage was done".

Judgment was awarded for the rental from July 13th to August 1st, \$2,451.60, with interest thereon from August 1, 1955; the cost of returning said scrapers to plaintiff's yard which was \$80; and the reasonable cost of repairing the damage found to have been done to them by plaintiff, \$2,468.40; making the total amount of the judgment \$5,000.

Appellant contends that there is no substantial evidence to support the findings that the bailed property was not to be used in rocky ground, the amount of the court's award for damage to the scrapers, or the cost of cartage.

The record discloses that plaintiff testified that before delivering the machines he went to the job site and told the superintendent on the job that he did not want the machines worked in rock and the superintendent said he would not work the machines in rock; and that on the same day he talked with Mr. Cravitz, the president of defendant corporation, and told him the equipment was not to be used in rock; later he went to the job and saw the equipment working in rock, told the foreman he should not work the machines in rock and the foreman replied that they were only stripping some dirt off so the rock could be blasted; that later when he went to the job the

equipment was again working in rock, he spoke to the superintendent who removed the equipment into dirt. Chester Thompson, the operator of one of the machines, testified that plaintiff came to the job on one occasion and told him "either to stay out of rock or take it down and park it", that the foreman then directed him to work on the lower road, and that after plaintiff left the equipment was returned to the rock. That testimony is sufficient to support the finding that the agreement was not to use the scrapers in rock, and for the purposes of this appeal evidence in conflict with it is of no concern.

[1] The finding that "by reason of the damage done" to said scrapers "plaintiff was damaged in the sum of \$2,468.40" is supported by evidence that repairs costing \$4,044.28 were made immediately after the plaintiff repossessed the scrapers included items ranging in amount from "welding supplies \$12.00" to "2 tires damaged beyond repair and excessive wear on remaining tires \$2,501.30". The record also includes testimony that some of the needed repairs were not then made or included in said \$4,044.28. Under the facts and circumstances of the instant action, the amount of damages so found—\$2,468.40—does not appear to be unreasonable or arbitrary.

[2] There is in the record some testimony that the reasonable cost of moving said scrapers from the defendant's job to the plaintiff's yard was \$80, and that defendant agreed to return the equipment to plaintiff's yard.

[3-5] Appellant urges that the judgment must be reversed because "there was a waiver by plaintiff of the alleged restriction prohibiting the use of the bailed property in rocky ground". In support of this contention it relies upon the fact that plaintiff insisted upon defendant's hiring of certain operators for the machines and cites some testimony to the effect that plaintiff knew the machines were working in rock and failed to repossess them. The opera-

tors were on defendant's payroll, taking their orders from defendant, and were not the agents of plaintiff. Their knowledge was not imputed to plaintiff. When plaintiff first became aware that the scrapers were being used in rock, he could have ended the bailment. Sec. 1930, Civil Code. Instead, he insisted that defendant remove them from the rock, which was done. Usually waiver is a question of fact. *Lyons v. Brunswick-Balke etc. Co.*, 20 Cal.2d 579, 583, 127 P.2d 924, 141 A.L.R. 1173. In the instant action, plaintiff's leaving the scrapers with defendant did not waive, as a matter of law, the defendant's use of the scrapers in rock thereafter.

The finding that defendant did agree not to use the equipment in rock and that defendant broke that agreement causing damage to the equipment is supported by substantial evidence. Defendant's statement that a bailee is not an insurer of the equipment and owes no duty beyond ordinary care, therefore, is not applicable to the facts now engaging our attention.

Damage to plaintiff's equipment caused by defendant's breach of its expressed agreement not to use said equipment in rock is sought and awarded. The cases *ex delicto* cited and relied upon by appellant are not determinative of any question presented to us herein.

[6] Appellant urges that the judgment is erroneous because it includes an "award of rental after bailment terminated". Appellant's argument under this heading, however, is that since the court found that "on July 27, 1955, defendant * * * notified plaintiff that it no longer needed said motor scrapers and that defendant * * * tendered to plaintiff a check for the rental * * * through July 26, 1955 and * * * told plaintiff the location of said motor scrapers and demanded that plaintiff call for them", it must be concluded that the bailment ended July 26, 1955.

Respondent states in his reply brief that the bailment was one from month to month and would not have expired until August

12th, except for the fact that plaintiff retook possession of the equipment on August 1st; that the period of the bailment beyond the month paid for by defendant is from and including July 13th to and including July 31st, or 19 days at the daily rate of \$129.03, or \$2,451.60, the amount awarded by the judgment.

The real question, therefore, is whether the bailment was terminated by defendant's notice to plaintiff or by plaintiff's taking possession of the bailed property. From testimony given by the broker and by plaintiff, it could be implied that the rental was to be "from month to month" or "on a monthly basis". Also in the record there is testimony from which it might be implied that the bailment was for the "duration of the job". According to testimony of defendant's president, other scrapers were hired to complete the job late in August.

[7] In the instant action, the agreement between the parties to a bailment included the provision that the bailee would return the property to bailor's premises. We are satisfied that the parties originally intended the bailment to continue until defendant's return of the bailed scrapers to plaintiff's yard. Regardless of its expressed terms, any contract may be terminated at any time by the mutual consent of the parties. Respondent's repossession of the motor scrapers, after appellant's demand that he do so, is evidence of the mutual agreement of the parties that the bailment should end at the time of the bailor's repossession. The court below did not err in awarding rent for the scrapers to and including the day of such repossession.

[8] Appellant also urges that the judgment is erroneous and must be reversed because it includes rental for time during which the scrapers were being repaired. The judgment does not include rent from August 1st to 3rd when plaintiff was repairing the scrapers after repossessing them and before returning them to his own yard. In this connection appellant relies upon the bailor's implied warranty that the scrapers

were in condition fit for the purpose for which they were hired. They refer to the plaintiff's testimony on cross-examination that he recalled "certain defects in the wheels of the equipment"; that he knew about such defect prior to renting to defendant; that he did not tell defendant about it; that "there was about an inch and a half crack in front of the front wheels, it would probably run for ten years on normal conditions or it would probably breach in a month or two"; that he had informed the Shepherd people of this defect; that "you never replace a wheel until it is completely gone, that is a factory repair"; that his agreement with the Shepherd people was "to run this equipment until it broke down" and "then they would go out and replace it"; and other evidence that the equipment "did break down" on the defendant's job and "was under repair part of July 11, all of the 12th and part of the 13th of July". The facts that the scraper was used by defendant for 28 days before the beginning of such "down-time" and that part of said use was in rock contrary to the terms of the bailment supports the implied finding that the "defect" had not caused the need for such repairs.

McNeal v. Greenberg, 40 Cal.2d 740, 255 P.2d 810, 813, relied upon by appellant, involved the rental of a tractor. A directed verdict for defendant-bailor was reversed for the reason that the failure of the tractor's brakes shortly after its delivery to the bailee "is sufficient basis for an inference that the brakes were defective at the time of the delivery of the vehicle and that a reasonable inspection would have disclosed the defect" (40 Cal.2d at page 744, 255 P.2d at page 813) and the jury should have been allowed to weigh the evidence. The McNeal case has no application to the facts of the instant action.

In the case at bar it is not disputed that on or about the 22nd day of July, defendant paid the full rent on both scrapers for the first month ending July 12th, and that defendant did not report any break-down or need for repairs to the plaintiff.

[9] Assuming that the repairs made by defendant on July 11, 12 and 13 were needed because of a defect in the scraper and that plaintiff should have made them, and assuming further that the facts would have justified defendant's deduction of the "down-time" from the first month's rent, under the circumstances of this action defendant's proceeding to repair the scraper without first giving plaintiff the chance to do it, and its payment of the full rent for the first month of the bailment, is evidence that it waived its right, if any, to be reimbursed for such "down-time".

The judgment is affirmed.

FOURT, J., and DRAPEAU, J. pro tem.,
concur.



157 Cal.App.2d 536

Robert J. HUGHES, Plaintiff and Appellant,
v.

**Dr. Samuel D. BURGESON, aka Samuel D.
Burgeson, M.D., Defendant and
Respondent.**

Civ. 22412.

District Court of Appeal, Second District,
Division 3, California.

Feb. 10, 1958.

Rehearing Denied March 4, 1958.

Hearing Denied April 9, 1958.

Action by lessor for lessee's failure to surrender possession after expiration of lease and for damages by reason of lessee's failure to construct certain buildings and premises as required by lease. The Superior Court of Los Angeles County, Walter H. Odemar, J., entered judgment which entitled lessor to recover possession, damages for detention, accrued rent and taxes which had been agreed to be paid by lessee and damages by reason of lessee's failure to construct certain buildings as required by lease. The lessor appealed

on ground that damages allowed for failure to construct buildings were insufficient. The District Court of Appeal, Patrosso, J. pro tem., held that evidence justified finding that lessor had accepted, under lease requiring lessee to construct five or more multiple residential units, three buildings, which had been moved on premises and altered and remodeled, as though they had originally been constructed on premises and as satisfying requirement of lease.

Judgment affirmed.

1. New Trial ⇨27

Where lessor sought to recover from lessee damages for failure to construct buildings as required by lease, lessor was permitted to testify, on theory lease was ambiguous, with reference to conversations between parties preceding execution of lease and question whether lessor had agreed to accept buildings which would be moved on the premises was fully explored, even assuming that defense based on theory lessor had agreed to accept such buildings constituted new matter which should have been specially pleaded by lessee, no prejudice resulted and new trial was not warranted because of technical defect in pleading.

2. Landlord and Tenant ⇨159(1)

In action by lessor against lessee based on theory that lessee had failed to construct certain buildings as required under a lease, finding that lessor had accepted three buildings, which had been moved onto premises and altered and remodeled, as though they had been originally constructed thereon and as satisfying requirement of lease, was supported by evidence.

Robert B. Hughes, Los Angeles, for appellant.

McIver & Green, Robert Miller Green, Montebello, for respondent.

PATROSSO, Justice pro tem.

In this action of unlawful detainer for defendant's failure to surrender possession

after the expiration of the terms of the lease under which the premises were leased, plaintiff recovered judgment for recovery of possession, damages for the detention thereof, accrued rent and taxes agreed to be paid by defendant as well as for damages by reason of defendant's failure to construct certain buildings as required by the lease. Being dissatisfied with the amount allowed by way of damages for the latter item, plaintiff appeals from such portion of the judgment, the propriety of which is the sole question presented upon this appeal.

By the terms of the lease defendant was required to construct five or more "multiple residential units" of stucco construction with "cement floors and plastered inside or as mutually agreed upon"; the defendant undertaking to submit to plaintiff within thirty days "a plan of a multiple unit which he expects to use as a model" subject to the proviso that "such units however may be altered as mutually agreed upon." No such plan was ever submitted by defendant but the trial court found that the parties had agreed that each unit was to consist of four apartments, with each apartment having a combination living-bedroom, kitchen with a dining area, and a bath. By a subsequent agreement dated November 15, 1950, the lease was modified so as to provide for the purchase by defendant of an existing building of six units, the purchase price thereof to be evidenced by a promissory note to be executed jointly by plaintiff and defendant but to be paid by the latter, and secured by a deed of trust upon the demised premises. The agreement contemplated that the building so purchased was to be moved upon the demised premises, and it was in fact so moved thereon at defendant's expense; the agreement further providing that it should "be accepted by the Lessor in place of one of the five multiple units referred to in the original lease, which the Lessee * * * agreed to construct at his own cost on the leased property." This building is identified in the record as 3.

The evidence discloses that during the negotiations between the parties leading up to the execution of the lease, but a few weeks before the formal execution thereof, defendant acquired and caused to be moved onto the demised premises a large building which was originally a garage, which he converted into two separate units consisting of five sleeping rooms each. Later, in the year 1947, defendant converted six of said sleeping rooms into apartments each containing a living room, kitchen and bathroom. These two buildings are designated in the record as "1" and "1". Still later, in 1948, defendant acquired with funds borrowed from plaintiff, and by him later repaid, another existing building which he caused to be moved onto the demised premises. This building originally consisted of four motel rooms, but was altered or reconstructed by defendant into three apartments and one motel room, each apartment consisting of a living room, kitchen, shower and toilet. This building is designated in the record as 2.

The trial court found that buildings "1" and "1" and building 2 last above referred to, were accepted by plaintiff in place of three of the four multiple units which defendant, by the terms of the lease as modified by the agreement of November 15, 1950, agreed to construct. The court further found that the fourth multiple unit was never constructed by defendant and awarded plaintiff damages therefor in the sum of \$10,200.

Plaintiff complains of this finding, his contention being that it is erroneous for two reasons: (1) that the pleadings raised no issue with respect to the acceptance of said buildings as satisfying the requirement of the lease, as modified, that defendant construct four multiple units, and (2) that in any event the finding is unsupported by the evidence. We proceed to consider each of these contentions in the order stated.

[1] Looking to the pleadings we find that after alleging the execution and terms

of the lease and modifying agreement of November 15, 1950, the complaint alleges that defendant failed to construct four multiple units to plaintiff's damage in the sum of \$40,000, and this allegation is denied in defendant's answer.

Upon the trial during plaintiff's case in chief his counsel sought to examine plaintiff with reference to conversations had between the parties preceding the execution of the lease with specific reference to the type and size of the buildings which defendant was to construct. Upon objection being made thereto by counsel for defendant, counsel for plaintiff urged that such proof was admissible by reason of the fact that the lease was ambiguous in that it did not set forth the type and size of such buildings. The trial judge accepted this view and overruled the objection whereupon plaintiff was permitted to testify at length to conversations had with defendant with respect to this subject. Upon cross-examination of the plaintiff when counsel for defendant sought to examine him with reference to such conversations for the specific purpose of showing that it was agreed that under the provision requiring the construction of multiple units defendant was to be permitted to acquire buildings already constructed and move the same upon the demised premises, counsel for the plaintiff objected that such proof was outside of the issues tendered by the pleadings. The trial judge in overruling the objection stated that he had permitted plaintiff to adduce proof as to the character of the buildings upon his (plaintiff's) insistence that the lease was ambiguous in this particular, and that under the circumstances defendant was entitled to inquire fully with respect to conversations had upon the subject in question. Defendant did not request a continuance for the purpose of meeting such proof, and thereafter the matter was fully explored by both parties.

The defendant's answer denied the allegations of paragraph XV of plaintiff's complaint wherein it is alleged that by agreement of the parties the multiple units "were to consist of four apartments each, with

each apartment having a combination living-bedroom, kitchen with a dining area, and a bath" and that defendant had neglected and refused to "construct the four multiple units which he agreed to construct." Under the issue thus raised we see no reason why defendant should not be permitted to prove that he had complied at least in part with his agreement by moving onto the demised premises buildings "1" and "1" and building 2; thereafter altered or remodelled the same into apartments, and that plaintiff accepted the same as complying with the terms of the lease. "The defendant, under an answer specifically denying the allegations of the complaint, may show any facts tending to defeat the plaintiff's right to recover at all or to recover to the extent claimed, or tending to prove that the cause of action never existed. Likewise, under a general denial, where otherwise proper, the defendant may introduce evidence of a fact that tends directly to disprove some allegation in the complaint, such as payment, title, or transfer to another person of the demand sued on." 39 Cal.Jur.2d p. 455, sec. 336. However if it were to be conceded, as plaintiff contends, that this constituted new matter which should have been specially pleaded, we would not be disposed to reverse the judgment. Pleadings serve a real purpose in defining the issues but they are a means and not an end in themselves. Where, as here, no prejudice has resulted, it would be futile to order a new trial upon an issue fully tried because of a technical defect in pleading which upon such new trial the court would undoubtedly permit an amendment to correct.

[2] Likewise without merit is appellant's second contention that the trial court's finding to the effect that appellant accepted the three buildings previously referred to in place of three multiple units which defendant agreed to construct, is unsupported by the evidence. The pertinent testimony touching this matter, viewed in the light most favorable to respondent, may be briefly summarized.

The demised premises at and prior to the time of the execution of the lease between the parties here had been used as a trailer camp and were in a run-down condition. At this time respondent was engaged in operating a motel on Olympic Boulevard, of which fact appellant was aware, having inspected it prior to the execution of the lease and being familiar with the manner of its operation. With this knowledge appellant sought to interest respondent in taking a lease upon appellant's property. In the course of the negotiations preceding the execution of the lease it was stated that respondent was to conduct his operations thereon "along the same pattern" as the Olympic Motel, and that the "construction idea of the premises *were* to be similar to" the Olympic Motel. Respondent stated to appellant that it would not be possible for him at the time to build any buildings due to the inability to secure priorities, and that it would be necessary to acquire buildings already constructed and move them onto the property as he (respondent) had done at his Olympic Motel. Appellant then stated that he desired respondent "to do about the same as you have at the East Olympic Motel; find some buildings and move them in," and respondent replied that he would have his business manager start looking for buildings. Following this respondent advised appellant that he had located a building 18 by 100 which he felt might be converted into two buildings of five sleeping rooms each. Appellant thereupon stated he would look at the building, and later gave his permission to move the same upon the property, following which it was placed upon the premises at a location agreed upon between the parties, and divided into two buildings and later remodelled into apartments. This structure is the one heretofore referred to as buildings "1" and

"1". Later respondent advised appellant that he had located another building in Venice. The parties visited this building together, and thereupon an agreement was reached whereby appellant was to loan respondent \$2,500 with which to acquire the building. The building was thus acquired and by the respondent moved upon the demised premises and converted into apartments as previously described. This building is the one hereinbefore designated as 2.

Upon the basis of this evidence the trial court was warranted in concluding, as it did, that appellant had accepted each of these three buildings as altered and remodelled after being moved onto the demised premises as though they had been originally constructed thereon and as satisfying the requirement of the lease. In opposition to this view appellant argues that, if such had been the intention of the parties, they would in each instance have executed a written agreement similar to that of November 15, 1950, with respect to building 3. Also reference is made to this modifying agreement wherein it is recited that this building "shall be accepted by the Lessor in place of one of the five multiple units referred to in the original lease" and it is said that this negatives any intent by appellant that he had so accepted the previous three buildings ("1" and "1" and 2) which had been moved upon the premises. Such an inference may justifiably be said to arise from these facts but at best this serves only to create a conflict in the evidence which has been resolved adversely to appellant by the finding of the trial court.

The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J.,
concur.

157 Cal.App.2d 432

Emma SPECTOR, Plaintiff and Appellant,
v.

Ione Lois PETE, Administratrix, etc., et al.,
Defendants and Respondents.

Civ. 5568.

District Court of Appeal, Fourth District,
California.

Feb. 4, 1958.

Hearing Denied April 2, 1958.

Action for specific performance, to quiet title, and for equitable relief. From a judgment of the Superior Court, Riverside County, Russell S. Waite and O. K. Morton, JJ., plaintiff appealed. The District Court of Appeal, Griffin, J., held that even if, as alleged, restricted-land sale agreement was, originally, to become effective when Interior Secretary approved by issuance of fee patent deed to either purchasers or Indian vendor, Secretary could not be deemed to have approved agreement between parties when he issued fee patent to Indian vendor, where parties had, in interim, modified agreement to provide for conveyance to one of purchasers.

Affirmed.

1. Indians ⇨15(1)

An Indian in an "incompetent" status is one whose right to alienate his land is restricted and who is a ward of the federal government. 25 U.S.C.A. § 348.

See publication Words and Phrases
for other judicial constructions and definitions of "Incompetent".

2. Contracts ⇨97(1)

As a general rule, contract that is null and void is incapable of being ratified and cannot create an estoppel.

3. Indians ⇨15(1)

Any ratification of contract to sell restricted land would necessarily have to be by Indian himself after attaining competency. 25 U.S.C.A. § 348.

4. Specific Performance ⇨114(2)

Complaint for specific performance must show existence of contract which is

both valid and binding and of type which may be specifically enforced.

5. Indians ⇨15(2)

Agreement to sell restricted Indian lands is void unless authorized by Secretary of Interior. 25 U.S.C.A. § 348.

6. Indians ⇨15(2)

Restricted-land sale agreement made subject to Interior Secretary's approval would be unenforceable unless approval were forthcoming. 25 U.S.C.A. § 405.

7. Indians ⇨15(2)

Even if, as alleged, restricted-land sale agreement was, originally, to become effective when Interior Secretary approved by issuance of fee patent deed to either named purchasers or Indian vendor, Secretary could not be deemed to have approved agreement between parties when he issued fee patent to Indian vendor, where parties had, in interim, modified agreement to provide for conveyance to one of purchasers. 25 U.S.C.A. § 405.

Irl Davis Brett, Los Angeles, for appellant.

Thompson & Colegate, F. Gillar Boyd, Jr., Arnold Rumwell, Palm Springs, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant brought this action which is set forth in a third amended complaint and supplement thereto (hereinafter referred to as the complaint) for specific performance, to quiet title, and for equitable relief. It is alleged generally that on April 29, 1954, Marcus Pete, Jr., an Indian, and a member of the Palm Springs or Agua Caliente Band of Indians, was the owner of certain lands, to wit: Block 2, sec. 14, township 4 S. R. 4 E., S. B. B. & M., within the Palm Springs Indian reservation; that on said date he entered into a written agreement with the contracting purchasers, jointly, namely, defendants C. W. Miller and wife, Oscar Mandinach and wife, Ronald R. Dunlap and wife, and Dr. W. H. Clark-son and wife, to buy said property as a unit

for \$78,660; that Marcus Pete, Jr., conditionally agreed therein to submit said transaction to the Secretary of the Interior of the United States, through the district agent at Palm Springs, for approval by the United States, evidenced either by the express written approval or the issuance of a patent direct to the contracting purchasers or by releasing all restrictions imposed by law upon his right to convey through the issuance and delivery to him of a full, unrestricted fee patent, and that such conveyance should be made if and when, and only if and when, the United States issued and delivered a patent to the contracting purchasers, or said Marcus Pete, Jr., received an unrestricted fee patent thereto; that in part performance thereof Pete and the contracting purchasers submitted said transaction to the United States for approval through the district agent; that subsequent thereto the district agent was instructed by the United States to inform Pete and the others that the United States would require that its patent to the contracting purchasers be made to one individual *only* and that the parties choose and select the person who would become grantee, in trust, for them; that by supplemental agreement in writing, Pete and the contracting purchasers agreed that the total amount should be conveyed by patent from the United States to defendant Miller, and subsequent arrangements would be made between them for the partition of the whole, at the price formerly agreed upon; that immediately thereafter, and in part performance thereof Pete and the contracting parties met with the district agent and agreed in writing, by approving a sketch made by the agent, that such land should be partitioned and separately conveyed to said purchasers, i. e., to plaintiff, a certain described part of lot 2, and a certain described individual portion thereof to each of the other contracting purchasers and their wives; that subsequent thereto and prior to the partial partition hereinafter alleged, the United States elected not to issue a patent direct to defendant Miller but instead to offer the property free of re-

strictions to Pete so he could directly consummate said transaction, by issuing and delivering to Pete an unrestricted fee patent to all of said property, and in furtherance thereof it executed and delivered to Pete a fee simple patent to the whole on June 30, 1954; that after receiving said patent Pete, in part performance of the agreement to convey, partitioned said lands by conveying portions thereof to certain of the contracting defendants by grant deeds dated July 29, 1954, and August 5, 1954; that plaintiff performed her part of the agreement and Pete failed and refused to deed the portion claimed by plaintiff, without plaintiff's knowledge or consent, but on August 25, he deeded that portion to one Myra Lewis; that thereafter Pete accepted a deed of trust on this property, dated August 28, 1954, naming Pete as beneficiary; that defendant Myra Lewis was acting for an undisclosed principal, defendant Abe Adelman, her uncle, who had both actual and constructive knowledge of the agreement sued upon and at the time, August 11, this action was pending and *lis pendens* was of record; that the reasonable value of said property was \$78,660, and plaintiff's claimed portion was of the value of \$7,500; and that the agreement sought to be specifically alleged was just and reasonable.

Marcus Pete, Jr., died on May 2, 1955, and the action proceeded against defendant Ione Lois Pete, as administratrix. At the time this action originated, each of the contracting purchasers was the separate holder of a lease upon the property agreed to be conveyed by Pete to them, with the possible exception of a 3-foot strip described, which plaintiff alleges other defendants hold without right. As a second cause of action certain other conveyances were alleged to have been made after this action was filed and after *lis pendens* recorded, involving the same property in which Pete reconveyed the property, including the 3-foot strip, back to the other contracting parties, notwithstanding plaintiff had erected and was occupying improvements she had placed on the property which

she was leasing and agreed to purchase from Pete.

The prayer is that the administratrix be required to specifically perform the contract Pete made with plaintiff and to convey that portion to her which is specifically described; that other defendants be compelled to reconvey to her any portion of that land to which they may claim any interest, to quiet plaintiff's title thereto, and for general relief. A general demurrer to the complaint was, by order of Judge Waite, who heard the argument, sustained without leave to amend. A judgment of dismissal was subsequently signed by Judge Morton. The appeal is from the judgment and order.

[1] It affirmatively appears from the facts alleged in the complaint that Marcus Pete, Jr., was an Indian of the Agua Caliente Band of *Mission* Indians, and was, at the time of the execution of the written instrument to sell the property, in a restricted or incompetent status. (The word incompetent, as thus used, has been judicially defined to mean an Indian whose right to alienate his land, is restricted (*United States v. Nez Perce County, Idaho, D.C., 267 F. 495*), and who is a ward of the United States Government.) The property he then owned was an Indian Trust patent issued to him pursuant to section 5 of the General Allotment Act [24 Stat. 389 et seq., which is codified as 25 U.S.C.A. § 348]. By the express terms thereof:

"Upon the approval of the allotments provided for in sections 331 to 334, inclusive, and 336 by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, * * and that at the expiration of said period the United States will convey the same by patent to said Indian * * * in

fee, discharged of said trust and free of all charge or incumbrance whatsoever:

* * * *And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void * * *.*"

(Italics ours.)

The main question is whether the conditional agreement, as amended, for the sale of the land was lawful or whether it was null and void *ab initio*. Plaintiff claims it was lawful or at least voidable and therefore subject to ratification, citing such authority as *Smith v. Glo-Fire Co., 94 Cal.App.2d 154, 210 P.2d 286*. Defendants argue that by the terms of the statute itself, above quoted, the agreement was null and void and accordingly, as such, would be unenforceable in a specific performance action. In face of the positive language there used and italicized, it does not appear that it could be held otherwise, particularly if the Secretary of the Interior did not give his approval to it. This conclusion is fortified by the decisions in *Sage v. Hampe, 235 U.S. 99, 35 S.Ct. 94, 59 L.Ed. 147*; *United States v. Walters, D.C., 17 F.2d 116*; *MacRae v. Heath, 60 Cal.App. 64, 212 P. 228*; *Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420*; *Arenas v. Preston, 9 Cir., 181 F.2d 62*; *United States v. Hellard, 322 U.S. 363, 64 S.Ct. 985, 88 L.Ed. 1326*; *United States v. Brown, D.C., 8 F.2d 564*; *Probert v. Kibby, 87 Okl. 198, 209 P. 916*; and *Kelley v. New State Land Co., 115 Okl. 170, 245 P. 988*.

It is plaintiff's position that even if the contract of purchase was void under that statute, voidable, or was lawful, it was ratified by Pete's actions after the issuance of a patent in fee and after the disability was removed by partially executing the agreement in deeding the other portions of said property to the named defendants.

[2] It is the general rule that a contract that is null and void is incapable of being

ratified and cannot create an estoppel. *Butterfield Construction Co. v. Federal Land Value Ins. Co.*, 5 Cal.App.2d 16, 41 P.2d 958; *Industrial Indemnity Co. v. Golden State Co.*, 117 Cal.App.2d 519, 256 P.2d 677; *Rideout v. Eich*, 100 Cal.App. 135, 280 P. 140; *Wood v. Imperial Irrigation District*, 216 Cal. 748, 17 P.2d 128.

[3] As to the claimed ratification pleaded, there is no indication showing any additional contract or dealings whatever between plaintiff and Pete, after he received his patent on June 30, 1954. If there was a ratification it would necessarily have to be by the Indian himself after attaining competency. The only attempt to plead ratification is that after attaining competency and receiving his patent he sold and deeded several parcels of his land, as above indicated, to other persons. The original written agreement or the amendment to it was not pleaded in *haec verba* nor was a copy attached to the complaint. Apparently there were many changes made, different from the original written agreement, particularly as to the description of the property, name of the party or parties who were to hold title to the property if and when the patent was issued, and the method of dividing it between the contracting purchasers.

[4] It is a general rule of pleading in a specific performance action that the complaint show the existence of a valid and binding contract with the defendant and one which is specifically enforceable. 49 Am.Jur. p. 182, sec. 159.

In opposition to this conclusion, plaintiff argues that a later Act of Congress *permitted* conveyance and sale of such an allotment. (The word "allotment" is used interchangeably with a restricted or trust patent.) 34 Stat. 1018, 25 U.S.C.A. § 405, reads in part:

"Any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty * * * may sell or convey all or any part of such allotment * * * *on such terms and*

conditions and under such rules and regulations as the Secretary of the Interior may prescribe." (Italics ours.)

[5] Plaintiff concedes that there is adequate authority holding that an agreement made to sell restricted Indian lands, where the agreement and consummation thereof was made without authority and without knowledge of the Secretary of the Interior, is void, citing *United States v. Walters, D.C.*, 17 F.2d 116 and cases cited, but claims neither she nor defendants have found a case directly in point on the facts here alleged which shows the contract was conditioned on such approval before the conveyance was made and where both the Indian and purchasers immediately complied with its requirements and petitioned for such authority and agreed to abide by all requirements exacted and agreed to defer conveyance until after the restrictions were removed. It is argued that these are the distinguishing factors; that to obtain such consent the Indian must petition the Secretary of the Interior in writing and that it is necessary as a condition precedent to so doing that he have an identified purchaser, identified property which is to be sold, a fixed price, and the terms and conditions of the sale, because it is his duty to exercise discretion as to whether the sale shall be permitted, citing 27 Opinions U. S. Attorney General, 530 and 541; that there is an alternate method of obtaining the right to sell, to wit: By convincing the Secretary of the Interior so he will, in his discretion, cause a fee simple patent to be issued to the Indian as authorized by 25 U.S.C.A. § 348, *supra*; and that once the fee simple patent has been issued the prior trust and the incidental restriction against alienation is terminated, citing *Larkin v. Paugh*, 276 U.S. 431, 439, 48 S.Ct. 366, 368, 72 L.Ed. 640. In this connection certain dictum from *Oates v. Freeman*, 57 Okl. 449, 157 P. 74, 80, is cited. It reads:

"* * * counsel say: 'We want to make plain the distinction between a legal and an illegal act. Deeds, leases, and other instruments affecting restricted lands, which are executed with

the intention of obtaining the approval of the Secretary of the Interior, are not illegal, and do not violate any provision of the act of Congress. *These instruments never become valid unless approved*, but after approval they have the same validity as though the instrument had originally covered unrestricted land. On the other hand, instruments made for the purpose of evading the statute, without any intent of procuring the approval of the Secretary of the Interior, fall within the inhibitions of Congress.'

"This may be conceded to be a correct statement of law." (Italics ours.)

It is therefore argued that the Secretary of the Interior approved the sale in the instant case by his actions and that the original agreement then had the same validity as though the parties had conveyed unrestricted land and the contract was subject to specific performance.

In answer to this contention the facts here pleaded clearly show that the Indian, while noncompetent, signed the agreement of April, 1954, which provided in general terms that for the consideration of \$78,660, he conditionally, upon the approval of the Secretary of the Interior (which approval was necessary to validate it) would convey to the contracting parties jointly the lands described as a unit; that the approval would be evidenced by express written approval and issuance of a United States patent direct to the contracting purchasers or by releasing all restriction imposed by law upon his right to convey, and that such conveyance should be made only if and when the United States issued and delivered a patent to the contracting purchasers or said Marcus Pete received an unrestricted fee patent thereto.

It might well appear from later enactments of Congress (34 Stat. 1018, "Non-competent Act" March 1, 1907, 25 U.S.C.A. § 405) and decisions based thereon that, under certain conditions, a non-competent Indian, prior to the expiration of the trust period, is authorized to sell or convey all or part of his land, *subject to the approval of*

the Secretary of the Interior, and upon such terms and conditions as he may prescribe, and the Secretary is also authorized to approve a deed of conveyance executed by the allottee and it carries full title, as if fee simple had been issued to the allottee. 43 L.D. (1914) I.M.-O.W.-Tan-I.C. pp. 102-103; 48 L.D. (1921) Fort Hall Lands, 455, at pp. 457-458; 40 L.D. (1911) pp. 179-181; Mott v. United States, 283 U.S. 747, 51 S.Ct. 642, 75 L.Ed. 1385; Seber v. Spring Oil Co., D.C., 33 F.Supp. 805, 809.

[6] It therefore appears that as between the non-competent Indian and the prospective purchasers, without the approval of the Secretary of the Interior, the agreement was void *ab initio*. Such an agreement only amounted to a proposal and would not be enforceable.

In Miller v. United States, 10 Cir., 57 F. 2d 987, it was held that a plan or purpose to acquire lands when they became for sale at a fair price, when approved by the Secretary of the Interior, was not an unlawful "plan and purpose", where the patent was used for the purpose of enabling the Indian to sell the land described in his application. The question here arises as to whether it was approved in accordance with the written agreement of the parties, otherwise it would be unenforceable.

[7] According to the pleadings plaintiff alleged that on April 29, 1954, Pete, in the original agreement, agreed to jointly convey the property to the parties named, as a unit, and for a consideration of \$78,660 upon written approval of the Secretary of the Interior, either by the issuance of the fee patent deed to the named purchasers or to Pete, the Indian; that subsequently Pete informed them the Secretary required that such patent be issued to an individual and not to the group named and that the parties must select the person who would hold it in trust for them. This in effect was a disapproval of their original agreement. Plaintiff further alleges that a written agreement was then entered into between Pete (who was still non-competent

tent) and the contracting parties, that the property mentioned should be conveyed to Miller for this purpose and that subsequent agreements would be made between them for the partitioning of the whole and allocating the purchase price of \$78,660 among them. (Apparently this modified and changed the terms of the original agreement providing that the patent should be issued to the parties named or to Pete in person.) It then alleged that immediately and in part performance thereof (apparently the amended agreement) Pete, and the contracting defendants met and agreed in writing, by approving a sketch, as to the method of partitioning the described portions each named party was to have and the price to be paid for such portions. It then alleged that subsequently the Secretary of the Interior did not follow or approve this plan or agreement and elected not to issue a patent direct to Miller, but instead, decided to directly issue and deliver to Pete an unrestricted fee patent to all the property. This was done on June 30, 1954.

It therefore appears that the Secretary of the Interior did not approve the amended agreement as to the method of issuance of the patent and the allocation of the property which agreement modified the original agreement as to the general disposition of the property. Accordingly the agreement, as thus amended and modified, was not specifically enforceable for the reason it was not *approved by the Secretary of the Interior* and was therefore void under the authorities heretofore cited. Likewise, the alleged written agreement, as thus amended, was indefinite. It is claimed by plaintiff that in it there was some mistake or misdescription of the property now claimed by her.

The allegation of part performance of the agreement was based upon the amendment proposed but which was rejected by the Secretary of the Interior. The agreement as amended, not being approved by the Secretary of the Interior, was void and not subject to ratification. See cases above cited.

Although the equities of this case strongly favor a recovery by the plaintiff, we conclude that under the pleadings and authorities cited the trial court properly sustained the demurrer without leave to amend.

Judgment of dismissal affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



157 Cal.App.2d 395

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Jesse HORACE, Defendant and Appellant.
Cr. 3448.**

District Court of Appeal, First District,
Division 1, California.

Feb. 4, 1958.

Prosecution for attempted burglary. The Superior Court, City and County of San Francisco, Harry J. Newbarth, J., tried defendant without jury and entered judgment against him. Defendant appealed from the judgment and order denying new trial. The District Court of Appeal, Bray, J., held that evidence which showed that defendant had failed to explain his presence nearby burglarized building, that hammer with imbedded glass was found in his automobile which was parked in front of building, and that he had cuts in his clothing, glass in sole of his shoes and on automobile floor which corresponded with fragments of glass of broken window in building, was sufficient to sustain conviction.

Affirmed.

I. Criminal Law ☞1144(13)

On appeal in criminal case, appellate court must assume, in support of the judgment, the existence of every fact which the

trial court could have reasonably deduced from the evidence.

2. Burglary ☞41(10)

Evidence which showed that defendant had failed to explain his presence nearby burglarized building, that hammer with imbedded glass was found in defendant's automobile parked in front of building, that he had cuts in his clothing, and that glass in the sole of his shoes, in his clothes and on automobile floor corresponded with fragments of glass of broken window in building, was sufficient to sustain conviction for attempted burglary, second degree.

3. Criminal Law ☞260(11)

Where evidence reasonably justifies finding of trier of fact, even if evidence is also compatible with innocence of defendant, reviewing court cannot disturb determination of trial court.

C. L. Shinn, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

BRAY, Justice.

After trial without a jury defendant was convicted of attempted burglary (second degree).¹ He appeals from the judgment and from the order denying new trial, contending that the evidence was insufficient to support the conviction.

Evidence.

About 2 a. m. Police Sergeant Engler, riding in a private automobile by the premises of the Thompson Products Company on Fulton Street in San Francisco, observed defendant standing on the sidewalk near the property line of Thompson. He also noticed that a window at the Thompson building was broken. Engler's car momentarily stopped and defendant seemed to look towards it. After turning the corner

Engler looked through its back window and saw defendant stick his head around the corner as though to see where the car was going. As Engler circled the block defendant got into his automobile which was parked at the curb in front of the Thompson building. As defendant drove off, Engler followed and stopped defendant, who was alone in the car. Engler asked him what he was doing around the building. Defendant smiled and said nothing. Defendant had cuts and tears in his clothing and some glass in the cuffs of his trousers, and minute particles of glass in his clothing. There were also bits of glass on the floor mat of the car and imbedded in a hammer that was partly under the front seat. Defendant was returned to the Thompson building and stripped of his trousers, jacket and shoes. The latter had glass in the soles. Engler and another officer searched the building, entering it through the broken window. There was a brown leather case containing a movie projector beneath the window on top of a pile of brake linings. Cartons of brake linings were tipped over and linings were all over the floor. The drawers in the desks on the premises were all pulled out and appeared to have been gone through. Glass samples were taken from the floor under the window and from outside the window and from the floor of the car. (The entire glass that was on the sidewalk was confined to a 2-foot semicircle around the window.) Nothing was found on defendant's person that could be established as coming from the Products company, nor was anything missing from the building.

At the police station defendant denied having been in the building and said that he had been up the street visiting a friend, had just left and was getting into his car when Engler came along. Defendant was not sure whether the home of the friend was in the same block as the building. It might have been a block up.

1. Defendant admitted two priors with which he was charged, one, violation of section 503, Vehicle Code (theft and

unlawful taking of a vehicle), and the other, burglary.

A Thompson clerk testified that on leaving the premises around 5 o'clock the previous evening this window was intact and that the brake linings were piled near the window and not in disarray. The movie projector at that time was kept near the office. About four days prior an earthquake had broken many windows in the building but these had been boarded both on the inside and outside with carriage bolts holding the boards together.

Roger Greene of the State Bureau of Criminal Identification and Investigation testified to tests conducted on the glass particles secured by Engler. In his opinion the glass from inside and outside the window were identical within the limits of error of the experiments with that found in defendant's trouser cuffs and the floor of defendant's automobile, and that the glass came from the same source.

Defendant testified that around midnight he became intoxicated and had a fight with a couple of men at another location. In the fight he was thrown to the sidewalk where he "tussled" with his adversary. No glass was broken in the fight nor did he hit any glass. A stranger broke up the fight and offered to take defendant home. The stranger drove defendant's car to the location in front of the Products building. Defendant spent about an hour and a half in the stranger's house which was nearby, although he did not know the address. There he sobered a little. Leaving the house defendant went directly to his car. He did not notice the broken window until the officers returned him to the premises. He could not account for the presence of the glass in his cuffs and clothes unless he got them in the scuffle above mentioned, although he said that there were a "lot of places I could have gotten glass," but he could not remember getting it. He said he saw lots of broken glass on the sidewalk in front of the building and could hear it scraping on his shoes as he and his friend walked by the building. His only explanation for the glass imbedded in the hammer was that he might have stepped on the

hammer while he was in the car. He admitted that the next day he was taken by the police to the vicinity and even though they entered every house there he could not pick out the house he visited the morning before.

Sufficiency of Evidence.

[1,2] Assuming, as we are required to do, in support of the judgment, every fact which the trial court could have reasonably deduced from the evidence (*People v. Frankfort*, 114 Cal.App.2d 680, 251 P.2d 401) it is clear that the evidence amply supports the judgment of conviction. The window was broken, the Products premises entered and ransacked. Apparently the only thing interesting to the burglar was the movie projector which he removed from its usual place and then dropped near the window. Obviously, he had placed it there, then stepped out the window to see if the coast was clear, intending to reach in for it, if there was no one in sight. Defendant is found nearby, his car parked in front of the place. His only explanation to the officer as to his presence there was a smile and the statement that he was doing "nothing." A hammer with glass imbedded in it was found in his car; his clothing cut as if by glass; glass was found in his trouser cuffs and in the sole of his shoes. All this glass corresponds with glass from the broken window. Defendant's story of his actions that night is not only improbable but is refuted by his failure to identify any house in the vicinity as the one in which he stayed with the stranger.

This is not a case of mere "suspicion" of guilt as was the situation in *People v. Wilkins*, 141 Cal.App.2d 557, 297 P.2d 42, and *People v. Draper*, 69 Cal.App.2d 781, 160 P.2d 80, cited by defendant. In those cases the only fact proved was that the defendants had the opportunity to have attempted to commit burglary but there was no evidence that they entered or tried to enter the premises in question, nor that they had attempted a burglary. In our case not only was opportunity shown but breaking and entry also.

[3] Even assuming, as contended by defendant, that the evidence here was also compatible with innocence (an assumption which we would find it hard to make) nevertheless, as the evidence reasonably justifies the finding of the trier of fact, we could only affirm the judgment. See *People v. Newland*, 15 Cal.2d 678, 684, 104 P.2d 778.

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



157 Cal.App.2d 230

**Phyllis BUCK and Paul Buck, Plaintiffs,
Appellants and Respondents,**

v.

STANDARD OIL COMPANY OF CALIFORNIA et al., Defendants,

Standard Oil Company of California, a corporation, Defendant and Respondent,

Bond & Rushing, Individually and as co-partners, Defendants and Appellants.

**Phyllis BUCK and Paul Buck, Plaintiffs
and Appellants,**

v.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, et al., Defendants,

**John Andrew Rustan, as executor of the estate of Nicholas Paul Buskovich, etc.,
Defendants and Respondents.**

Nos. 17522, 17524.

District Court of Appeal, First District,
Division 1, California.

Jan. 29, 1958.

Rehearing Denied Feb. 28, 1958.

Hearing Denied March 26, 1958.

Two actions by automobile driver and passenger, husband and wife; one against landowner's executor and oil company for personal injuries sustained by passenger wife when automobile driver hit puddle of oil on highway, his automobile skidded sideways and he collided with oncoming vehicle

and the other against oil company and a copartnership, which furnished subsoiler machinery in order to subsoil landowner's land. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgment against driver and passenger in action against landowner and oil company and in favor of driver and passenger and against copartnership in second action. The driver and passenger and copartnership appealed. The District Court of Appeal, McMurray, J. pro tem., held, inter alia, that complaint against landowner based on allegation of present negligence with respect to oil pipe breaking three days after landowner's death when subsoiling work was being done on property failed to state a cause of action against subowner's estate.

Judgments affirmed.

1. Pleading ⚡350(3)

A motion for judgment on the pleadings is like a general demurrer and the court's consideration of motion is confined to face of pleadings under attack.

2. Executors and Administrators ⚡443(1)

Complaint by automobile driver and passenger, husband and wife, for personal injuries sustained by passenger-wife, when automobile skidded sideways due to hitting pool of sprayed oil on highway and collided with oncoming automobile allegedly due to fact that landowner permitted subsoiling operations and such operations caused break in pipe line three days after landowner's death, failed to state a cause of action against landowner's estate. West's Ann.Civ.Code, § 956; West's Ann.Code Civ. Proc. § 377; West's Ann.Prob.Code, § 573.

3. Negligence ⚡2

An individual does not have the duty of performing an idle act.

4. Negligence ⚡52

Where landowner hired individual to subsoil property upon which pipe line was located, and individual knew of dangers attendant to subsoiling operations, if any there were, oil company which owned pipe

line was under no obligation to give individual warning of dangers which individual was already aware of.

5. Negligence ⇨52, 56(1.16)

Where one has actual knowledge of existence of a dangerous condition, creator of condition is not required to give warning, and warning becomes immaterial and can have no causal connection with injury sustained because of dangerous condition.

6. Automobiles ⇨309(2)

In action by automobile passenger and driver, husband and wife, against oil company for personal injuries sustained by passenger-wife when automobile skidded in pool of oil on highway and struck oncoming automobile allegedly due to fact that oil pipe line had broken as result of subsoiling operations on land by individual who was aware of existence of pipe line, instruction to effect that oil company had right to assume that other individuals would perform their duty under law was proper, under circumstances, without addition of qualification that one is not justified in ignoring obvious danger, although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.

7. Automobiles ⇨306(5)

In action by automobile driver and passenger, husband and wife, against oil company for personal injuries sustained by wife when automobile in which they were riding skidded on oil pool on highway and collided with oncoming automobile allegedly due to fact that subsoiling operation on land damaged oil pipe line and sprayed oil on highway, evidence supported verdict in favor of oil company and oil company was not liable on theory that oil company's employees knew or should have known that subsoiler operator was about to damage pipe line and that employees ignored an obvious danger.

8. Joint Ventures ⇨1.2

In order for joint venture to exist, it is necessary that there be a community of interest in object of undertaking, an equal right to direct and govern the con-

duct of each other with respect thereto, share in losses, if any, and a close and even fiduciary relationship between parties.

9. Joint Ventures ⇨1.7

Lack of an agreement to share losses is not fatal to existence of a joint venture inasmuch as law supplies provision.

10. Joint Ventures ⇨1.8

Joint venturers may delegate responsibility between them for certain portions of job without destroying joint venture aspect thereof.

11. Joint Ventures ⇨1.15

In action by automobile driver and passenger, husband and wife, against copartnership for personal injuries sustained by passenger-wife when automobile skidded in oil pool on highway and collided with oncoming automobile allegedly due to fact that oil pipe line was damaged during subsoiling operations by copartnership and another individual, evidence sustained finding that copartnership and individual were engaged in a joint venture with respect to subsoiling operation and that copartnership and individual had right to direct and govern the conduct of each other with respect to joint venture.

12. Joint Ventures ⇨1.8

Where copartnership and another individual agreed to undertake subsoiling operation, fact that individual was not told how to run copartnership's tractor for subsoiling operation and landowner told individual that he wanted the subsoiling done in both directions did negate a finding of joint venture between individual and copartnership, which had reached an agreement with individual that individual would receive, from total price for the operation of the copartnership's tractor, the sum of \$3 per hour plus five percent for soliciting employment.

13. Joint Ventures ⇨1

Mere fact that one member of joint adventure did not contribute equipment for subsoiling operation was immaterial where he had furnished his skill and services.

14. Joint Adventures ⇨1.8

Where an individual and a copartnership were engaged in a joint venture to subsoil landowner's land, fact that landowner made some suggestions as to subsoiling did not destroy the elements of joint venture as between individual and copartnership.

15. Automobiles ⇨304(2)

Where automobile passenger was injured when automobile skidded in pool of oil on highway and collided with oncoming automobile allegedly due to fact that during subsoiling operation oil pipe line had been damaged and oil had been sprayed on highway, doctrine of *res ipsa loquitur* was applicable as to both oil company who owned pipe line and copartnership which undertook the subsoiling operation.

16. Automobiles ⇨304(2)

Where automobile passenger was injured when automobile skidded on pool of oil on highway and collided with an oncoming automobile allegedly due to fact that subsoiling operation had broken pipe line, fact that subsoiler caused a break in pipe line owned by another could not be used by the operator of the subsoiler or his joint venturer to negate applicability of *res ipsa loquitur* doctrine on theory that instrumentality causing injury, the pipe line, was not under control of joint venturers.

17. Trial ⇨295(1)

Both jury and appellate court must read instructions as a whole and consider each in the light of all others.

Newman, Marsh & Furtado, Hayward, for appellants Buck.

Edward A. Friend, San Francisco, for appellants Bond & Rushing.

Wadsworth & Souza, Tracy, John A. Wilson, Stockton, for respondent Rustan.

Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco, Wilbur J. Russ, San Francisco, of counsel, for respondent Standard Oil Co. of California.

McMURRAY, Justice pro tem.

Two appeals are here involved; one is an appeal from a judgment entered on the pleadings against the plaintiffs, and the other following a verdict by a jury. The first appeal, numbered 17,524, is hereafter referred to as the Buskovich appeal, and the second appeal, numbered 17,522, is made up of two appeals, one by the plaintiffs from a judgment in favor of defendant Standard Oil Company of California, and the other from a judgment in favor of the plaintiffs and against the defendant Bond & Rushing and from the denial of that defendant's motion for judgment notwithstanding the verdict.

On October 27, 1954, sometime shortly after 6:30 in the evening Paul and Phyllis Buck left the town of Tracy to go watch the Wednesday night fights on television at the wife's parents' house, which was some two miles westerly of Tracy. Paul Buck drove the car, and while proceeding westerly on U. S. Highway 50 he saw a puddle on the highway after he had passed a bus. He put his foot on the brakes and started to skid. He had no control over the car; his forward vision was suddenly obscured, and he could see nothing for a moment, but after he hit the main portion of the puddle, the car skidded sideways and through the side window he could see another car coming at him. This other car struck the Bucks' car and Mrs. Buck was thrown out onto the highway and received injuries. Plaintiff Paul Buck later ascertained that the matter that had obscured his vision was oil spraying across the highway from a broken oil pipe line on the property of one Nicholas Paul Buskovich.

Before the occurrence of this accident, one Martin had undertaken to level the land belonging to Mr. Buskovich, and, after having completed the leveling, had been engaged for several days in subsoiling the property. Subsoiling, it appears from the evidence, is an operation wherein a piece of heavy equipment, weighing approximately 15,000 pounds and bearing tines or rippers two feet or more in length, is pulled

across the land in such manner as to cause the tines to rip the soil so as to allow its aeration. The depth of the operation depends upon the landowner's instruction, but there is testimony that ordinarily the subsoiling is requested to be as deep as possible. Buskovich, the owner of the property upon which the subsoiling operation was taking place and across which the Standard Oil Company of California had acquired an easement to lay and maintain a pipe line, died three days before the accident here involved, and his funeral was held the morning of the day the accident occurred.

Before his death, Buskovich had employed T. R. Martin to level his land. Martin, who had previously solicited land-leveling jobs in the vicinity, had discussed with defendant Bond & Rushing the purchase or rental of a tractor to do such work. He had not sufficient financial stability to accomplish either of these things, but reached an agreement that he would receive, from the total price for operation of the Bond & Rushing tractor, the sum of \$3 per hour plus 5 per cent for soliciting such employment.

The work on the Buskovich property was staked out by Bond & Rushing and the cut-and-fill map for Martin's guidance was made by them. Martin testified that Bond & Rushing came to the Buskovich property almost every day to help with adjustment, greasing and oiling of the tractor and sometimes to see if he was getting along all right; and would suggest ways to do a good, cheap job for the owner. Bond & Rushing authorized Martin to buy necessary fuel and charge it to them. Bond & Rushing submitted a bill to the Buskovich estate for the work done by Martin, which at the time of trial had not been paid.

The Buskovich appeal arises from a judgment on the pleadings against the plaintiffs; that judgment was based upon a cause of action alleged against John Rustan, the executor of the deceased Buskovich's estate. Plaintiffs, in appealing, cite section 573 of the Probate Code, which provides in part:

"* * * all action * * * upon any liability for physical injury * * * may be maintained * * * against executors and administrators in all cases in which the cause of action whether arising before or after death is one which would not abate upon the death of their respective testators or intestates * * *" and Civil Code, section 956, which provides in part: "A thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer or any other person liable for damages for such injury, nor by reason of the death of the person injured or of any other person who owns any such thing in action." In addition to these two code sections, the plaintiffs attempt to find support for their position in the provisions of the wrongful death statute, section 377 of the Code of Civil Procedure. Aside from citing these three code sections, however, the plaintiffs have not, in their appeal from the judgment entered in favor of the Buskovich estate, furnished any further authorities.

[1,2] A motion for judgment on the pleadings is like a general demurrer, and the court's consideration is confined to the face of the pleadings under attack. *Davis v. City of Santa Ana*, 108 Cal.App.2d 669, 685, 239 P.2d 656; *Witkin, California Procedure*, Vol. 2, § 67, p. 1704. Plaintiffs place great reliance upon the words of the Probate Code section "whether arising before or after death," but ignore the words "all cases in which the cause of action * * * is one which would not abate upon the death of their respective testators * * *." It would be difficult, indeed, to charge a person with the duty of ordinary care for an act which took place three days after his death. The section cited by the plaintiffs are assuredly survival-of-action sections, but they do not, by the most ingenious and tortured construction, create any new cause of action against a deceased after his death. The respondent Rustan argues at some length as to termination of employment and cites several cases to the effect

that an action cannot be maintained against the personal representative of an estate for a tort committed by him. Certainly, under the pleadings which are set forth in the record before us, there is no allegation of any breach of duty by the deceased, but a mere allegation of present negligence on his part on a date three days after his death. Under this state of facts, it is apparent that the judgment on the pleadings was properly entered. The judgment appealed from in the Buskovich appeal is affirmed.

Plaintiffs' Appeal

The appeal by plaintiffs from the verdict in favor of the Standard Oil Company contains, among the contentions on appeal, a contention that an instruction given relative to the duty of the Standard Oil Company to warn the subsoiler was erroneous.

[3,4] The instruction complained of reads as follows: "The law does not require the duty of an idle act. If you find from the evidence herein that Martin knew of the dangers attendant to his subsoiling operation, if any there were, the Standard Oil Company of California was under no obligation to give him warning of such dangers that he was already aware of."

[5] In addition to the instruction complained of, the court also instructed, at the plaintiffs' request, as follows: "In this case, it has been admitted that the defendant Standard Oil had a company rule requiring certain employees to report and give warning to farm equipment operators working farm land adjacent to the pipe line. In determining whether or not the Standard Oil Company, acting through its agents and employees, was negligent in its conduct toward the plaintiffs, you may consider whether or not the company rule was violated by its agents or employees." The record before us discloses that Martin had been told by one Breuer of the location of the pipe line. This was not an indication of the exact location of the pipe, but it appears that it was the general location. If this testimony was believed by the jury,

the instruction complained of by plaintiffs was properly given. Actual knowledge in such case would be sufficient to relieve Standard Oil Company of its liability in this instance. Where one has actual knowledge of the existence of a dangerous condition, the question of warning becomes immaterial and can have no causal connection with the injury sustained. *Markwell v. Swift & Co.*, 126 Cal.App.2d 245, 251, 272 P.2d 47.

[6] Plaintiffs, in their appeal, also urge that it was error to give the instruction contained in B.A.J.I. No. 138 without adding the qualification contained in the second part of that instruction. The instruction as given was as follows: "A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another."

"A landowner and his agents have a duty to avoid injuring or unreasonably interfering with a pipe line laid across his property with permission.

"In this connection, Standard Oil Company could, while itself exercising ordinary care, assume that the landowner or his agents would perform this duty and could rely and act on the assumption that the landowner or his agents would not damage or unreasonably interfere with their pipe lines."

The qualification which was omitted, and of which omission plaintiffs complain in their appeal, reads as follows: "[However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty.]

"[One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.]"

It is plaintiffs' contention that there is uncontradicted evidence from which the jury could have found Standard Oil's employees knew or should have known that the subsoiler operator was about to damage the pipe line and that Standard Oil's employees were ignoring obvious danger. The testimony quoted by plaintiffs is testimony as to conditions of the soil after the break in the pipe line and does not reveal the condition of the soil over the pipe line before the break.

The only testimony regarding knowledge of Standard Oil before the accident was from William Davis, the linewalker. The record reveals that a linewalker is one employed by the Standard Oil Company to walk the distance from Pinole to Tracy, a distance of 58 miles, each week to observe the condition of the pipe line. The linewalker in this case testified that on October 15, 1954, he saw equipment working in the field here in question and reported it to the Tracy Reservoir. He again passed the Buskovich farm on October 22, 1954, and saw a tractor pulling a piece of equipment he could not identify but which he believed was a land scraper or subsoiler. At the time he made this observation that equipment was about 400 to 500 feet away from the pipe line and moving parallel to it and in an east-west direction. Davis also noticed that the soil was loose up to about three feet of the pipe line but never saw any equipment working in the area of the pipe line.

Plaintiffs cite several cases where the court held that the failure to add the qualification here contended for was prejudicial error. All of these cases are cases involving automobile collisions, and the distinction between them and the case at bar is obvious. In each of the cited cases the question of negligence and contributory negligence was extremely close. But here there is no evidence which would reasonably make Standard Oil foresee that the landowner and his agents would hit the pipe line when they had full knowledge of its presence and location. The easement was a matter of record, and the line had

existed for 40 years, having been replaced some 15 years before the accident. Buskovich and previous owners had planted crops on the land and had worked it during all the years of the pipe's existence. It would seem unreasonable to argue that a farmer working his field 400 to 500 feet from the line in full accordance with his rights is notice that he will violate his duty with respect to the easement. The case of *Vernon v. Owl Truck & Construction Co.*, 137 Cal.App.2d 437, 290 P.2d 603, holds that it is not error to refuse the qualification where there is no evidence which would indicate that another would not perform his duty also. In *Richter v. Adobe Creek Lodge*, 143 Cal.App.2d 514, 299 P.2d 941, where children pushed a piano on coasters to the edge of a stage, allowing it to fall off and cause injuries to the plaintiff, an invitee, the court states in 143 Cal.App.2d on pages 516, 517, 299 P.2d on page 943: "There was nothing about the piano itself or its mere presence upon the stage that constituted a hazard to invitees. This piano, despite its large ball-bearing casters and the smoothness and slope of the stage, was neither a self-propelling nor a 'free-wheeling' instrument; it moved with difficulty. It was foreseeable that patrons might move the piano about upon the stage as might suit their convenient use of the stage. But that was not an operation which of itself would render the premises foreseeably unsafe for invitees. Nor was that the causative factor here.

"It was the handling of the piano in such a manner as to push one corner of it (one of the casters) over the edge and off the stage that caused the instrument to topple over and injure plaintiff. That was not a danger known to the defendant, nor one which under the circumstances of the case his duty of reasonable care charged him with anticipating and guarding against, especially in view of the lack of any similar occurrence during the four or five years this piano had been on this stage." And on page 518 of 143 Cal.App.2d, on page 943 of 299 P.2d: "It is axiomatic that in the absence of conduct to put him on notice

to the contrary a person is entitled to assume that others will not act negligently or unlawfully. *Leo v. Dunham*, 41 Cal.2d 712, 715, 264 P.2d 1. We are satisfied that there was no evidence of any facts in this case which would reasonably put respondent on notice that one spectator would run violently into another so as to put the duty upon it to take steps to guard against such contingency. Such cases as have considered a like question in other jurisdictions support this conclusion." We do not feel that the omission of the qualification from the instruction was error under the facts of this case.

[7] Plaintiffs further contend that the judgment against plaintiffs and in favor of the Standard Oil Company was not supported by sufficient evidence. This contention is without merit, as there is ample testimony to support the jury's finding.

Defendant Bond & Rushing's Appeal

Defendant Bond & Rushing appeals from the judgment against it and in favor of the plaintiffs. It contends that the evidence fails to support the allegation of joint venture between Bond & Rushing and Martin, the operator of the subsoiler, and also contends that it was prejudicial error to give a certain instruction on *res ipsa loquitur*.

The contention that there is not sufficient evidence to support a finding of a joint venture between Bond & Rushing and Martin cannot be supported unless the testimony of Martin is disregarded.

[8,9] In order to find that a joint venture exists it is necessary that the following elements be present: (1) A community of interest in the object of the undertaking; (2) An equal right to direct and govern the conduct of each other with respect thereto; (3) Share in the losses, if any; (4) Close and even fiduciary relationship between the parties (*Beck v. Cagle*, 46 Cal.App.2d 152, 161, 115 P.2d 613). The appellant Bond & Rushing concedes that there was a community of interest in the undertaking. Both parties ex-

pected to make money; however Bond & Rushing denies that there was an agreement to share losses. The lack of such an agreement to share losses does not appear fatal to the existence of a joint venture, however. In *Fitzgerald v. Provines*, 102 Cal. App.2d 529, 536, 227 P.2d 860, 864, quoting from *Martter v. Byers*, 75 Cal.App.2d 375, 383, 171 P.2d 101, the court states: "[I]f the facts sustain the finding that a joint venture relationship was created, 'The omission of a provision for the sharing of losses in a joint venture is immaterial because the law supplies that provision. In the absence of agreement, losses by the parties are shared in the same proportion as profits are to be divided.'"

[10-12] Bond & Rushing contends that there is no evidence to sustain the element necessary to a joint venture as to the right to direct and govern the conduct of each other with respect thereto. The testimony of Martin appears to be that the expressions made by Bond & Rushing, relative to his performance of the work, were more in the nature of suggestions than control, and a reading of the entire testimony of Martin would justify a finding that there was sufficient control exercised to find that this element of a joint venture was here present. The fact that Martin was not told how to run the tractor and that Buskovich told him that he wanted the subsoiling done in both directions would not negate this finding. Joint venturers may delegate responsibility between them for certain portions of the job without destroying the joint venture aspect thereof. "Where there is shown no express agreement as to the right of the claimed employer to control the mode and manner of doing the work, the existence or nonexistence of the right must be determined by reasonable inferences drawn from the circumstances shown, and it is a question for the jury. * * * It is only where but one inference can reasonably be drawn from the evidence that the question of whether one is an employee or an independent contractor becomes one of law for the court." *Burling-*

ham v. Gray, 22 Cal.2d 87, 100, 137 P.2d 9, 16.

Bond & Rushing contends that the extent of the fiduciary relationship was that either might collect from Buskovich and distribute to the other his portion. The fact that Bond & Rushing has submitted a claim for the work done to the Buskovich estate, coupled with the testimony of Martin, is sufficient to sustain the jury's finding that a joint venture existed.

[13,14] The fact that Martin did not contribute equipment is immaterial, since he furnished his skill and services. 28 Cal. Jur.2d 480. The mere fact that it appears that the testimony of Martin would indicate that there was no control by Bond & Rushing but rather mere suggestions is consistent with a joint venture, but whether Bond & Rushing merely suggested or whether they exercised control was a question for the jury. The facts here do not justify this court in stating as a matter of law that Bond & Rushing did not exercise control jointly with Martin over the entire venture. The fact that Buskovich made some suggestions certainly does not destroy the elements of a joint venture.

Bond & Rushing argues that the giving of the following instruction was erroneous: "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendants. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendants to rebut the inference, if any, by showing that they did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on their part."

Bond & Rushing argues that the instrumentality which caused the injury to Mrs. Buck was the oil in the pipe line rather than any act on their part or on the part of their joint venturer, Martin.

The jury in this case was fully instructed and was given a complete charge on the law in the case. It is one thing to dissect an instruction given by a trial court in the atmosphere of an appellate court and quite another to consider the instructions as they are actually given—as a complete charge given by the judge to a jury which has listened to the facts presented in the particular case.

[15] In the case under consideration, there is certainly a proper basis shown by the evidence to require the giving of an instruction on *res ipsa loquitur*. The plaintiffs here were guilty of no negligence and were performing a completely lawful act when an incident occurred which is of a type which does not ordinarily occur without negligence. At the time the instruction was given the jury had not as yet determined whether or not Standard Oil Company or Bond & Rushing was guilty of any negligence. The instruction was equally applicable to both defendants, and under the evidence here presented might have supported a verdict against either or both of them. However, the jury, acting within its fact-finding province, found that Standard Oil had not been negligent.

"Where the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of *res ipsa loquitur* are present." *Baker v. B. F. Goodrich Co.*, 115 Cal.App.2d 221, 229, 252 P.2d 24, 29. In the case before this court there is conflicting evidence which might well be subject to different inferences. The question was properly submitted to the jury. The conditions necessary to invoke the doctrine of *res ipsa loquitur* appear to here be present. These are stated to be in *Snyder v. Hollingbery*, 141 Cal.App.2d 520,

528, 297 P.2d 485, 490: "(a) There is a basis of experience, either common to the community or brought out in evidence, from which it may reasonably be concluded that the accident is of a kind which does not normally occur unless someone has been negligent. (b) It must be caused by an agency or instrumentality within the exclusive control of the defendant. (c) It must not have been due to any voluntary action or contribution on the part of the plaintiff."

[16,17] Bond & Rushing admits that conditions (a) and (c) are met in this case. They aggressively assert, however, that condition (b) is totally lacking, contending that the instrumentality causing the accident was oil and that Martin was never in control of any oil nor was Bond & Rushing. It would be a needless extension of artificial rules to release Bond & Rushing for the negligence of its joint venturer because an instrumentality under the control of another was released in such manner and by negligent act of their joint venturer as to cause injury to a third person. The instrumentality which here caused the damage was the subsoiler. The fact that the subsoiler caused a break in the pipe line owned by another cannot be used by the operator of the subsoiler or his joint venturer as a defense to their just liability in this matter. Reading the instructions as a whole and considering each in the light of all others, as a jury and an appellate court must do, we find no error in the giving of the instruction complained of.

The judgment appealed from in the Buskovich appeal, Number 17,524, is hereby affirmed, as is the judgment in Number 17,522 in favor of Standard Oil Company of California, and the judgment and order appealed from by Bond & Rushing in Number 17,522 are affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting. SHENK, J., not participating.

157 Cal.App.2d 375

The PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,
Plaintiff,

v.

Inez E. BROADHURST, also known as Inez C. Broadhurst Newall, Sherry Lee Chapman, a minor, Erma Mae Broadhurst, and Anna Broadhurst Morgan, Administratrix of the Estate of Richard George Broadhurst, Deceased, Defendants.

Anna Broadhurst MORGAN, Administratrix of the Estate of Richard George Broadhurst, Deceased, Cross-Complainant and Appellant,

v.

Inez E. BROADHURST, also known as Inez C. Broadhurst Newell, Cross-Complainant and Respondent.

Civ. 22703.

District Court of Appeal, Second District,
Division 1, California.

Feb. 3, 1958.

Interpleader action. The Superior Court of Los Angeles County entered the decree challenged on appeal. The District Court of Appeal, Herndon, J. pro tem., held that, construed in light of surrounding circumstances, property settlement agreement, reciting that wife transferred to her husband any interest she might have in policy on his life, evinced no intent that she should thereby lose her right to take as beneficiary of policy.

Affirmed.

1. Insurance ☞585(1)

Interest of beneficiary designated by insured who has right to change beneficiary is a mere expectancy of a gift at time of insured's death.

2. Assignments ☞8

An expectancy may be assigned or renounced.

3. Assignments ☞71

An assignment or renunciation of an expectancy becomes enforceable when expectancy develops into a right.

4. Assignments Ⓒ52

A contract constitutes an equitable assignment or renunciation of an expectancy only if it expressly or by necessary implication so provides.

5. Assignments Ⓒ41

General expressions or clauses in contract are not to be construed as including assignment or renunciation of expectancy.

6. Insurance Ⓒ585(1), 593(1)**Wills** Ⓒ740(4)

Beneficiary retains his status under insurance policy or under will if it does not clearly appear from contract, alleged to constitute equitable assignment or renunciation of expectancy, that it was intended thereby to deprive him of right to take under will or insurance contract.

7. Insurance Ⓒ587

Failure of insured to change beneficiary may be regarded as indicative of his intent not to effect a change.

8. Insurance Ⓒ585(3)

Construed in light of surrounding circumstances, property settlement agreement, reciting that wife transferred to her husband any interest she might have in policy on his life, evinced no intent that she should thereby lose her right to take as beneficiary of policy.

9. Appeal and Error Ⓒ1008(3)

Appellate court will adhere to trial court's interpretation of contract, and not substitute another of its own, where parol evidence was introduced in aid of trial court's interpretation and was such that conflicting inferences could be drawn therefrom.

Alex Goldberg, Los Angeles, for appellant.

Kenneth W. Gale, San Pedro, for respondent.

HERNDON, Justice pro tem.

The determinative question presented on this appeal is whether it must be held as a matter of law that by the terms of a prop-

erty settlement agreement respondent, the divorced wife of an insured, effectively waived her right to receive, as beneficiary, the proceeds of a policy of insurance on the life of her former husband.

In this interpleader action brought by the insurance carrier, the tripartite contest over the policy proceeds was waged in the trial court by (1) respondent, the former wife of the insured, who was the named primary beneficiary, (2) appellant, the administratrix of the insured's estate, and (3) Sherry Lee Chapman, respondent's minor daughter, who was the named secondary beneficiary. Upon findings of fact and conclusions of law favorable to respondent, the trial court held that her right to take as beneficiary was not foreclosed by the provisions of the property settlement agreement and rendered judgment accordingly. The administratrix of the insured's estate has appealed from the judgment and from an order denying her motion for a different judgment.

Richard Broadhurst, the deceased, was the insured under a life insurance policy issued in January, 1946. His then wife Adna was named primary beneficiary. His marriage to Adna having been dissolved by divorce, he executed a change of beneficiary form dated January 19, 1948, naming his father as primary beneficiary. On February 17, 1951, insured was married to Inez, the respondent here. On June 14, 1952, the insured executed a change of beneficiary form naming respondent primary beneficiary and his father secondary beneficiary. A few weeks later, Inez and the insured separated. Thereafter, on December 1, 1952, insured executed a third change of beneficiary form, redesignating respondent as primary beneficiary and naming her minor daughter Sherry as secondary beneficiary.

The insured and respondent entered into a property settlement agreement dated March 2, 1953, which was approved in an interlocutory divorce decree dated April 3, 1953. The preamble to the agreement refers to the pendency of the divorce suit and contains the following recital: "Whereas

it is the mutual desire of the parties to settle and adjust now and forever all property rights and all rights, obligations and duties so far as is within their power so to do arising out of or founded upon the marital relationship or otherwise, and to waive all rights, duties and privileges not herein expressly reserved in favor of either and against the other existing prior to and on the date hereof, so that henceforth all rights, duties, privileges, obligations and liabilities of the parties hereto shall be exclusively based upon and determined by the terms of this agreement".

Among the provisions of the agreement dividing the various items of real and personal property between the parties is the following: "Wife also transfers to husband any interest she may have in the life insurance policy on the life of the husband." The trial court found that the last quoted provision referred to the policy involved in this action but held that it was not intended as a waiver or relinquishment of her right to take as a beneficiary of the policy.

The final decree terminating the marriage of respondent and the insured was entered on May 11, 1954. Thereafter respondent married a Mr. Newell and on April 3, 1955, the insured married Erma Broadhurst. Insured was murdered by Erma on August 12, 1955. Erma was named a party defendant in this action, but she failed to appear and her default was duly entered.

[1-3] The interest of a beneficiary designated by an insured who has the right to change the beneficiary is, like that of a legatee under a will, a mere expectancy of a gift at the time of the insured's death. *Thorp v. Randazzo*, 41 Cal.2d 770, 773, 264 P.2d 38; *Grimm v. Grimm*, 26 Cal.2d 173, 176, 157 P.2d 841. It is recognized that an expectancy may be assigned or renounced and that such assignment or renunciation becomes enforceable when the expectancy has developed into a right. *Sullivan v. Union Oil Company*, 16 Cal.2d 229, 237, 105 P.2d 922; *Bennett v. Forrest*, 24 Cal.2d 485, 492, 150 P.2d 416; *In re Estate of Crane*, 6 Cal.2d 218, 220, 57 P.2d 476, 104 A.L.R. 1101.

[4-6] It is well settled, however, that a contract constitutes an equitable assignment or renunciation of an expectancy only if it expressly or by necessary implication so provides. It is further settled that "general expressions or clauses in such agreements are not to be construed as including an assignment or renunciation of expectancies and that a beneficiary therefore retains his status under an insurance policy or under a will if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take property under a will or an insurance contract of the other." *Thorp v. Randazzo*, supra, 41 Cal.2d at page 774, 264 P.2d at page 40; *Grimm v. Grimm*, supra, 26 Cal.2d at page 176, 157 P.2d 841.

From the cited decisions it becomes manifest that in each case the controlling question basically was one of fact: *What did the parties intend?* And so it necessarily follows that "each case must be decided upon its own facts." *Thorp v. Randazzo*, supra, 41 Cal.2d at page 774, 264 P.2d 38, 40; *Miller v. Miller*, 94 Cal.App.2d 785, 790, 211 P.2d 357.

[7,8] Our application of the above stated principles of law to the facts of the instant case leads us to the conclusion that the decision of the trial court must be sustained. The strength of the factual element in that decision is emphasized by the presence in the record of circumstantial evidence extrinsic to the agreement from which the trial judge could draw legitimate inferences in aid of his interpretation. Within a period of less than six years, the insured had executed three different change of beneficiary forms. This indicated his knowledge of, and his readiness to exercise, the procedure prescribed by the company for changing beneficiaries. After separating from respondent, he redesignated her as beneficiary and made her daughter his secondary beneficiary. He lived more than two years after the agreement was executed, more than one year after his divorce from respondent became final, and more than four months after his marriage to the

woman whose criminal act effectively terminated his earthly existence. These facts and circumstances strengthen the application of the rule that failure of the insured to change the beneficiary may be regarded as indicative of his intent not to effect a change. *Shaw v. Board of Administration*, 109 Cal.App.2d 770, 776, 241 P.2d 635; *Estate of Crane*, supra, 6 Cal.2d at page 221, 57 P.2d 476, 104 A.L.R. 1101; *Miller v. Miller*, supra, 94 Cal.App.2d at page 790, 211 P.2d 357.

Respondent's reliance upon the decision in *Grimm v. Grimm*, supra, is justified. Indeed, the language of the property settlement agreement involved in the *Grimm* case afforded a stronger basis for the argument that a renunciation and transfer of the expectancy was intended than does the agreement involved here. By the terms of the agreement in *Grimm* [26 Cal.2d 176, 157 P.2d 844] it was provided that the wife (beneficiary) "hereby transfers, releases and relinquishes to first party all interest in and to said policy of insurance and the premiums paid thereunder *and the avails thereof*." (Emphasis added.) It is self-evident that the last quoted language is broader and more inclusive than the corresponding language of the agreement in the instant case.

[9] The cases primarily relied upon by appellant, to-wit, *Thorp v. Randazzo*, supra, and *Sullivan v. Union Oil Co.*, supra, are distinguishable upon the basis of substantial differences in the language of the agreements involved. The Supreme Court alluded to these differences in *Thorp v. Randazzo* (41 Cal.2d at pages 775 and 776, 264 P.2d 38) in distinguishing *Grimm v. Grimm*, supra. Additionally, appellant is confronted by the rule that an appellate court will accept or adhere to the interpretation of a contract adopted by the trial court—and not substitute another of its own—where parol evidence was introduced in aid of its interpretation, and the evidence is such that conflicting inferences may be drawn therefrom. In re *Estate of Rule*, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319; *Universal Sales Corp. v. Calif.*

etc. Press Mfg. Co., 20 Cal.2d 751, 772, 128 P.2d 665.

Respondent advances the further contention that appellant is without standing to maintain this appeal for the reason that the non-appealing secondary beneficiary would have been entitled to the policy proceeds if there had been an effective renunciation by respondent. See *Beck v. West Coast Life Ins. Co.*, 38 Cal.2d 643, 241 P.2d 544, 26 A.L.R.2d 979. Our disposition of the controlling question first presented makes it unnecessary for us to decide the merit of this latter contention.

The judgment and order appealed from are affirmed.

WHITE, P. J., and FOUNT, J., concur.



157 Cal.App.2d 451

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Arthur CUMMINGS and Patrick Edward
Jordan, Defendants and Appellants.**

Patrick Edward Jordan, Petitioner.

Cr. 6068.

**District Court of Appeal, Second District,
Division 1, California.**

Feb. 5, 1958.

Defendant was convicted on several counts of conspiracy to commit abortion. Defendant made a motion in the District Court of Appeal for stay of execution of judgment of conviction. The District Court of Appeal, Fount, J., held that where there had been no determination of plea of not guilty by reason of insanity of defendant, who had been sentenced to state prison and was presently confined in Folsom Prison, and it was necessary that

he eventually be returned to Los Angeles County for further disposition of his case on his plea of not guilty by reason of insanity, and he had only limited use of law library at Folsom Prison, and if he should be confined in Los Angeles County jail he would have free access to county law library for purpose of preparing his appeal in propria persona, District Court of Appeal would grant defendant stay of execution pending final determination of case on appeal, and would order that warden of Folsom Prison deliver defendant to custody of sheriff of Los Angeles County to be detained in county jail.

Motion granted.

Criminal Law Ⓒ1001

Prisons Ⓒ13

Where there had been no determination of plea of not guilty by reason of insanity of defendant presently confined in Folsom Prison, and it was necessary that he eventually be returned to Los Angeles County for further disposition of his case on his plea of not guilty by reason of insanity, and he had only limited use of law library at Folsom Prison, and if he should be confined in Los Angeles County jail he would have free access to county law library to prepare his appeal in propria persona, District Court of Appeal would grant defendant stay of execution pending final determination of case on appeal, and would order that warden deliver defendant to custody of sheriff of Los Angeles County to be detained in county jail. West's Ann.Pen.Code, § 1243.

Patrick Edward Jordan, in pro. per.

Edmund G. Brown, Atty. Gen. of the State of Cal., for respondent.

FOURT, Justice.

Defendant and appellant, Patrick Edward Jordan, has petitioned this court for a stay of execution of a judgment of conviction pending the determination of his appeal, following the refusal of the trial court to

order a stay of execution pending appeal pursuant to section 1243 of the Penal Code.

Defendant Jordan, hereinafter referred to as the defendant, was charged in an information with a conspiracy to commit abortion and with nine separate counts of the crime of abortion. The co-defendant, Arthur Cummings, was similarly charged and convicted. Jordan appeared in court on February 5, 1957, with his counsel, the public defender, and pleaded not guilty to each of the ten counts then charged against him. On February 18, 1957, the defendant and his counsel were present in court, and it is set forth in the proceedings of that day, "It appearing to the Court that the defendant has been committed to the Department of Mental Hygiene, cause is advanced from February 25, 1957. Counsel for the defendant enters a plea of 'Not Guilty by reason of Insanity' at the time of the commission of the offense on behalf of the defendant. Doctor Robert E. Wyers and Doctor John A. Mitchell are appointed under section 1027 Penal Code to examine the defendant as to his sanity at the time of the commission of the offense, and are also appointed under section 1871, CCP to examine the defendant as to his present sanity, and report to the Court by February 25, 1957. Trial is restored to calendar February 25, 1957, at 9:15 a. m. * * *."

On February 25, 1957, the defendant and his counsel were present in court and upon the basis of the reports of the doctors, theretofore appointed, the court found that the defendant was "presently sane and able to cooperate with counsel in his own defense." A jury was waived, the trial then commenced, and it was stipulated that the cause be submitted on the transcript of the testimony taken at the preliminary hearing, all parties reserving the right to introduce additional evidence. The trial was then continued to April 2, 1957, and the defendant was remanded to the Metropolitan State Hospital at Norwalk.

On April 2, 1957, the defendant made a motion in effect requesting that a daily transcript of the proceedings be ordered and the motion was denied. Several witnesses

were then sworn and testified, and the trial continued on into the next day at which time the People rested their case. The defendant introduced certain evidence in the days that followed and then rested his case. On April 5, 1957, the cause was continued to April 29, 1957 for further trial. On April 26, 1957, the court ordered the court reporter to prepare an original and three copies of the transcript of the testimony taken on April 2, 3, 4 and 5, 1957. On April 29, 1957, each of the defendants made a motion to reopen the case for the purposes of taking additional evidence and the motion was denied. The cause was then argued and continued to April 30, 1957, upon which day the arguments were concluded and the court found this defendant guilty of counts, I, V, VI, VII, VIII and X, and not guilty as to counts II, III, IV and IX.

The record set forth in the superior court file discloses that there was no determination of the defendant's plea of not guilty by reason of insanity. The attorney general has conceded that no such determination was made. The defendant was sentenced to the state prison, and he is presently confined in Folsom prison.

At the time of arraigning the defendant for the pronouncement of judgment the court made no mention of the defendant's plea of not guilty by reason of insanity, however, the trial judge must have had in mind something concerning the mental condition of the defendant for he said, "It is the opinion of the Court that it would probably be more beneficial for him to be sent to Vacaville (California Medical Facility) for treatment than to be incarcerated in one of the institutions."

On December 6, 1957, the defendant caused to be filed in the superior court a "Motion for Stay of Execution and/or release on bail by own recognizance, and/or Modification of Sentence." Among other grounds for the stay of execution, the defendant contended that he was then in Folsom prison and preparing his appeal in propria persona without assistance of counsel or prison authorities. It is further

set forth that there is a prison law library, however that it can only be used during leisure hours and he can spend only about four hours each week in said law library. He further contends that if given a stay of execution he "* * *" would have the benefits of diligently perfecting his appeal from within the confinement of the L. A. County Jail where he would have free access to the County Law Library and consultation with counsel if he so *chooses* and relief from a constant restraint which presently deprives him from acting as his own attorney, in the event that he did not make bail from the County Jail."

Defendant further stated, "At the time of sentencing this Honorable Court in pronouncing said sentence made a recommendation that defendant be confined in the California Medical Facility at Vacaville and by such recommendation it is presumed by defendant that the Court did not intend for the defendant to be placed in the Maximum security prison in Folsom wherein he is prohibited from faithfully and diligently perfecting his case on appeal."

By letter the defendant has been advised by counsel for the co-defendant that a transcript is not presently available to him, as the only copy has been given to the attorneys for the co-defendant who is and has been at all times released on bail. Counsel for the co-defendant did indicate that he would loan his copy to the defendant on condition that it be returned to him on request.

Defendant's motion for a stay of execution in the superior court was denied on December 12, 1957.

The defendant did, on December 30, 1957, file in this court a motion for a stay of execution wherein he sets forth a statement of the case and asserts certain grounds for the stay of execution, among others being some of the grounds urged in the superior court.

We are of the opinion under the peculiar and particular aspects and circumstances of this case, and further because the defendant is going to have to be returned to Los

Angeles county for further disposition of his case on his plea of not guilty by reason of insanity, that a stay of execution should be, and is granted pending the final determination of the case on appeal.

It is further ordered that the Warden of the Folsom State Prison at Folsom deliver defendant to the custody of the Sheriff of Los Angeles County to be detained by said Sheriff in the County Jail at Los Angeles pending further order of this court.

WHITE, P. J., and DORAN, J., concur.



Everette M. LEWIS, Plaintiff and Appellant,
v.

MUNTZ CAR COMPANY OF CALIFORNIA, and Seaboard Finance Company, a corporation, Defendants and Respondents.*

Civ. 22637.

District Court of Appeal, Second District,
Division 1, California.

Feb. 3, 1958.

Rehearing Denied March 3, 1958.

Hearing Denied April 2, 1958.

Action by automobile buyer against firm selling same and holder of conditional sales contract for damages based on seller's alleged violation statute prescribing requirements of conditional sales contract. The Superior Court, Los Angeles County, Arthur K. Marshall, J., entered judgment in favor of buyer against seller, and against holder of conditional sales contract after deducting certain offsets, and buyer appealed. The District Court of Appeal, Drapeau, J. pro tem., held that although seller had failed to comply with statute in executing conditional sales contract and holder of conditional sales contract had notice at least so far as violations appeared on face of contract, no penalty could be inflicted against holder under statute which

prescribed penalty against holder only in case that holder failed or refused to satisfy indebtedness when buyer offered to pay it.

Affirmed as to one defendant and reversed as to the other defendant.

1. Automobiles ☞19

Court must look to statute respecting conditional sales contracts dealing with automobile financing for power to adjudge penalties for fraud in financing motor vehicle sales. West's Ann.Civ.Code, § 2982(d, f).

2. Automobiles ☞19

Where buyer of automobile on conditional sales contract had been defrauded by seller thereof which had failed to comply with statutory requirements regarding prerequisites of conditional sales contract, and holder of such contract had notice at least in so far as violations appeared on face of contract, no penalty could be assessed against holder under statute which provided a penalty against holder only in the case that it failed or refused to satisfy indebtedness when buyer offered to pay it. West's Ann.Civ.Code, §§ 2981, 2982(d, f).

David J. Lee, Los Angeles, for appellant.

K. E. Nungesser and Bromley, Ritter & Lindersmith, Los Angeles, for respondent Seaboard Finance Co.

DRAPEAU, Justice pro tem.

Everette M. Lewis purchased an automobile in 1953 from Muntz Car Company of California, a corporation. He and a salesman for Muntz agreed upon the terms of the sale. Agents of Muntz then spread before him several printed documents which Mr. Lewis signed. None of the blanks in the documents were filled in. And none of the documents were given to him, then or ever.

After Mr. Lewis took possession of the automobile, Muntz filled in the blanks in the documents, and added provisions and

obligations that had not been assumed by Mr. Lewis.

After that Muntz assigned the contract to defendant Seaboard Finance Company.

Mr. Lewis brought this action against Muntz and Seaboard on three counts: (1) To cancel the contract. (2) To rescind it. And (3) in assumpsit.

Muntz was served with process, but defaulted, having gone out of business.

Seaboard appeared, and contested the action on the ground that it had no notice or knowledge of irregularities in the contract, and that it was a purchaser for value.

Judgment in the superior court was for Mr. Lewis against Seaboard for \$2,833.30, the amount he paid on the contract, but with an offset for Seaboard of \$2,000, the value of his use of the automobile; making \$833.30 only for Mr. Lewis. Mr. Lewis also had judgment against Muntz in the sum of \$3,633.30, less the same offset as above in the amount of \$2,000.

Mr. Lewis appeals from the judgment, and bases his appeal upon three grounds: (1) Upon his objection to the offset. (2) Upon his contention that he should have had judgment also for the amount paid for the car \$3,633.30. He computes this sum by adding his down payment to Muntz, \$800 to the \$2,833.30 paid to Seaboard. And (3) upon his contention that he should also have had judgment for possession of the car.

To understand this situation, it is necessary to quote pertinent portions of the trial judge's findings, as follows:

"(a) That plaintiff did on or about the 20th day of April, 1953, enter into a said purported contract of conditional sale as purchaser with defendant Muntz Car Company of California as seller, but that at the time the plaintiff executed the same, said document was a mere blank document containing blank spaces for the items mentioned in said paragraph, but none of said items were filled in nor was plaintiff given a copy of said document at that time, or at all; and all copies thereof were thereafter retained by defendants and said blank

spaces were subsequently filled in by defendants without the knowledge, consent or permission of plaintiff, with the figures alleged in said paragraph.

"(b) That the contract does recite \$5,-232.96 as the cash selling price, but the court finds that said sum is not true and correct; that said sum includes a fictitious credit of \$1,000.00 over and above the actual cash selling price agreed upon, together with sales tax thereon in the amount of \$35.00, both of which amounts should be deducted to arrive at the true and correct cash selling price in violation of subsection (1) of subdivision (a) of Section 2982 of the Civil Code.

"(c) That the contract does recite a down payment of \$1,800.00 consisting of \$800.00 in cash and \$1,000.00 described as the net agreed value of the trade-in, which is not described, but the court finds that there was no trade-in involved in the transaction and that said \$1,000.00 was merely a fictitious credit or 'balloon' designed to give the impression that the purchaser had paid as a down payment one-third of the purchase price, in violation of subdivision (a) subsection (2) of Section 2982 of the Civil Code.

"(d) That the contract does recite the amount unpaid on the cash price as \$3,432.-96, but the court finds that that sum is not the true and correct amount required to be recited therein; that it does not represent the difference between the true and correct cash selling price and down payment above described, in violation of subdivision (a) (3) of said section.

"(e) That the contract recites as cost of total insurance premiums the sum of \$166.-00 representing according to the recitations therein comprehensive and collision coverages. In addition 'life insurance, \$126.05' is typed below this item. The court finds that the defendant Muntz Car Company agreed to furnish plaintiff with public liability and property damage coverages in addition to comprehensive and collision coverages for said premiums of \$166.00, but did not do so, but on the contrary procured comprehensive and collision coverages only

and at a premium of \$320.00, and, in addition the court finds that the plaintiff never agreed to purchase life insurance as recited in said contract and no such life insurance policy was ever procured by defendants for plaintiff or delivered to plaintiff, and plaintiff did not agree to pay the sum of \$126.05 for the premium therefor. That the charges contained in said contract for insurance are not true and correct, in violation of subdivision (a) (4) of said section.

“(f) That the contract does not recite the registration and title fees as required by subdivision (a) (5) of said section, but on the contrary this section of the contract was blank.

“(g) That the contract does not recite the true and correct unpaid balance as required by subdivision (a) (6) of said section. The court finds that the unpaid balance recited in said contract of \$3,598.96 is not the true and correct unpaid balance.

“(h) That the court further finds that the failure to add the sum of \$292.05 for insurance premiums to the amount unpaid on the cash price of \$3,432.96 recited in said contract was not due to an accidental or bona fide error in computation; that the total insurance premiums were \$166.00 and not \$292.05 as hereinabove found.

“(i) That the court finds that the contract does not recite the true and correct time price differential, in violation of subdivision (a) (8) of said section. That the time price differential recited in said contract does not represent the difference between the unpaid balance and the contract balance recited therein, or the true and correct figures for said items.

“(j) The court finds that subsection (b) of said section required delivery of insurance policies to the purchaser. It is found by the court that no life insurance policy was delivered to plaintiff.

“(k) The court further finds that the time price differential is in excess of the limitations prescribed in subsection (a) of said section. The contract recites an unpaid balance of \$3,598.96, which said sum is itself \$35.00 in excess of the true and

correct unpaid balance. Taking said sum as the unpaid balance, however, the court further finds that the maximum time price differential computed for said contract is \$1,115.69, which said sum is exceeded by the time price differential recited in said contract of \$1,152.99 and also the difference between said \$3,598.96 taken as the unpaid balance and the contract balance recited therein of \$4,878.00 which difference is \$1,279.04. The court further finds that said excessive time price differential charge is not due to an accidental or bona fide error in computation.”

With respect to Seaboard the court found: “* * * That said defendant Seaboard Finance Company knew of the foregoing violations visible on the face of the contract at the time it purchased said contract.”

The findings are to some extent conflicting. For example, paragraph (a) above quoted, recites that the blank spaces in the contract “were subsequently filled in by *defendants* without the knowledge, consent or permission of plaintiff.” (Emphasis added.) Then, by reference to paragraph III of Seaboard’s answer the court found that Seaboard “as a bona fide purchaser for value, purchased all of the right, title and interest of the seller in and to said contract of conditional sale and in and to said automobile, * * *.” And then the court found, by interlineation on the proposed findings, that Seaboard knew of the foregoing violations “visible on the face of the contract” at the time Seaboard purchased it from Muntz.

Inasmuch as Civil Code sections 2981 and 2982 determine the problem in this case, we will set forth in this opinion all of section 2982 as follows:

“§ 2982. Motor vehicles

“(a) Contents; formalities. Every conditional sale contract for the sale of a motor vehicle, with or without accessories, shall be in writing and shall contain all of the agreements between the buyer and the seller relating to the personal property described therein. It shall be signed by the buyer or

his authorized representative and by the seller or its authorized representative, and when so executed an exact copy thereof shall be delivered by the seller to the buyer at the time of its execution. It shall recite the following separate items as such, in the following order:

"1. The cash price of the personal property described in the conditional sale contract.

"2. The amount of the buyer's down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with a statement of the respective amounts credited for cash and for such property. As soon as received by the dealer the dealer shall refund to the buyer or credit to the buyer on the next payment due the amount realized on any insurance policy, or rights thereunder, assigned to the seller by the buyer in connection with the conditional sale. Failure of the dealer to comply with the foregoing provision shall in no way affect the validity or enforceability of the conditional sale contract.

"3. The amount unpaid on the cash price, which is the difference between Items 1 and 2.

"4. The cost to the buyer of any insurance, the premium for which is included in the contract balance.

"5. A description and itemization of amounts, if any, which will actually be paid by the seller or his assignee to any public officer as fees in connection with the transaction, which are included in the contract balance.

"6. The amount of the unpaid balance, which is the sum of Items 3, 4, and 5.

"7. The amount of the time price differential.

"8. The contract balance owed by the buyer to the seller, which is the sum of Items 6 and 7.

"9. The number of installments required to pay the contract balance, the amount of each installment, and the date for payment of the installments.

"(b) Insurance. If any charge for insurance is included in the amount paid or to be paid by the buyer under any conditional sale contract for the sale of a motor vehicle, with or without accessories, an insurance policy or policies or a certificate of insurance under a master policy shall be issued and the seller shall within 30 days after the execution of the conditional sale contract send or cause to be sent to the buyer the original or an exact copy of such policy or policies or certificate.

"(c) Time price differential; limit. The amount of the time price differential in any conditional sale contract for the sale of a motor vehicle, with or without accessories, shall not exceed 1 percent of the unpaid balance multiplied by the number of months, including any excess fraction thereof as one month, elapsing between the date of such contract and the due date of the last installment, or twenty-five dollars (\$25), whichever is greater, provided that such contract may provide for interest on any delinquent installment from and after the date of delinquency, and for reasonable collection costs and fees in the event of delinquency.

"(d) Payment before maturity; refund credit. Any provision in any conditional sale contract for the sale of a motor vehicle to the contrary notwithstanding, the buyer may satisfy in full the indebtedness evidenced by such contract at any time before the final maturity thereof, and in so satisfying such indebtedness shall receive a refund credit thereon for such anticipation of payments. The amount of such refund shall represent at least as great a proportion of the time price differential, after first deducting from such time price differential a minimum charge of not to exceed twenty-five dollars (\$25), as the sum of the periodic time balances after the month in which such contract is paid in full bears to the sum of all of the periodic time balances under the schedule of payments in the contract, both sums to be determined according to the monthly balances which would result if the indebtedness were paid accord-

ing to the terms of the contract; provided, however, that the provisions of this subsection shall not impair the right of the seller or his assignee to receive a minimum time price differential of twenty-five dollars (\$25), or to receive interest on delinquent installments or reasonable collection costs and fees, as provided in subsection (c) of this section; and provided further, that where the amount of such refund credit would be less than one dollar (\$1), no refund need be made.

"(e) Seller's deliberate violation; buyer's rights. If the seller, except as the result of an accidental or bona fide error in computation, shall violate any provision of subdivisions (c), or (d) of this section the conditional sale contract shall not be enforceable, except by a bona fide purchaser for value, and the buyer may recover from the seller in a civil action the total amount paid on the contract balance by the buyer to the seller or his assignee pursuant to the terms of such contract.

"(f) Contract holder's violation; buyer's rights. If the holder of such contract, except as the result of an accidental or bona fide error in computation, shall violate any provision of subdivision (d) of this section, the buyer may recover from such holder in a civil action the total amount paid on the contract balance by the buyer to such holder pursuant to the terms of such contract."

Problems in applying our law regulating financing of sales of motor vehicles are discussed in 2 Stanford Law Review, in an article published in 1950. This article may also be found in West's Annotated California Codes, annotated to Civil Code section 2981. The writer points out that the legislative purpose in enacting these two code sections was to prevent abuses in installment sales contracts of motor vehicles, and in an attempt to set up a sensible, fair regulation of motor vehicle time financing. Also that unless the law has adequate sanctions for its violation, sellers of motor vehicles and holders of conditional sales contracts may violate it with impunity.

[1] But the courts must look to the law itself for power to adjudge penalties for fraud in financing motor vehicle sales. So far as holders of conditional sale contracts are concerned, the penalty is to be found in subsections (f) and (d) of Civil Code section 2982 only.

Subsection (f) provides that if the holder shall violate any provision of subsection (d) the buyer may recover from such holder the amount paid on the contract balance.

[2] It therefore follows that we must look to subsection (d) to see what the penalty is for. And here we find the answer to this whole case.

For subsection (d) provides that there shall be a penalty if the holder fails or refuses to satisfy the indebtedness on the vehicle when the buyer offers to pay it. And that is the only conduct for which a penalty against a holder is provided.

In the leading case of *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, at page 571, 203 P.2d 758, at page 763, our Supreme Court held that Civil Code sections 2981 and 2982 applied to the sale of a truck and trailer when a chattel mortgage and not a conditional sale contract was used to secure payment of the purchase price.

In the same case, however, the Supreme Court made a clear distinction between a seller and one who financed the sale. In that case two trucks and two trailers were involved. One of the trucks was a G.M.C. with a Weber trailer; the other was a Sterling truck, with a Fruehauf trailer. In its opinion the Supreme Court states as to the G.M.C. truck and its trailer, that the defendant merely financed the purchase thereof by the plaintiff; and that, to the contrary, the Sterling truck, with its Fruehauf trailer, was sold to plaintiff by defendant. Therefore, a judgment for defendant as to the sale of the Sterling truck and Fruehauf trailer was reversed, with directions to the trial court to determine the sums due plaintiff under section 2982 of the Civil Code. The law then provided for treble damages.

But the judgment was affirmed as to the truck and trailer that defendant had financed.

Therefore, we must, in the circumstances of this case, hold that under our law as it now reads no penalty can be adjudged against Seaboard, the holder of the conditional sale contract, despite the chicanery of Muntz, the seller, of which Seaboard, the holder, had notice, at least so far as it appeared on the face of the contract.

Having come to this conclusion, there is no need to comment upon Mr. Lewis' other contentions, or upon extensive arguments in the briefs as to the law of offset when there is a penalty. The fact that the law does not provide any penalty against a holder other than the one stated disposes of all of these matters, at least so far as this case is concerned.

The judgment is affirmed as to Muntz, and reversed as to Seaboard.

WHITE, P. J., and FOURT, J., concur.



157 Cal.App.2d 474

**Matter of the ESTATE of Charles L.
BRENNEMAN, Deceased.**

**Edna A. BRENNEMAN et al., Contestants-
Appellants and Respondents,
v.**

**John H. WEEKS and V. Charles Weeks, Pe-
titioners-Respondents and Appellants.**

Civ. 22801.

District Court of Appeal, Second District,
Division 3, California.

Feb. 5, 1958.

Hearing Denied April 2, 1958.

Proceeding to determine heirship. The Superior Court of Los Angeles County, Newcomb Condee, J., rendered decree determining that all of decedent's property except a parcel of realty constituted com-

munity property, and heirs of decedent and of his predeceased wife, respectively, appealed. The District Court of Appeal, Patrosso, J. pro tempore, held that the statutory presumption that property acquired during marriage is community property is itself evidence, and heirs of predeceased spouse claiming community status need not adduce independent evidence that such property did not have its source in separate property of surviving spouse, but burden of proving its status as separate property was on adversaries.

Affirmed in part, and reversed and remanded with directions in part.

1. Husband and Wife ⇐262(1)

The statutory presumption that property acquired during marriage is community property is itself evidence, and heirs of predeceased spouse claiming community status need not adduce independent evidence that such property did not have its source in separate property of surviving spouse, but burden of proving its status as separate property was on adversaries. West's Ann.Prob.Code, §§ 228, 229.

2. Husband and Wife ⇐264

Evidence, which was uncertain as to deceased husband's occupation and source of income, supported finding that husband's personality was community property and did not support finding that realty was separate estate, though husband had owned realty in Pennsylvania acquired before marriage. West's Ann.Prob.Code, §§ 228, 229.

Paul Goodsell Sullins, Pasadena, for contestants-appellants and respondents.

Bailey & McWhinney, Los Angeles, for petitioners-respondents and appellants.

PATROSSO, Justice pro tem.

We are confronted here with cross-appeals by the heirs of the decedent upon the one hand and the heirs of his predeceased wife on the other, from the decree entered in a proceeding to determine heir-

ship. By its decree the trial court determined that all of the property of the decedent with the exception of a single parcel of real property, constituted the community property of the decedent and his predeceased wife, which upon his death vested, subject to administration, one-half in the heirs of the decedent and one-half in the heirs of the deceased wife, and that the parcel of real property constituted the separate property of the decedent which descended to and vested in his heirs. The decedent's heirs, hereinafter referred to as contestants, appeal, from so much of the decree as determines that any portion of his estate was community property of the decedent and his predeceased wife, and the heirs of the latter, hereinafter referred to as petitioners, appeal from the portion of the decree determining that the parcel of real property previously mentioned constituted separate property of the decedent. All of the estate with the exception of this parcel of real property is personalty.

Substantially all of the relevant facts were stipulated to upon the hearing and there is no material dispute with reference thereto.

The decedent died intestate on June 6, 1956, at the age of 86; his wife, whom he married in Pennsylvania on June 9, 1908, having predeceased him on August 11, 1953, at the age of 83. Following their marriage the parties resided in the state of Pennsylvania continuously until moving to California in the summer or fall of 1923, where they thereafter continued to reside until their respective deaths. Decedent went to grammar school in Chicora and Freeport, Pennsylvania, but did not finish the eighth grade. When he was about fifteen he got a job in a grocery store in Freeport after which he was engaged in some kind of work in Washington, Pennsylvania, the exact nature of which does not appear. Thereafter he had what is described as a "brokerage job" in Connelville, Pennsylvania, for an undisclosed period of time. In what activities, if any, decedent was employed at the time of or

immediately preceding his marriage does not appear, and the same is likewise true of the period following his marriage during his residence in Pennsylvania. Some two years prior to his marriage decedent acquired improved real property in Aspinvale, Pennsylvania, for a consideration of \$6,250 and which he sold on December 1, 1923, for \$6,200. Following his arrival in California decedent in 1926 acquired by a deed in his name as a married man, a parcel of real property in Pasadena which continued to be the home of the parties and in which decedent still resided at the time of his death. The consideration paid for this property does not appear. On May 29, 1928, decedent and his wife joined in the execution of a deed of this property to one Dolly C. Daugherty, who in turn, on November 2, 1928, reconveyed the property to decedent and his wife as joint tenants, and the record title thereto so remained at the time of decedent's death. The inventoried value of the decedent's estate including the real property last mentioned, all of which was acquired during marriage or with proceeds of property so acquired, is \$86,440.93, and in addition to said real property consists of cash and a commercial checking account in the name of decedent aggregating \$3,059.21; U. S. Savings Bonds in the name of decedent aggregating \$19,275; promissory notes secured by trust deeds in the name of decedent and his wife as joint tenants in the total sum of \$19,424.06; certificates of various building and loan associations in the name of decedent aggregating \$32,164.58; a savings and loan certificate in the name of decedent's wife in the sum of \$1,018.08 and household furniture and furnishings of the value of \$500.

Insofar as the record discloses little is known of decedent's activities during the period of his marriage but it was stipulated that neither decedent nor his wife were ever employed upon a salary or for wages. It does appear that during the period of his marriage decedent bought and sold shares of stocks and bonds in various corporations

as well as real properties in both Pennsylvania and California. The Pasadena telephone directories contain no listing of a telephone in the name of decedent or his wife from 1923 to January 1941, and no listing for decedent thereafter disclosed any purported occupation of decedent. In the 1925 City Directory of Pasadena the decedent is listed at his residence address as a "teleg. opr."; in the 1930 directory as a "carp." and in the 1954 directory as a "tchr." In a Torrens certificate dated September 24, 1924, decedent's occupation is set forth as "telegraph operator" and in another Torrens certificate dated July 27, 1932, he is described as "retired." Upon the signature card which was prepared in connection with the opening by him of a commercial bank account in the year 1926, his occupation is set forth as "builder." The record, however, is devoid of any independent evidence that he followed any of the indicated occupations. Aside from an inheritance which decedent received in 1926 from the estate of his father in the sum of \$2,187.33, there is no evidence that either decedent or his wife ever received any property by way of gift, devise, bequest or descent.

The contestants (decedent's heirs) contend that the evidence which we have epitomized above is insufficient to sustain the trial court's findings that all of the personal estate constituted community property of the decedent and his predeceased wife, and in turn the latter's heirs contend that the evidence is insufficient to support the trial court's finding that the parcel of real property was the separate estate of the decedent.

In support of their contention that the trial court erred in its determination that all of the decedent's personal estate was community property, contestants urge that in order for petitioners to establish their right to succeed to some or all of the property in decedent's estate, the burden rested upon them not only to prove, as they admittedly did, that such property was acquired during the marriage, but in addi-

tion thereto that such property had its source in community property.

[1] While in the cases construing Probate Code sections 228 and 229, there are to be found some seemingly contradictory statements, which afford some basis for this contention, upon careful analysis it will be found that they do not support the proposition contended for by contestants.

While by virtue of section 164 of the Civil Code proof that property was acquired by husband or wife during marriage gives rise to a presumption that it is community, in *Re Estate of Reizian*, 1951, 36 Cal.2d 746, 749, 227 P.2d 249, 250, it is said: "In determining the character of property for the purpose of applying §§ 228 and 229 of the Probate Code, it is the source of its acquisition, and not the nature of its ownership immediately before death, which is controlling. In *re Estate of Abdale*, 28 Cal.2d 587, 170 P.2d 918; In *re Estate of Perkins*, 21 Cal.2d 561, 134 P.2d 231; In *re Estate of Rat-tray*, 13 Cal.2d 702, 91 P.2d 1042."

Contestants construe this language to mean that where the only proof produced by one claiming the right to inherit through a predeceased spouse with respect to the character of the property in the estate of the surviving spouse, is that it was acquired during marriage, he has failed to establish his right. When viewed in the light of the facts of that case and of the cases therein cited in support of this statement, this is not correct. What the court there undertook to say was merely that if it is made to appear that property acquired during marriage by either spouse was originally the separate property of one of the spouses, it is to be treated as the separate property of such spouse. Thus in *In re Estate of Abdale*, 1946, 28 Cal.2d 587, 170 P.2d 918, which is cited in support of the statement quoted above, it is held that property of the surviving spouse which was originally separate, but title to which prior to the death of the predeceased spouse was transferred to himself and wife

as joint tenants, and later vested in the surviving spouse upon the death of his wife, is to be distributed upon the death intestate of the surviving spouse as his separate property. Moreover in the opinion in that case which was written by Mr. Justice Traynor who is the author of the opinion in the *In re Estate of Reizian*, speaking of the burden of proof it is said (28 Cal.2d at page 593, 170 P.2d at page 922): "It is settled that section 229 does not apply unless property allegedly distributable thereunder is traced and identified as the former separate property of the predeceased spouse (*In re Estate of Brady*, supra, 171 Cal. 1, 5, 151 P. 275; *Pickens v. Merriam*, 9 Cir., 274 F. 1, 11), and that the burden is on the party claiming thereunder to so identify the property. *Estate of Rattray*, supra, 13 Cal.2d 702, 706, 91 P.2d 1042; *In re Estate of Harris*, supra, 9 Cal.2d 649, 662, 72 P.2d 873; *In re Estate of Simonton*, 183 Cal. 53, 60, 190 P. 442; see 9 Cal.Jur. 416, 563." And in *In re Estate of Rattray*, also therein cited, it is held that property originally community, which came to the surviving spouse of *inter vivos* gift from the predeceased spouse is, for the purposes of section 228, to be deemed community and not separate.

None of the foregoing authorities undertakes to declare, as contestants assume, that in order for the heirs of a predeceased spouse to establish *prima facie* their right to succeed to property shown to have been acquired during marriage, they must adduce independent evidence to the effect that such property did not have its source in separate property of the surviving spouse. On the contrary we believe that the correct rule in this regard is stated in *Re Estate of Adams*, 1955, 132 Cal.App.2d 190, page 196, 282 P.2d 190, 194, in which a hearing by the Supreme Court was denied, as follows:

"The Adams claimants are correct in contending that the burden involved rested on the Schmitt claimants. These claimants are relatives of the predeceased Isabella. By section 228

they are made statutory heirs of George if they can prove that any property in his estate was in fact the community property of George and Isabella. Such proof is a condition precedent to recovery by them. * * *

"The Schmitt claimants, as respondents, do not seriously challenge this rule of law, but contend that they have met this burden. Their argument is simply that the court has found that certain properties in the possession of George when Isabella died in 1941 were acquired during the more than 32 years of married life other than by gift, devise, bequest or descent, and were, therefore, the community property of George and Isabella. This determination is supported by the presumption contained in section 164 of the Civil Code that such property acquired during marriage was community property. By reason of this presumption, which is itself evidence, the Schmitt claimants established a *prima facie* case, and the burden of proving that the property acquired after marriage and in the possession of George in 1941 was separate property, rested on the Adams claimants."

Contestants, however, assert that the foregoing statements are in conflict with the language of the opinion in *In re Estate of Reizian*, supra [36 Cal.2d 749, 227 P.2d 251] to the effect that "§ 164 of the Civil Code creates no presumption as to the source of acquisition of property." At first blush there would appear to be some merit to this claim, but it is dissipated when considered in context and in the light of the particular facts of that case. The presumption there referred to is not, as contestants seemingly believe, the one to the effect that property acquired during marriage is presumed to be community but, as is apparent from the opening sentence of the paragraph in which the quoted statement occurs, to the presumption in section 164 that whenever a married woman acquires property by an instrument in

writing it is presumed to be her separate property unless a contrary intention is expressed in the instrument. There the decedent was a married woman and the property in her estate consisted of an improved parcel of real property which was acquired during marriage and title thereto taken in her name. The contest was between the decedent's heir—her father—and the heirs of her predeceased husband. The former, claiming the right to succeed to the entire estate, relied, as stated in the opinion (36 Cal.2d at page 749, 227 P.2d at page 250) "upon the presumption of § 164 of the Civil Code (that property acquired by a married woman in her name is presumptively separate) as proof that its source was the separate property of his daughter." The Supreme Court, holding that the presumption was inapplicable and afforded no support for the father's claim, proceeded to consider whether there was any other evidence supporting the trial court's finding to the effect that it was separate property, and finding such evidence present affirmed the judgment. But the court could have found it necessary to search for independent evidence of its separate character in order to support the judgment so decreeing only because it entertained the view that, absent such proof, the property was presumptively community because it had been acquired during marriage. We cannot bring ourselves to believe, as contestants' argument assumes, that the court entertained the view that, in a situation such as here where there is no independent evidence as to the source of the property in the estate of a surviving spouse other than the fact that it was acquired during coverture, since property is to be distributed as separate under Probate Code, section 229, rather than as community under section 228. On the contrary the necessary effect of the decision in *In re Estate of Reizian* would appear to be that upon proof that property in the estate of a surviving spouse was acquired during marriage, it is to be considered as community in the absence of evidence tending to prove that it had its

source in the separate property of the decedent.

Insofar as the question of the burden of proof is concerned there is, therefore, no real conflict between *In re Estate of Reizian* and *In re Estate of Adams*, and both cases are in harmony with the other authorities in this State announcing the same rule. Without extending this opinion unduly, the following quotation from *In re Estate of Jolly*, 1925, 196 Cal. 547, 553, 238 P. 353, 355, which involved a proceeding similar to this, will suffice:

"That portion of section 164 of the Civil Code which prescribes the rules of presumptions in community property cases, provides as follows: 'All other property acquired after marriage by either husband or wife, or both, * * * is community property.'

"The disputable presumption raised by section 164 of the Civil Code, is a form of evidence under the express terms of section 1957 of the Code of Civil Proc. It may be controverted by other evidence, direct or indirect, but, unless so controverted, the court or jury is bound to find according to the presumption.' *Stafford v. Martini*, 192 Cal. 724, 221 P. 919.

"The community [property] generically embraces all property belonging to the spouses, except such as the statute specifically removes from its operation. Community property is the rule, separate property the exception thereto. Hence the presumption * * * follows. * * *' *Ballinger on Community Property*, p. 213.

"No evidence of sufficient strength was adduced at the trial to overcome the presumption created by section 164 of the Civil Code. * * * [3] The presumption of the wife's community interest in property acquired after marriage can be overcome only by the production of clear and satisfactory proof that the property in question was the separate property of the

wife.' [In re] Estate of Rolls, 193 Cal. 594, 226 P. 608; [see, also] Dimmick v. Dimmick, 95 Cal. [323] 326, 30 P. 547; Rowe v. Hibernia Sav. & Loan Soc., 134 Cal. 403, 66 P. 569; Freese v. Hibernia Sav. & Loan Soc., 139 Cal. 392, 73 P. 172; 5 Cal.Jur. 311, 312, 313."

And at page 554 of 196 Cal., at page 356 of 238 P. the court quotes with approval the following from 31 C.J. 47: "Since the very basic conception of the community property system is that it is a species of partnership between a husband and wife, whereby they are to share equally in the benefit and enjoyment of the results of their joint or separate industry, labor, and earning capacity, and accordingly 'separate property' is defined in terms necessarily making it an exception to the usual estate held by the members of the community, every inquiry as to whether particular property belongs to the community, or to the separate estate of one or the other members thereof, begins with a *prima facie* presumption that it belongs to the former, especially where the matrimonial union has continued for a considerable length of time. * * * The burden of overcoming the general presumption in favor of the community is upon the party asserting separate ownership. * * *." See, also, 41 C.J.S. Husband and Wife § 489.

Here, the evidence is to the effect that all of the property in the estate of the decedent was acquired during the marriage or had its source in property so acquired, and there is no evidence that any part of such property was acquired with separate property of the decedent. While it is true that decedent at the time of his marriage possessed the parcel of real property in Pennsylvania which was sold in 1923 and he received a small inheritance from the estate of his father in 1926, none of these funds were traced into the property which he owned at the time of his death. They were apparently commingled with the community property of the parties, and the burden rested upon contestants to establish that some portion of the property possessed

by decedent at the time of his death had its source in such separate estate. In re Estate of Fellows, 1930, 106 Cal.App. 681, 684, 289 P. 887; Lamb v. Lamb, 1955, 131 Cal.App.2d 489, 494, 280 P.2d 793; In re Estate of Adams, 1955, 132 Cal.App.2d 190, 197-198, 282 P.2d 190. No such proof was made.

[2] In view of the foregoing, we conclude that the trial court's finding that the personal estate was community is sustained by the evidence and by the same token that its findings that the parcel of real property was separate is without support.

The decree appealed from insofar as it determines that the personal estate is community is affirmed; insofar as it determines that the parcel of real property is separate it is reversed, and the cause remanded with directions to the trial court to amend its findings and decree accordingly. Petitioners John H. Weeks and V. Charles Weeks to recover costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.



157 Cal.App.2d 387

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Elnora RIXNER, Defendant and Appellant.
Cr. 6051.

District Court of Appeal, Second District,
Division 1, California
Feb. 3, 1958.

Defendant was convicted of illegal possession of a preparation of heroin. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment, and defendant appealed therefrom and from an order denying a new trial. The District

Court of Appeal, White, P. J., held that where informer told police officer that defendant was selling heroin at her home at stated address and that defendant had heroin in her possession and informer was known to police officer and had on three prior occasions given information to officer and officer believed that informer was reliable and officer went to that address and saw a known narcotic peddler leave the premises, the officer had probable cause to arrest defendant without a warrant.

Affirmed.

1. Arrest ☞63(4)

Where informer told police officer that defendant was selling heroin at her home at stated address and that defendant had heroin in her possession and informer was known to police officer and had on three prior occasions given information to officer and officer believed that informer was reliable and officer went to that address and saw a known narcotic peddler leave the premises, the officer had probable cause to arrest defendant without a warrant. West's Ann.Health & Safety Code, § 11500.

2. Arrest ☞63(4)

"Probable cause" for arrest without warrant means that which inclines the mind to believe, but leaves some room for doubt.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

3. Arrest ☞63(4)

An officer is justified in making an arrest without a warrant solely upon information furnished by an informant where the latter is known to the arresting officer and is in good faith believed by officer to be trustworthy and reliable.

4. Arrest ☞63(4)

The question of whether an informant possesses such reliability as to justify an arrest without a warrant in reliance on information presents factual question to be determined by trial court in exercise of sound discretion.

5. Arrest ☞68

An officer is not required to use force in entering a place to make an arrest, either with or without a warrant.

John J. Bradley, and Max Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of a violation of Section 11500 of the Health and Safety Code in that on or about October 10, 1956, she had in her possession a preparation of heroin. It was further alleged that she had suffered a prior conviction of a felony, to wit, sale of heroin, in the United States District Court for the Southern District of California, for which she served a term of imprisonment in a federal prison.

Defendant pleaded not guilty and denied the prior conviction. Trial by jury was duly waived and the People's case was submitted on the transcript of the preliminary examination. Defendant testified in her own behalf. Defendant was adjudged guilty, the prior conviction was stricken from the record, and she was sentenced to state prison. From the judgment of conviction, and from the order denying her motion for a new trial, defendant prosecutes this appeal.

Concerning the factual background surrounding this prosecution, the record reflects that on the basis of information received in person by Police Officer Pena on October 9, 1956, and by telephone on the day following, from a confidential police informant, to the effect that defendant was selling heroin at her home at 1622 Ridgely Drive, and that on the date of the telephonic information, had heroin in her possession, Officers Pena and Walsh went to defendant's home on October 10, 1956, at about 10 a. m., and placed it under observation. Officer Pena had received informa-

tion three times before from this informant and considered him reliable. The prior information resulted in two arrests for narcotic violations which subsequently terminated in one conviction and one acquittal. Officer Pena saw a man, William Cavitt, known to him as a narcotic peddler, leave the house. He conversed with this man, searched him and found no narcotics. The officer then approached defendant's home, knocked on the door, which was open, and entered. When he knocked on the door, Officer Pena testified he thought he heard the defendant say, "Come in".

Officer Pena identified himself and stated that the defendant was under arrest for possession of narcotics. At this point Officer Pena observed that the defendant held a piece of cellophane in her left hand, and he requested that she show him what she had there. The defendant did not comply with the request, but instead, made a motion toward her mouth, which was thwarted by the officers grabbing her hands. The defendant then threw the bundle to the floor where Officer Walsh picked it up. Officer Pena asked the defendant if there was "any more in the house", to which she replied, "No, that is all there is." Defendant further stated, "I sniff a little bit and there is a little bit in that paper and that is all I have."

After the officers searched the defendant's home Officer Pena asked defendant if she would like to tell him about her peddling to which she replied, "I am not peddling. I have told you that before. All I do is sniff a little bit. That is all I have."

James H. Carter, a police officer of the City of Los Angeles, assigned to the Scientific Investigation Division, and whose qualifications as an expert forensic chemist was stipulated, testified that contents of the cellophane taken from defendant consisted of two grains of heroin.

Sworn as a witness in her own behalf, defendant testified that on the day of her arrest she went to answer the telephone in her kitchen; that her dog barked and she told the lady on the phone someone was at the

door; that before she could get away from the phone two officers came in and grabbed her by the arm. That she never saw the cellophane and contents before the officers entered her home. That her first knowledge of it was when the officers handcuffed her and showed it to her. That she did not drop the cellophane to the floor. Defendant also denied that she stated to the officers, "No, that is all there is", or "I sniff a little bit, and there is a little bit in that paper, and that is all I have."

[1] Appellant's sole ground for reversal is that there was not probable cause for her arrest in that the police officer's reliance on the information received by him was unreasonable. That therefore, the evidence presented by the prosecution was illegally obtained and inadmissible.

Appellant asserts that "The prosecution justifies the action of the officers upon information received from an *unknown* informer to the effect that appellant was peddling heroin out of the house". (Emphasis added.) But such is not the case. The record clearly establishes that the informer *was known* to Officer Pena and had, on three prior occasions, given information to him.

[2-4] It is appellant's next contention that the source of the information upon which the officer acted was unreliable and furnished no probable cause for an arrest, in that such prior information resulted in two arrests, and only one conviction. With this contention we cannot agree. In *Trowbridge v. Superior Court*, 144 Cal.App. 2d 13, 16, 300 P.2d 222, 225, "Probable cause" was defined as meaning that which "inclines the mind to believe, but leaves some room for doubt". An unbroken line of decisions hold that an officer is justified in making an arrest acting solely upon information furnished by an informant where the latter is known to the arresting officer and is in good faith believed by him to be trustworthy and reliable. (For a partial list of such cases see *Lorenzen v. Superior Court*, 150 Cal.App.2d 506, 310 P.2d 180.) And, as stated in the case just cited,

150 Cal.App.2d at page 509, 310 P.2d at page 183, the question of whether an informant possesses such reliability as to justify an arrest without a warrant in reliance on the information, presents a factual question to be determined by the trial court in the exercise of a sound discretion. See also *People v. Garnett*, 148 Cal.App.2d 280, 306 P.2d 571; *Trowbridge v. Superior Court*, supra, 144 Cal.App.2d at page 22, 300 P.2d at page 228. With the foregoing rules in mind, we find in the instant case the fact that the informer was known to Officer Pena; had given him information on three prior occasions; that the officer believed him to be reliable; and finally, that the trial court in the exercise of the sound discretion vested in it, found that the officer's reliance on the information was reasonable.

[5] Appellant urges that "The fact the officer knocked on the door and entered after hearing what he thought was 'Come in' supports the logical inference that the officer himself did not have a trust in his informer because of past experience and did not believe he had reasonable cause to arrest appellant at the time he went to her house." We are unable to follow the logic of this reasoning because we know of no code section or case authority which requires an officer to use force in entering a place to make an arrest, either with or without a warrant.

Appellant's final contention that, "If the officer had received no prior information from the same source he would be unable to justify acting on such information alone in making an arrest or unlawful entry." is, to say the least, open to question. In *Willson v. Superior Court*, 46 Cal.2d 291, 294 P.2d 36, the identity of the informer was unknown to the arresting officers and the latter had no previous experience with him to indicate that his information was reliable. The information given to the police was that a large bookmaking operation was in progress in a certain bar; that a certain waitress would be found standing near the telephone, and that she accepted

bets from customers. When the police arrived they found the circumstances to be the same as narrated to them by the informer. The waitress was standing by a pad and pencil and had slips of paper in her hands. When asked what she had in her hand she attempted to conceal it. In denying a writ to restrain the superior court from proceeding further with a prosecution of the case, our Supreme Court said, 46 Cal.2d at pages 295, 296, 294 P.2d 36, 39: "Although petitioner's conduct observed by Officer Sunday in the bar would not of itself constitute reasonable cause to believe she was committing a felony, it was sufficient to justify Officer Sunday's reliance on the information given her of petitioner's bookmaking. Under these circumstances the evidence before the magistrate was sufficient to justify the conclusion that a violation of Penal Code, section 337a, had been committed, that Officer Sunday had reasonable cause before the search and seizure to believe that petitioner was guilty thereof, and that therefore the search, seizure, and arrest were lawful. (Citing cases.)" See also *People v. Holguin*, 145 Cal.App.2d 520, 522, 523, 302 P.2d 635. In the case now engaging our attention the informant was not an unknown or mere anonymous "tipster", but on the contrary, was known to Officer Pena and had, on three prior occasions, supplied him with information. Since under the authorities last above cited, every anonymous information when corroborated may afford reasonable or probable cause to justify an arrest, we are persuaded that in the instant case, where the information was not from an anonymous source, the fact that the informant directed the officers to the correct address and that upon arrival thereat, Officer Pena saw a man known to him as a narcotic peddler, leave appellant's home, furnished sufficient corroboration to sustain a conclusion that there existed probable cause for arrest of appellant.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DRAPEAU, J. pro tem., concurs.

FOURT, Justice.

I reluctantly concur.

This cause is one of the ever growing number of cases, arising particularly in Los Angeles County, where the trial judge, in the face of a certified copy of a prison record of the defendant showing that the defendant was convicted of a felony and served a term in prison therefor, and a sworn admission on the part of the defendant that he or she was previously convicted of a felony and served a term in prison therefor as charged in the information, either finds the prior conviction to be not true or strikes the same and sentences the defendant as a first offender.

In this case in the first instance the judge found "the defendant guilty of the charge, with a good prior." Counsel for the defendant then asked the judge to withhold decision on the matter of the prior, and asked "leave to file a written application for probation."

At the time of hearing the report of the probation officer and pronouncement of judgment, counsel for the defendant represented to the court that the defendant was sick and that she had lost a part of one finger in an automobile accident, and further that the amount of heroin found in her possession was only a small amount, namely two grains, and therefore the court should dismiss the prior conviction of sale of heroin and give her probation.

The defendant, in a letter to the court, indicated, with reference to her health, that if granted probation she intended to start a restaurant and eating place. A doctor who had examined the defendant wrote a letter dated May 20, 1957, in her behalf to the effect that insofar as her hand or finger was concerned she would have full use thereof in three months.

The court, upon the urging of defendant's counsel, thereupon stated, "The court will dismiss the prior, strike the prior in the interest of justice," and then denied the application for probation and sentenced

the defendant to the state prison, not as a recidivist, which she was, but as a first offender.

The record before the judge at the time of sentencing disclosed that in 1950 the defendant was charged with a violation of section 11500, Health and Safety Code, and pleaded guilty thereto, and was sentenced to the county jail for one year, and that the sentence was then suspended and she was put on probation for three years and fined \$100. The probation so granted was ultimately revoked because of the defendant's involvement in other later narcotic offenses, and the sentence which was then imposed ran concurrently with the sentence imposed in a federal court. In 1953, in the United States District Court in Los Angeles County, she was charged in Count I with concealing five grains of heroin, in Count II with selling eight grains of heroin, and in Count III with selling twelve grains of heroin. She entered a plea of guilty to the first two counts, and the third count was dismissed. She was then sentenced to serve three years in the federal prison. Her parole expired July 13, 1956. She was arrested on the present charge October 10, 1956, and as heretofore set forth, was then charged with but one prior conviction.

The officer testified: "I received information that this defendant, who was known to me as Eleanora Glover, had recently moved to this address at 1622 Ridgely Drive, and she was peddling heroin out of the house. On this date of the arrest I received a call approximately an hour before I went there, informing me that she had heroin in her possession at that time." The defendant stated to the officer, "* * * I sniff a little bit and there is a little bit in that paper and that is all I have."

The husband of the defendant admitted to the use of narcotics, but stated that he was "not hooked yet." The fact of the matter is that he had theretofore been sentenced to the state prison for involvement in narcotics offenses and had just been released from jail in Alameda County on

October 10, 1956, after serving ninety days as an addict.

The record further disclosed that the defendant had previously worked as a housemaid and the husband as a painter, yet they lived in an \$18,500 house and owner other property of the value of about \$15,000, and she had a substantial sum of money in her purse at the time of her arrest.

As I view it, the defendant, first of all, was not eligible for probation (Pen.Code, sec. 1203; Health & Saf.Code, sec. 11715.6), and no useful purpose could have been served by permitting her, as an ineligible defendant, to apply for probation. Secondly, the Health and Safety Code specifically sets forth (§ 11712):

"[Imprisonment in county jail or State prison.] Any person convicted under this division for having in possession any narcotic, or of violating the provisions of Section 11530 or 11557 shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not more than 10 years.

"[Effect of prior conviction.] If such a person has been previously convicted of any offense described in this division or has been previously convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as an offense described in this division, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison for not less than two years nor more than 20 years."

The defendant in this case clearly demonstrated by her conduct that she and her husband used narcotics, and that she, from

time to time, was engaged in the sale thereof. Less than three months had expired from the federal parole to the date of her present arrest. In other words, she was barely out of one transaction until she was into another.

It appears to me that to state that it is in the interests of justice to strike a prior conviction under such circumstances is to distort the language to the breaking point. No good purpose is served by treating recidivist narcotic offenders as anything other than just what they are. To grant their requests for lighter punishment in the face of a legislative determination and mandate to the contrary (1) aids in the further sale and use of illicit narcotics, (2) adds to the burdens of those whose duty it is to ferret out persons engaged in the illicit narcotics traffic, and (3) brings the administration of justice into disrepute.

Among other things, such a course of conduct makes for maladministration in the prisons, because it brings about a situation in which two inmates with identical records and identical offenses are treated entirely differently.

If every person is to be rendered his or her due, the courts should measure and stand up to their responsibilities and render true justice.

It further appears to me that society as a whole should be considered in such matters. Any sentimentality brought into play in favor of a defendant, ought to be measured against the anguish and disgrace brought to the users who secured their heroin from the defendant.

In my opinion, it is not "in the interest of justice" to treat a repeating narcotic violator as a first offender. It was once appropriately said, "There can be no greater injustice than to treat unequal things equally."

157 Cal.App.2d 441

Clara Hellman HELLER (Successor to Clar-
iel Company), Florence Hellman Ehrman,
I. W. Hellman, Frederick J. Hellman, Mar-
co F. Hellman, Lloyd W. Dinkelspiel, Indi-
vidually and Lloyd W. Dinkelspiel and
Wells Fargo Bank, as co-trustees under the
Last Will and Testament of Florence H.
Dinkelspiel, deceased, Petitioners in Supe-
rior Court and Respondents on Appeal,

v.

CITY COUNCIL OF the CITY OF SEAL
BEACH, California, George H. Clark, Al
R. Leonard, Donovan D. Lawhead, Fred
Flanagan and Paul Calvo, Respondents In
Superior Court,

City Council of the City of Seal Beach, Cal-
ifornia, George H. Clark, Al R. Leonard,
Donovan D. Lawhead, Fred Flanagan and
Paul Calvo, and Harold George Tancre
(whose correct name is Joe Harold Tancre),
H. C. Ross, Jr., and Clyde Spencer, Suc-
cessors in office to said George H. Clark,
Al R. Leonard and Donovan D. Lawhead,
as Councilmen of said City of Seal Beach,
California, said Fred Flanagan, Paul Cal-
vo, Harold George Tancre, H. C. Ross, Jr.,
and Clyde Spencer now constituting the
City Council of Said City of Seal Beach,
Appellants.

Civ. 22586.

District Court of Appeal, Second District,
Division 1, California.

Feb. 5, 1958.

Proceeding for writ of mandate to for-
bid city from carrying out proposed an-
nexation of territory. The Superior Court,
Los Angeles County, John J. Ford, J., is-
sued writ of mandate and city appealed.
The District Court of Appeal, Fourth, J.,
held that under statute providing that if
owners of one-half of value of territory
proposed to be annexed protests annexa-
tion, city council can take no further action,
city council was not entitled to assign a
value to property owned by federal govern-
ment in territory.

Affirmed.

Municipal Corporations §33(9)

Where city proposed to annex certain
territory and protests to such annexation

were filed by individual owners within terri-
tory whose property equaled one-half of
value of territory as shown by last equalized
assessment roll, under statute forbidding
city council to take further action if owners
of property equal to one-half of value pro-
tested, city was not entitled, for protest pur-
poses, to assign a value to the hitherto un-
valued property owned by federal govern-
ment which had not protested annexation.
West's Ann.Gov.Code, §§ 35300-35326.

Robert Buck and Clarence Hengel, Long
Beach, for appellants.

John G. Clock, Clock, Waestman &
Clock, Long Beach, Lloyd W. Dinkelspiel,
Heller, Ehrman, White & McAuliffe, San
Francisco, for respondents.

FOURTH, Justice.

This is an appeal from a judgment where-
in a writ of mandate was issued against the
appellants, commanding in effect that the
proceedings of appellants having to do with
annexation of petitioners' property to the
city of Seal Beach be terminated.

On January 6, 1956, the city council of
the city of Seal Beach, sometimes herein-
after referred to as "appellants," passed a
resolution numbered 915 proposing the an-
nexation, under the Annexation of Unin-
habited Territory Act of 1939 (Govern-
ment Code, §§ 35300-35326), to the city of
Seal Beach, of certain property adjoining
the then existing boundaries of the city.
Property owned by the petitioners, herein-
after referred to as "respondents," and
property owned by the United States of
America, known as "United States Naval
Ammunition and Net Depot," constituted
the greater part of the property proposed to
be annexed. There were, however, some
smaller parcels owned by Hancock Oil
Company, the Southern California Edison
Company and Ernest A. Bryant and others
described in the resolution above referred
to. The latter two were non-protesting
owners.

On January 17, 1956, the city council
adopted resolution numbered 915 which de-

scribed by metes and bounds the property proposed to be annexed and set 7:30 o'clock p. m., February 29, 1956, as the deadline for the filing of protests against the proposed annexation, pursuant to section 35313, Government Code. The proceedings were designated as "The Hellman-Naval Depot Annexation" in the last mentioned resolution, and among other things, set forth that protests need only be in writing, stating the name of the owners and describing the property and the area involved in general terms.

Before February 29, 1956, respondents filed with the city council a written document wherein respondents stated that they protested the annexation. The various interests were designated, the property was generally designated, and some major parcels thereof were specifically described by metes and bounds.

On February 29, 1956, the city council met and reviewed certain documents which had been submitted (among them the protests of respondents), and determined that some of the documents did not constitute legal protests and that others did. It was found that a letter from the Assistant Secretary of the United States Navy was not a legal protest. The city council did find, however, that the document submitted by the respondents was a formal protest and ordered it filed as such. The city council also made findings as to the value, shown by the last equalized assessment roll, of the property belonging to the respondents. The assessment roll of 1955 showed, and the city council found, respondents' property to be valued at \$160,560, and the value of the Hancock Oil Company property, which company had filed a protest, to be \$37,390. Of respondents' property, \$120,780 thereof consisted of property specifically described by metes and bounds, and the remaining \$38,780 thereof was as to property not specifically described.

The value of the property as shown by the assessment roll of Southern California Edison Company was \$3,500, and that of Ernest A. Bryant was \$1,150, or a total of

\$4,650 valuation represented by non-protesting private owners.

The value of all the property assessed on the 1955 equalized assessment roll (excluding the United States Naval Ammunition and Net Depot property which was exempt and therefore not valued) was \$202,600.

At the same meeting, the city council assigned a value of \$825,080 to the United States Naval Ammunition and Net Depot property, and then took the position that they were entitled to include the value of the government property, as so determined by them, in determining whether the owners of one-half in value of the property proposed to be annexed had protested. The inclusion of the United States Naval Ammunition and Net Depot property put the total value assigned to all of the property at \$1,027,680, and the city council thereupon determined that the property valued at \$197,950 was not enough to stop the annexation proceedings. The city council then adopted an ordinance numbered 488, approving the annexation of the property described in resolution numbered 915. Thereafter the city clerk followed the procedure outlined in the Government Code in such cases. Prior to the time a certified copy of the resolution was filed, an alternative writ of mandate was issued by the superior court in Los Angeles county. A hearing was had on May 23, 1956, and the court did, on June 12, 1956, order the issuance of a peremptory writ of mandate. Judgment was entered January 17, 1957. The appeal is from the judgment.

Appellants contend that "essentially the important point and only issue in this case is the construction and application of Sections 35312 and 35313 of the Government Code, as amended in 1955 * * * which sections form parts of the 'Annexation of Uninhabited Territory Act of 1939, Government Code Section 35300, *et seq.*'"

The sections in question read as follows:

"§ 35312. At any time before the hour set for hearing objections, any owner of property within the territory may file written protest against the annexation. The

protest shall state the name of the owner of the property affected and the description and area of the property in general terms. As used in this article, 'owner' means the owner as shown on the last equalized assessment roll, or the person or persons entitled to be shown as owner on the last equalized assessment roll, or where the property affected is subject to a recorded written agreement to buy, the purchaser under such agreement to buy shall be deemed the owner. Protests may be made on behalf of the owner by an agent."

"§ 35313. At the time set for hearing protests, or to which the hearing may have been continued, the legislative body shall hear and pass upon all protests so made. If protest is made by the owners of one-half of the value of the territory as shown by the last equalized assessment roll, [or if protest is made by public and private owners equal to one-half of the value of the territory proposed to be annexed], further proceedings shall not be taken. The value to be given publicly owned property for protest purposes shall be determined by the legislative body. * * * As used in this article, 'value of the territory' means the value of the land and improvements thereon."

In short the appellants contend that the court erred in refusing to take into consideration for protest purposes the value of a publicly owned property as determined by the city council, and in finding and concluding that the total value to be considered was only that of privately owned property in the amount of \$202,600.

Recently, the Attorney General had occasion to write an opinion with reference to the sections of the Code in question in the present case (30 Ops.Cal.Atty.Gen., pp. 1-6). It was appropriately stated in that opinion, as follows:

"* * * The applicant and other private owners of real property located within the territory to be annexed (which property was shown on the last equalized assessment roll) filed within the proper time, and apparently in the proper manner, pro-

tests to the annexation. Some land and improvements owned by public agencies were located within the territory proposed to be annexed. Section 35302.5 of the Government Code provides: 'Real property belonging to a governmental agency may be annexed pursuant to this article.' (Added by Calif.Stats.1955, ch. 883, § 2. See also, *Potter v. City Council*, 102 Cal.App.2d 141, 143, 145-146 [227 P.2d 25].) No public agency, (federal, state, or local) owning property within the territory filed a protest to the annexation. At the public hearing, the city council, (pursuant to Gov.Code §§ 35312-35313) in determining the sufficiency of the protests, computed the total value of the land and improvements in the territory by adding the value of the land and improvements as shown on the last equalized assessment roll to the value of publicly owned property as determined by the city council. Thereafter at the same hearing, the city council made a finding that written protests were not made by the owner or owners of one-half of the value of the territory proposed to be annexed according to the last equalized assessment roll of the county, or by public or private owners equal to one-half of the value of the territory proposed to be annexed as determined by the city council.

"It appears that the written protests by persons shown on the last equalized assessment roll represented more than one-half of the value of the territory as shown by the last equalized assessment roll although the written protests were less than one-half of the combined value of public and private property located in the territory proposed to be annexed regardless of the method of valuation (assessment roll or market value) used.

"After the protest hearing, the city council enacted an ordinance allegedly annexing the territory to the City * * * and * * * the ordinance was filed with the Secretary of State * * *.

"The facts * * * present only one issue:

"Was the action of the city council proper in proceeding further after protest was

made by the owners of more than one-half of the value of the territory as shown by the last equalized assessment roll?

"Stating the issue in another fashion:

"May the value of all publicly owned property be included for protest purposes if no owners of publicly owned property have filed written protest to the annexation of their property?

"* * * In light of the lack of protests by public property owners, the value of publicly owned property not shown on the assessment roll should not have been included for protest purposes.

"Government Code section 35313 contains the relevant provisions concerning the type and number of protests which can prevent an annexation. The legislative history of this section is necessary to a proper understanding of the problem here involved. The provision first appeared as one sentence among other provisions in California Statutes 1899, chapter XLI, pages 37-39, section 1:

"In the event that the owners of more than one-half of the land so sought to be annexed, or the owners of any single tract of land exceeding five acres in area, file remonstrances against said annexation, said protestations shall be sustained by said board of supervisors, and shall be a bar to any further proceedings under the provisions of this act for the period of one year.'

"In 1929 the provision was amended to read (Calif.Stats.1929, ch. 436, pp. 800-801, § 1):

"In the event that the owners of more than one-half of the land so sought to be annexed, file remonstrances against such annexation, said protestations shall be sustained by said board of supervisors and shall be the bar to any further proceedings under the provisions of this act for the period of one year.'

"In 1934 in *Shepherd v. Board of Supervisors*, 137 Cal.App. 421 [30 P.2d 578], the court construed this amended version. There two-thirds of the territory to be annexed was public land and one-third private. The owners of a majority of the pri-

vate land protested, but no protests were filed by the one public owner. The court held that the owners of more than one-half of the land sought to be annexed had not protested, and that, therefore, the annexation was valid and all land, public and private was properly considered in determining protests. The court there stated [137 Cal.App.] at pages 430-431 [30 P.2d at page 583]:

"* * * Under the circumstances of this case, it is undoubtedly true that since the city owns two-thirds of the entire tract, a protest of owners of the entire privately owned portion thereof would be insufficient to defeat the petition. This may be unfortunate for the private owners, but the statute makes no distinction between public or private owners of land.'

"In 1937 (Calif.Stats.1937, ch. 252, p. 557) the Annexation of Uninhabited Territories Act of 1899 was repealed. In 1939 the Legislature enacted the Annexation of Uninhabited Territories Act of 1939 (Calif.Stats.1939, ch. 297, p. 1565). Section 6 of the act in regard to the nature or type of protest which would preclude an annexation stated:

"* * * if it be found that protest is made by the owner or owners of one-half of the value of the territory proposed to be annexed according to the last equalized assessment roll, no further proceedings shall be taken in connection with the proposed annexation.'

"The obvious purpose of this enactment was to avoid the harsh result of *Shepherd v. Board of Supervisors*, 137 Cal.App. 421 [30 P.2d 578]. Prior to the repeal in 1937 of the Uninhabited Annexation Act of 1899, an uninhabited annexation could be stopped by protest of the owners only if the owners of at least one-half of *all* the land to be annexed protested, regardless of the value of the land. Thus large tracts of unprotesting public land could at that time frustrate private owners who opposed uninhabited annexations. In the new provisions of 1939, the test became *value* of the *territory* according to the *last equalized assessment*

roll. Since most public land does not appear on the assessment roll, or is not given a value if it does so appear, this left most public land out of the calculations concerning legally effective protests.

"In 1949, acts relating to the alteration of city boundaries were codified in the Government Code (Calif.Stats.1949, ch. 79, pp. 116-143; Gov.Code §§ 35000-35951). In that codification, the provisions relating to the nature and type of protest necessary to halt an annexation became Government Code section 35313:

"* * * If protest is made by the owners of one-half of the value of the territory as shown by the last equalized assessment roll, further proceedings shall not be taken.'

"The substance was unchanged from the uncodified version of 1939.

"The California Supreme Court in *American Distilling Co. v. City Council* [of City of] Sausalito, 34 Cal.2d 660 [213 P.2d 704, 18 A.L.R.2d 1247] considered Government Code section 35313 as it was enacted in 1949 involving an uninhabited annexation in which was located private property as well as a large parcel of land owned by the United States Government. No protest was registered by the publicly owned property, while all of the owners of the privately owned property did protest. In invalidating the annexation, the court [34 Cal.2d] at page 666 [213 P.2d at page 708] stated:

"As pointed out in *Shepherd v. Board of Supervisors*, 1934, 137 Cal.App. 421, at page 429 [30 P.2d 578], also involving annexation proceedings, *if it should appear that protests were filed by a sufficient number of owners according to the statutory measure, the board would be without authority to do anything except to sustain the protests and terminate the proceedings*. The statute then in force (Stats.1899, p. 37; repealed by Stats.1937, p. 557), designated the owners of one-half of the land sought to be annexed as the guide by which the sufficiency of the protests was to be determined. That case involved publicly-owned land which comprised more than one-half of the uninhabited land annexed. There-

after the Legislature repealed the act and adopted the present statute for the obvious purpose of affording to private property owners a means of making effective protest. As applied to the present case the new statute requires that protests filed by the owner or owners of one-half of the 1947 assessed value of the territory sought to be annexed should be the measure of sufficiency. Without dispute the property of the petitioner was the only property in the territory which had assessable value in that year.

"The trial court's finding of sufficiency followed from the indisputable facts and required the conclusion that *the city council had no discretion to do other than comply with the statute and terminate the annexation proceedings* * * *'. (Italics added.)

"In 1951, the section was again amended (Calif.Stats.1951, ch. 1702, p. 3914, § 5) and then provided a form and substance similar to the version in effect at the time of * * * Annexation * * *:

"If protest is made by the owners of one-half of the value of the territory as shown by the last equalized assessment roll, or if protest is made by public and private owners equal to one-half of the value of the territory proposed to be annexed as determined by the legislative body, further proceedings shall not be taken.'

"In 1955 Government Code section 35313 was further amended and took the form in effect at the time of the * * * Annexation * * * (Calif.Stats.1955, ch.1948, § 5, p. 3580):

"If protest is made by the owners of one-half of the value of the territory as shown by the last equalized assessment roll, or if protest is made by public and private owners equal to one-half of the value of the territory proposed to be annexed, further proceedings shall not be taken. The value to be given publicly owned property for protest purposes shall be determined by the legislative body. As used in this article, "value of the territory" means the value of the land and improvements thereon.'

"The obvious purpose of the amendment in 1951 as continued and enlarged in 1955

was to provide the owners of public property with a method of filing protests to annexations which was denied them by the prior provisions as construed by *American Distilling Co. v. City Council* [of City of] Sausalito, 34 Cal.2d 660, 666 [213 P.2d 704]. However, the Legislature clearly did not wish to return to the rule of *Shepherd v. Board of Supervisors*, 137 Cal.App. 421, 430 [30 P.2d 578] under which private owners were without an effective protest whenever large parcels of public property were located in territories proposed to be annexed and the public owners did not wish to protest.

"Section 35313 as it presently stands provides two alternatives the existence of either of which could bar a city legislative body from further proceedings to annex uninhabited territory. The first alternative provides that if protest is made by the owners of one-half of the value of the territory as shown by the last equalized assessment roll, further proceedings shall not be taken. The second alternative is that if protest is made by public and private owners equal to one-half of the value of the property proposed to be annexed, further proceedings shall not be taken. It appears that if either alternative exists annexation is prohibited.

"As applied to the present annexation the language of the section appears to be clear. The latter alternative concerning protest by both private and public owners would seem to have no effect on the first alternative affording to private owners the means of making effective protest despite the amount of protesting or unprotesting publicly owned property involved. The latter alternative would appear to be relevant and useful only when protests by owners whose properties appear on the assessment roll are insufficient to halt the proceedings. It is only when protest has also been by public owners that the legislative body of a city has the duty or right to determine the value to be given to publicly owned property."

In this case no further proceedings should have been taken after the hearing since, among other things, protests were made by the owners of one-half of the value of the

territory as shown by the last equalized assessment roll.

Appellants also contend that the protests were not in proper form and did not comply with the provisions of the Codes. A reading of the protests indicates that there is no merit to such contention. Furthermore, the appellants treated the documents as good and sufficient protests and acted upon them accordingly. Also, they treated the protests as if they included all of the respondents' property, even though a part thereof was described by metes and bounds rather than generally. See *Foth v. City of Long Beach*, 125 Cal.App.2d 520, 529, 270 P.2d 868.

In our opinion the legislature carefully designed a procedure whereby the rights of private property owners and the public are protected in their right to protest annexation proceedings. Cities have been given great powers in the matter of annexations and with that power goes an equal responsibility to see to it that the power is not abused. It is of considerable importance to many landowners whether they be in a city or out of a city, and the utmost fair play by city authorities is called for. In *Hubbell v. City of Los Angeles*, 142 Cal. App.2d 1, at pages 5-6, 297 P.2d 724, at page 726, it was appropriately set forth:

"It requires no citation of authority in support of the proposition that the governing bodies of municipalities stand in a different and higher category than mere employees and directors of a private corporation. Whatever other functions they may be called upon to perform, members of a municipal council or other public body are at all times trustees of the public welfare. Obviously, such a trusteeship does not call for competition and strife between such bodies and the interested members of the public; nor between the bodies of neighboring municipalities. These salutary precepts do not appear to have been recognized or followed in the attempted annexation * * *.

* * * * *

"Of paramount importance in proceedings such as those here involved is the matter of public hearings, at which interested persons are entitled to be heard. If such hearings are permitted to degenerate into a mere token procedure, or if the administrative body proceeds arbitrarily and without regard to the protests filed, then the statutory requirements mean nothing, and those members of the public most vitally concerned lose all protection."

Judgment affirmed.

WHITE, P. J., and HERNDON, J. pro tem., concur.



157 Cal.App.2d 426

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Frederick M. FOX et al., Defendants,

Frederick M. Fox, Defendant and Appellant.
Cr. 2796.

District Court of Appeal, Third District,
California.

Feb. 4, 1958.

Defendant was convicted in the Superior Court, San Joaquin County, R. M. Dunne, J., for violating Penal Code section, by sending a threatening letter with intent to extort money from an individual by threatening to expose him to disgrace and threatening exposure of secrets affecting him, and he appealed. The District Court of Appeal, Peek, J., held (1) that the indictment count under which defendant had been convicted had been improperly joined with another count, charging defendant with assaulting same individual with intent to commit murder, and (2) that the jury had been erroneously instructed; but held that, in view of the overwhelming evidence against defendant on count under which he was convicted, reversal was not required.

Affirmed.

1. Criminal Law §1070

Where letter was filed by defendant in which he said that he wished to appeal his case, but nothing was filed on behalf of his co-defendant, and she did not herself take any further action, but briefs filed purported to be on behalf of both defendants, purported appeal by co-defendant would have to be dismissed.

2. Threats §1(1)

It was not necessary to conviction for violating Penal Code section by sending threatening letter that threat should have been apparent from face of letter or even that it should have been implicit therefrom; writing being sufficient if the language used was adapted to imply threat. West's Ann.Pen.Code, § 523.

3. Threats §1(1)

Crime charged in indictment for violating Penal Code section by sending threatening letter depended upon conduct and intent of defendant rather than effect produced upon person threatened; and if evidence warranted jury in believing that defendant had intended that his threat should produce "fear" and threat was of such character as might reasonably have had that result, it would be immaterial that person threatened had been unaffected thereby. West's Ann.Pen.Code, § 523.

4. Criminal Law §1167(2)

Indictment and Information §130

Indictment count charging violation of Penal Code section by sending threatening letter was improperly joined with count charging violation of Penal Code section by assaulting threatened individual with intent to commit murder; but in view of overwhelming evidence against defendant on first count, joinder would not require reversal. West's Ann.Pen.Code, §§ 217, 523.

5. Criminal Law §1170½(5)

Threats §1(1)

In prosecution for violating Penal Code section by sending threatening letter with intent to extort money by threatening to expose named individual to disgrace and threatening exposure of secrets affecting him, truth or falsity of charge against per-

son threatened was wholly immaterial; and, therefore, no prejudice could have resulted from curtailment of cross-examination designed to show that there had been no secret to expose. West's Ann.Pen.Code, § 523.

6. Criminal Law §798(1), 1186(4)

In prosecution for violating Penal Code section by sending threatening letter with intent to extort money from individual by threatening to expose him to disgrace and threatening exposure of secrets affecting him, instruction, that defendants were entitled to jurors' individual opinions and that they should not change their opinions unless they were convinced beyond a reasonable doubt of guilt or innocence of defendant, was erroneous; but in view of defendants' admission that they had written letter and in view of testimony which was more than sufficient to establish defendants' intent, reversal was not required. West's Ann.Const. art. 6, § 4½.

Frederick M. Fox, in pro. per.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Lloyd Hinkelman, Deputies Atty. Gen., for respondent.

PEEK, Justice.

[1] By an indictment Frederick M. Fox and his wife, Susan, were charged in Count I thereof with the crime of violating section 523 of the Penal Code, sending a threatening letter with the intent to extort money from one John Graffigna by threatening to expose him to disgrace and threatening the exposure of secrets affecting him. In Count II of the indictment Frederick alone was charged with a violation of section 217 of the Penal Code in that he assaulted Graffigna with the intent to commit murder. A motion to set aside the indictment on the grounds of insufficiency of the evidence, as well as a motion for separate trials, was denied. The case then proceeded to trial before a jury which returned verdicts finding both defendants guilty as charged in Count I, and the defendant Frederick not guilty as charged in

Count II. Probation was denied, as was defendants' motion for a new trial. Thereafter a letter was filed by Frederick in which he stated, "I wish to appeal my case." Nothing was filed on behalf of Susan, nor did she herself take any further action. However the brief filed by Frederick purports to be on behalf of both defendants. Under such circumstances it would appear that the purported appeal by Susan must be dismissed.

Section 523 of the Penal Code provides:

"Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in Section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat."

The portion of section 519 pertinent to the charge contained in Count I provides:

"Fear, such as will constitute extortion, may be induced by a threat, either:

* * * * *

"3. To expose, or to impute to him or them * * * disgrace * * *

"4. To expose any secret affecting him or them."

Thus to constitute a crime and sustain a conviction under Count I, it was necessary for the state to prove that defendants, with the intent to extort money through fear, sent a letter to John Graffigna which contained either a direct or implied threat, or was adapted to imply a threat, to expose some secret affecting him and to expose him to disgrace. The crime so defined by statute is complete when the letter is delivered to someone to be forwarded or posted. Sec. 660, Penal Code.

Defendant Frederick now contends (1) that the evidence was insufficient to support the verdict of the jury and the judgment of the trial court; (2) that the court improperly joined the offenses of violating sections 523 and 217 of the Penal Code; (3) that

defendant was denied his right of cross-examination; and (4) that the trial court improperly instructed the jury.

The record shows that the defendants who were residents of Glendale arrived in Lodi on December 16, 1956. At that time the alleged victim and his wife were involved in a divorce proceeding, the second which the wife had instituted. Graffigna had left their home pursuant to a court order in the divorce proceeding and was living in a Lodi motel. He also maintained a room at the Hotel Lodi. The defendants endeavored to contact him at his hotel on December 17 but were unsuccessful. They then made an appointment to meet Mrs. Graffigna at her home that evening. The defendants stated to her that they had information which concerned the conduct of Graffigna with one Sandra Brookshire, a neighbor of theirs in Glendale. Mrs. Graffigna told defendants she desired the information and would call her attorneys the next day and instruct them to pay defendants \$800. This sum purportedly represented the amount which defendants stated they had advanced to Mrs. Brookshire. The defendants admit that after leaving the home of Mrs. Graffigna at approximately 2 a. m. they stopped at the Hotel Lodi and left with the clerk a letter for delivery to Graffigna. The letter reads as follows:

"John Graffigna: I have tried to contact you since Saturday evening so I'll try this method now. This business concerns Mrs. Elsie Brookshire and yourself, plus a trip you made to Los Angeles recently. I will call at the desk later in the morning. Leave an address or number with the desk clerk where I can contact you. If don't hear from you by noon am going to contact your wife. [Signed.] Mr. and Mrs. Fox."

The following morning defendants talked with Graffigna, during the course of which conversation they implied that he was the father of Mrs. Brookshire's child and accused him of mistreating her during a recent trip to Glendale. They further

stated that they had advanced \$800 to her; that she had informed them he would repay the same; that unless he paid the money to them they would go to Mrs. Graffigna and reveal to her his association with Mrs. Brookshire. During this meeting the defendants also told Graffigna that the information they had was all written down in a book; that such information was all damaging to him; that with such information his wife would "clean * * * [him] up" in the divorce proceeding. They further threatened that they would go to the Internal Revenue office and he would be subject to an accounting. Later that morning the defendants talked to Mrs. Graffigna and asked if she had the money. Upon being informed she did not, appellant said he "would get it one way or another," and that to expose Graffigna he would go to the newspapers with some pictures that he had, or he would go to the Internal Revenue office. Pursuant to Mrs. Graffigna's telephone call to her attorney, defendants went to his office where they obtained the money and later delivered the book to Mrs. Graffigna.

[2, 3] In support of his first contention, appellant contends the evidence shows that no threat was made, nor was the element of fear present in the case. "It is not necessary that a threat should be apparent from the face of the letter, nor even necessary that it should be implied therefrom. The statute says, if the language used is adapted to imply a threat, then the writing is sufficient." *People v. Choynski*, 95 Cal. 640, 641-642, 30 P. 791. Furthermore it is well settled that the crime here charged " * * * depends upon the conduct and intent of the person who makes the threat, and that the effect produced upon the person against whom it is made is immaterial, so that if the * * * evidence warranted the jury in believing that the defendant intended that his threat would produce 'fear' in the mind of * * * [Graffigna], and, if the threat was of such character as might reasonably have that result, it would be wholly immaterial that * * * [Graffigna] was unaffected

thereby." *People v. Robinson*, 130 Cal.App. 664, 668, 20 P.2d 369, 370. The elements of threat and fear being questions of fact for the jury's determination, its finding in that regard will not be set aside where the evidence, as in the present case, supports its conclusion.

[4] Appellant's next contention is that the court improperly allowed the joinder of the offense charged in Count I with that charged in Count II. We find no more basis for the joinder in the instant case than we did in *People v. Renier*, 148 Cal. App.2d 516, 306 P.2d 917. But we conclude, as we did there, that the record is so overwhelmingly against defendants as to Count I, there could be no question of prejudice within the meaning of article VI, section 4½, of the Constitution.

[5] It is appellant's next contention that the court erred in limiting his counsel's cross-examination of prosecution witnesses. His primary contention in this regard is that he was precluded from showing the relationship between Graffigna and Mrs. Brookshire; that the relationship was well known to Mrs. Graffigna, and hence there could be no secret to expose. However it is the rule that the truth or falsity of the charge is wholly immaterial. *People v. Choyinski*, supra. Necessarily, therefore, no prejudice could result from the curtailment of cross-examination on irrelevant matters.

[6] It is finally contended that the court erred in its instructions to the jury, particularly in the giving of the following instruction:

"The defendants are entitled to your individual opinions and you should not change your opinions unless you are convinced beyond a reasonable doubt of the guilt or innocence of the defendants."

There can be no question but that the challenged instruction was erroneous. *People v. Wah Hing*, 15 Cal.App. 195, 114 P. 416. However, under the mandatory provisions of article VI, section 4½, of the Constitution, this court, by reason of the

record before us, could not reverse the instant case in the absence of a showing that the defendant was so prejudiced thereby that a reversal would be compelled. First defendants admit they wrote the letter and gave it to the hotel clerk for delivery to Graffigna. Second, even if it could be said that the letter on its face was insufficient to support a conviction of the crime charged, the testimony of the Graffignas was more than sufficient to establish the intent of the defendants.

The purported appeal of the defendant, Susan Fox, is dismissed. The judgment of conviction as to the defendant, Frederick Fox, is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



Martha MITCHELL and Milton Flynn,
Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, Respondent.*

Civ. 17638.

District Court of Appeal, First District,
Division 1, California.
Jan. 27, 1958.

Hearing Granted March 26, 1958.

Original proceeding for writ of prohibition to restrain further proceedings upon informations charging sale of narcotics. The District Court of Appeal, Fred B. Wood, J., held that during preliminary examination, defendants were entitled to ask prosecuting witnesses the names of informant-participants, or other means of identifying them, without necessity of showing lack of knowledge of their identity or whereabouts, or showing of how and to

* Opinion vacated 330 P.2d 48.

what extent the information might be useful.

Writ issued.

Opinion, 313 P.2d 170, vacated.

1. Criminal Law Ⓒ234

During preliminary examination, defendants charged by information with sale of narcotics were entitled to ask prosecuting witnesses the names of informant-participants or other means of identifying them, without necessity of showing lack of knowledge of their identity or whereabouts or showing of how and to what extent the information might be useful. West's Ann. Pen.Code, §§ 859, 865-867, 872; West's Ann.Code Civ.Proc. § 1881, subd. 5.

2. Criminal Law Ⓒ234

Fact that defendant does not have right of cross-examination before grand jury when it indicts does not negative his fundamental right of cross-examination when being examined before a magistrate in anticipation of filing information. West's Ann.Pen.Code, §§ 859, 865-867, 872.

3. Criminal Law Ⓒ234

Fact that defendants' counsel asked at preliminary examination whether informer-participant was living at particular address, getting no answer, did not demonstrate knowledge of identity of informer-participants so as to negative defendants' right to cross-examination on the issue.

4. Criminal Law Ⓒ234, 662(6)

At preliminary examination, defendant has right to confront and cross-examine prosecution's witnesses. West's Ann.Pen. Code, § 865.

5. Witnesses Ⓒ216

The policy of nondisclosure of communications to public officer in official confidence does not prevail in case of informant-participants. West's Ann.Code Civ. Proc. § 1881, subd. 5.

6. Criminal Law Ⓒ230

The constitutional and statutory mandates governing prosecution by information accord defendant all of the fundamental

rights of a fair trial on questions of whether public offense has been committed and whether there is sufficient cause to believe defendant guilty. West's Ann.Pen.Code, §§ 859, 865-867, 872; West's Ann.Pen.Code, §§ 868, 871; West's Ann.Const. art. 1, §§ 8, 13.

7. Criminal Law Ⓒ206

Under constitutional provision governing mode of prosecution of certain offenses "as may be prescribed by law," implementing statutes virtually have the dignity and sanction of constitutional mandates. West's Ann.Pen.Code, §§ 859, 865-867, 872; West's Ann.Pen.Code, §§ 868, 871; West's Ann.Const. art. 1, §§ 8, 13.

8. Indictment and Information Ⓒ137(5)

Under statute giving defendant right to have information set aside if defendant had not been "legally committed", quoted phrase refers to examination of the case and holding of defendant to answer as prescribed by Penal Code. West's Ann. Pen.Code, § 995.

See publication Words and Phrases, for other judicial constructions and definitions of "Legally Committed".

9. Criminal Law Ⓒ230, 234

The essential principles of procedure and evidence may not be departed from by committing magistrates. West's Ann.Pen. Code, § 995.

10. Constitutional Law Ⓒ106

The forms of procedure required by law in preliminary examinations establish a substantial right vested in every person charged with crime and should not be lightly waved aside. West's Ann.Pen.Code, § 995.

11. Criminal Law Ⓒ232, 234

Though not every deviation from requirements of preliminary examination would tincture with illegality a commitment based upon such examination, the thwarting of fundamental rights to benefit of counsel, to present witnesses, and to confront and cross-examine prosecution's witnesses would infect with illegality any order of commitment based upon the examination. West's Ann.Pen.Code, § 995.

12. Prohibition $\S$ 3(4)

Availability of remedy of appeal after termination of trial would not render writ of prohibition inappropriate and unavailable where defendants are denied fundamental right of cross-examination at preliminary examination.

13. Prohibition $\S$ 28

When inquiry in prohibition proceeding is whether evidence adduced at preliminary examination supports finding of reasonable and probable cause, court does not weigh the evidence if there be some supporting evidence, and is not concerned with mere irregularities of procedure before magistrate, nor, in general, with correctness of his rulings on admissibility of evidence.

14. Prohibition $\S$ 28

When the very legality of a preliminary examination is in question, as affected by violation of one or more of defendant's fundamental rights, nature and scope of inquiry in prohibition includes validity of magistrate's significant rulings.

15. Indictment and Information

$\S$ 10.2(3), 41(1)

1949 amendment of statutes, dealing only with subject of indictment found without reasonable or probable cause and of commitment upon information without reasonable or probable cause, did not imply a change of policy, but legislature aimed to give recognition to principles in respect to reasonable or probable cause. West's Ann. Pen.Code, $\S\S$ 995, 996, 999a.

Arthur D. Klang, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

When arraigned upon informations charging them with violations of sections 11500 and 11557 of the Health and Safety Code (possession of heroin, two sales of heroin, and maintenance of a place for the

sale of narcotics) the defendants moved to set aside the informations upon the ground that before the filing thereof the defendants had not been legally committed by a magistrate (Pen.Code, $\S\S$ 995-996), assigning violation of their constitutional rights to due process as the basis of the illegality. Upon denial of the motion defendants petitioned this court for a writ of prohibition restraining further proceedings upon any of the informations.

They do not claim that there is a lack of competent evidence to support the magistrate's findings that it appears to him that the offenses charged have been committed and that there is sufficient cause to believe the defendants guilty thereof. See Penal Code, $\S$ 872.

They predicate the asserted illegality of the commitment upon the refusal of the magistrate, during the preliminary examination, to allow them to ask the prosecuting witnesses the names of or other means of identifying two informant-participants.

At the preliminary examination, police officers testified to being informed by two "reliable informers" that defendants were selling narcotics in their apartment. After stripping and searching the informants and removing all articles in their clothing, the officers gave each \$20 in bills, the serial numbers of which were recorded, and escorted the informants to defendants' apartment. The bills were dusted with fluorescent powder invisible to the naked eye. Separately the informants entered the apartment and in a few minutes returned. They were then searched. The bills were gone and each had a bundle of heroin. The officers then waited in front of the apartment door for approximately 10 to 15 minutes. It was opened by defendant Mitchell, who was immediately placed under arrest. She dropped a package from her hand to the floor. It contained heroin. In the bedroom they arrested defendant Flynn. Four bundles were found on his person. Behind one of the dresser drawers they found the bills given to the first informant. They did not find those given the second informant. With a black box they

observed fluorescent powder on both hands of Mitchell and on the fingertips and shirt of Flynn. On cross-examination the officers refused to divulge the names of the informant-participants.¹

The petitioning defendants have made no showing that they lack the information thus sought. Indeed, they insist that there is no requirement that they make such a showing. The judge who presided at the preliminary examination said to defense counsel: "You haven't shown the Court, excepting by your own statement, that it would be useful." Counsel replied: "Now, these cases hold that it is not necessary to make a specific showing. That, automatically, is useful to the defendant. In other words, the mere fact that the defendant pleads 'not guilty,' and denies that these sales took place, then it automatically becomes useful, and the cases so hold. We don't have to get up here and make a specific showing as long as we have denied that the sales took place."

[1] We are not impressed by the prosecution's argument that a defendant in such a situation should make a showing that he does not know the identity or the whereabouts of the informant-participant. Nor need he show how and to what extent, if at all, that information might be useful to him. We are dealing with the prosecution's case, the presentation of its evidence tending to support its burden of proving legal cause for the arrest and seizure. In that process, through its key officer-witnesses, it presents a pivotal witness, a faceless witness, one who speaks only through the mouth of another. The right through

cross-examination to ascertain the identity of this faceless witness is not dependent upon any offer of proof or showing of need for the information; no more so than is the right to counsel dependent upon an offer of proof or a showing that one needs an attorney.

[2] Nor are we impressed by the contention that because a defendant does not have the right of cross-examination before the grand jury when it indicts he does not have it as a fundamental right when being examined before a magistrate anticipatory to the filing of an information. The framers of our Constitution prescribed different modes for prosecution by information and prosecution by indictment and the Legislature has implemented the distinctive methods thus prescribed.

[3] The state suggests that defendants demonstrated knowledge of the identity of one of the informer-participants when their counsel asked if his name is Joseph Fonteno and if he lives at 1226 Masonic Street, even though he got no answer. That is an obvious non-sequitur.

[4] We entertain no doubt of the right of a defendant, at a preliminary examination, to confront the prosecution's witnesses and cross-examine them. Pen.Code, § 865.

[5] The only basis urged by the prosecutor for his objection to the questions asked at the preliminary is the policy of nondisclosure of "Communications made" to a public officer "in official confidence, when the public interest would suffer by the disclosure." Code Civ.Proc., § 1881, subd.

1. Defendants' counsel asked such questions as these: (1) I want to know the name of the man who gave you the information that narcotics could be obtained at this place from these defendants. Objection: It calls for confidential and privileged information. Sustained. (2) Will you give me the name of the man to whom you gave the marked money in the first instance and who came out and surrendered a package to you? Objection: The same. Defense counsel's response: This is not an informer, now. We are talking about the person who participated. Sustained.

(3) Is that person Joseph Fonteno? Objection: It tends to disclose his identity. Sustained. (4) On this second occasion, what is the name of the man you searched at Page and Masonic at 11:00 o'clock in the evening? Objection: It tends to disclose the confidential informant and privileged information. Sustained. (5) Where does he live? Objection: The same. Sustained. (6) Is his name Joseph Fonteno? Same objection and ruling. (7) Does he live at 1226 Masonic Street (the building in which defendants' apartment was situated)? Same objection and ruling.

5. That policy does not prevail in the case of informant-participants. In this case we have informant-participants. They did not merely point their fingers at the defendants, leaving to the officers the task of finding evidence of crime. They participated with the defendants in effecting the very sales which the informations later filed charge the defendants of having made in violation of law; alleged sales concerning which only they and the defendants could testify as eye-witnesses.

The policy of nondisclosure does not obtain in such a case. It was held in *People v. Lawrence*, 149 Cal.App.2d 435, 450, 308 P.2d 821, 830, that upon the trial of a case this policy yields to the right of a defendant to defend himself: "To deny the defendant the right to examine an officer regarding the name of or to ask other material questions concerning an informant-participant would be to suppress an essential element of the *res gestae*. The crime is committed when the sale is made and not when the informant delivers the contraband to the officers and tells them about the sale."

The reasoning by which the court in the *Lawrence* case applied this principle to a hearing on *voir dire* held out of the presence of the jury, is persuasive of its applicability to the preliminary examination: "Although the question of the guilt of the defendant is not before the court, nevertheless, the defendant has the same right to present his defense at the hearing to determine the reasonableness of an arrest or search as he does on the question of his guilt. The fact that the hearing is held before the court in the absence of the jury makes it no less a criminal proceeding. Due process applies and all the rights the defendant may have at the trial proper apply with equal force and dignity to the proceedings before the court sitting in the absence of a jury." At page 451 of 149 Cal.App.2d, at page 831 of 308 P.2d.

One of the latest cases on this subject is *People v. Castiel*, 153 Cal.App.2d 653, 315 P.2d 79, 81 (hearing by Supreme Court denied), reversing a conviction because of the prosecution's refusal to disclose the

identity of an informer-participant. In a cogently reasoned opinion Mr. Justice Dooling exhaustively reviews the pertinent authorities and says in part: "The possible importance of this person's identity to the defense is just as great whether he happens to be a government informer or not. In either event, if the defendants had the opportunity to interview him and call him as a witness, he might contradict the testimony of the officers completely or in part. He might deny that he was present at all, or participated in any of the transactions. He might corroborate the officers as to the telephone calls and the purchases of narcotics but testify that the persons to whom he talked and from whom he made the purchases were persons other than the appellants. It would be intolerable if the government could convict its citizens of crime and thereby deprive them of their liberty and civil rights while denying them the opportunity to produce a witness or witnesses to the alleged crime, whose identity is known to the witnesses who testify against him. The defendant is entitled as a matter of due process of law to be allowed to interview and produce any witness who might give evidence favorable to his defense, and when a witness who testifies to the commission of a crime testifies that another person or other persons were also present, and particularly where such other person or persons according to the testimony were active participants, the right of the defendant to the disclosure of the identity of such person or persons on cross-examination seems too clear for successful contradiction. If this was a case without precedents logic and the basic constitutional guaranty of due process would compel this conclusion, but it is not a case without precedents." 153 Cal.App. 2d at page 657, 315 P.2d at page 81. "It is the deprivation of the defendants of the opportunity of producing evidence which *might* result in their exoneration which constitutes the error in this case, and we cannot assume because the prosecution evidence may seem strong that the undisclosed evidence might not prove sufficient to overcome it in the minds of the jurors. To do

so is to reason that in no case can a defendant suffer prejudice from the suppression of evidence which may be favorable to him if the prosecution has produced what seems to be a strong eyewitness case of the defendant's guilt." 153 Cal.App.2d at page 659, 315 P.2d at page 82. See also *People v. Mast*, 155 Cal.App.2d 379, 318 P.2d 44, hearing by Supreme Court denied.

This reasoning applies with equal force when the same question is presented in the same manner at a preliminary examination. The issues at the preliminary and at the trial are identical in kind. They differ only in degree. At the trial, *the alleged guilt* of the defendant is the issue. At the preliminary, *the sufficiency of cause to believe him guilty* is the issue. In either case the proof depends upon the legality of the seizure of the evidence. When tendering that proof the prosecution in each case has withheld vital information from the defendant. Is not that withholding (against the defendant's insistent demand) a violation of a fundamental right of the defendant, equally in the one case as in the other? Is this any less a violation of due process when it occurs at the preliminary than when it occurs at the trial? We think not.

[6] We base this conclusion upon the constitutional and statutory mandates which govern the prosecution of crime *by information*. They quite convincingly appear to accord the defendant all of the *fundamental elements* of a "fair trial" on the question whether "It appears * * * that a public offense has been committed" and whether there is "sufficient cause to believe the defendant guilty." Pen.Code, § 872.

For example, the defendant must be promptly taken before a magistrate who must immediately give him a copy of the

complaint, inform him of his right to counsel and allow him a reasonable time to send for counsel and, if he is unable to and desires counsel, assign counsel to defend him (Pen.Code, § 859). At the examination, the "witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf." § 865. When the examination of witnesses on the part of the People is closed, "any witnesses the defendant may produce must be sworn and examined." § 866. The defendant may not be examined unless he is represented by counsel or unless he waives his right to aid of counsel after being advised at such examination of his right to aid of counsel. § 866.5. The magistrate may exclude witnesses who have not yet testified (§ 867) and must exclude certain persons upon request of the defendant (§ 868). "If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged." § 871.

[7] Thus has the Legislature, in the exercise of the power expressly conferred upon it by the Constitution² surrounded the preliminary "examination * * * by a magistrate" with the safeguards and minimum requirements which the Constitution itself prescribes in "criminal prosecutions, in any court whatever" (art. I, § 13).³ Accordingly, it is not necessary in the present inquiry to determine whether the preliminary "examination" sanctioned by section 8 is a "criminal prosecution" within the meaning of the latter term as used in section 13 of article I. The Legislature has with complete competence "prescribed by law" the same fundamental

2. Section 8 of article I of the Constitution says that certain offenses "shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as *may be prescribed by law*." (Emphasis added.) *In view of this empowerment, the implementing statutes virtually have the dignity and sanction of constitutional mandates.*

3. The first sentence of section 13, article I, declares: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel."

safeguards for the conduct of the preliminary "examination" as the Constitution by direct mandate has prescribed for "criminal prosecutions, in any court whatever."

To assure the observance of these fundamental requirements, it would seem, the Legislature, at its very first session after the adoption of the Constitution which provided for prosecution by information, amended section 995 of the Penal Code to vest in the defendant the right to have the information "set aside by the court" in which arraigned if "before the filing thereof the defendant had not been legally committed by a magistrate." Amendments to the Codes, 1880 Pen.Code, ch. 118, p. 43. That ground of dismissal has continued without change all these years.

[8] "Legally committed" as used in section 995 "refers to the examination of the case, and the holding of the defendant to answer as prescribed by title 3, c. 7, Pen.Code." Ex parte Baker, 88 Cal. 84, 85, 25 P. 966, 967.

[9] The "essential principles of procedure and of evidence may not be departed from by committing magistrates." In re Schuber, 68 Cal.App.2d 424, 425-426, 156 P.2d 944, 945.

[10] "The forms of procedure required by law in preliminary examinations establish a substantial right vested in every person charged with crime and should not be lightly waved aside." People v. Brooks, 72 Cal.App.2d 657, 661, 165 P.2d 51, 53. Good reason, indeed, did the Supreme Court have for saying: "The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial." Jaffe v. Stone, 18 Cal.2d 146, 150, 114 P.2d 335, 338, 135 A.L.R. 775.

[11] Of course, not every deviation from the requirements with which the preliminary "examination" has been sur-

rounded would tincture with illegality a commitment based upon that examination. *The thwarting of a fundamental right of the defendant*, such as the right to the benefit of counsel, the right to present witnesses, and the right to confront and cross-examine the prosecution's witnesses, *would seem to be such a deviation from those requirements as would infect with illegality any order of commitment based upon the examination.*

It is already well established that deprivation of a defendant's right to the aid of counsel taints a magistrate's commitment with illegality. People v. Naphthaly, 1895, 105 Cal. 641, 644, 39 P. 29, reversing judgment of conviction and an order which denied a motion to set the information aside; People v. Salas, 1926, 80 Cal.App. 318, 250 P. 526, affirming trial court's order setting the information aside because of magistrate's failure to inform the defendant of his right to aid of counsel, citing sections 8 and 13 of article I, Constitution, and sections 858 and 859, Penal Code; People v. Miller, 1932, 123 Cal.App. 499, 11 P.2d 884, same action as in the Salas case, for the same reason; People v. Williams, 1954, 124 Cal.App.2d 32, 268 P.2d 156, same action as in the Salas case, for the same reason. Significantly, the Supreme Court in People v. Naphthaly, supra, 105 Cal. 641, 644, 39 P. 29, 30, said: "An examination which denied to defendant the right guaranteed him alike by the constitution and statute, of being defended by counsel, was in no sense a legal examination. It was a plain and palpable violation of a fundamental right of the defendant, which rendered the commitment illegal."⁴

[12] These cases are persuasive of the view that violation of the equally fundamental right of confrontation and cross-examination upon a crucial issue infects the ensuing commitment with illegality. These cases, it is true, were decided upon

4. We observe that it was not until the 1934 amendment of § 8 of article I that the Constitution expressly and specifically guaranteed the defendant the right to the aid of counsel at the preliminary examination.

Accordingly, when in the cases above cited that were decided before 1934 the right to counsel at the preliminary examination was referred to as guaranteed by the Constitution, it is possible that the courts had reference to the third

appeal. Does the availability of the remedy of appeal after termination of a trial render the writ of prohibition inappropriate and unavailable? It would seem not; no more so than when a defendant is committed after an examination that produces no evidence of reasonable or probable cause.

There are a few cases in which statements appear that might seem to cast a doubt upon this view. Careful scrutiny dispels any such doubt, as we read those cases.

In *Murphy v. Superior Court*, 58 Cal. 520, the petitioner represented that the magistrate who conducted the preliminary examination "did not examine on oath or otherwise * * * any witness * * *." The writ was denied. That seems wholly inconsistent with the rationale of *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713. Perhaps it is explainable upon the ground that the defendant did not make a motion for dismissal in the trial court (see Pen.Code, § 996), the printed decision being silent in respect thereto.

In *Western Meat Co. v. Superior Court*, 9 Cal.App., 538, 99 P. 976, the defendant-petitioner sought the writ upon the ground that he had been illegally committed, claiming that petitioner had not had a hearing at all before a megistrate. But it also appeared that the petitioner had not moved for dismissal in the trial court as required by sections 995 and 996. That was the reason for the denial of the writ. What the court said as to the adequacy of the remedy by way of appeal was pure dictum.

clause of the first sentence of § 13 of article I: "In criminal prosecutions, in any court whatever, the party accused shall have the right * * * to appear and defend, in person and *with counsel*." (Emphasis added.)

If so, those cases are authority for the view that "criminal prosecutions, in any court whatever," as used in § 13 embraces "examination and commitment by a magistrate" as used in § 8 of article I.

It would follow that the constitutional guarantees expressed in § 13 are avail-

[13] It is true that when the inquiry is whether or not the evidence adduced at the preliminary examination supports the magistrate's finding of reasonable and probable cause, a court in a prohibition proceeding does not undertake to weigh the evidence (if there be some supporting evidence), nor is it concerned with mere irregularities of procedure before the magistrate, nor, in general, with the correctness of his rulings on the admissibility of evidence. See *Rogers v. Superior Court*, 46 Cal.2d 3, 7-8, 291 P.2d 929; *Badillo v. Superior Court*, 46 Cal.2d 269, 271-272, 294 P.2d 23.

[14] But when the very legality of a preliminary examination is in question, as affected by the violation of one or more of the defendant's fundamental rights, the nature and scope of the inquiry is radically different. If a person's fundamental rights are to be protected and enforced by the courts the validity of the magistrate's significant rulings is of necessity a subject of inquiry.

[15] Nor do we infer a change in policy upon the part of the Legislature from the fact that when in 1949 it amended section 995 of the Penal Code and added section 999a thereto (Stats.1949, ch. 1311, p. 2298) it dealt only with the subject of indictment found without reasonable or probable cause and of commitment upon an information without reasonable or probable cause. It dealt with such an indictment and with such an information in section 999a, and added the first paragraph "2" to section 995. Sec. 995 already contained the second paragraph "2." It

able to the defendant at his preliminary examination to the same full extent as at his trial.

We do not rest our decision upon this ground but wish to make it clear we are not holding it may not be found, when fully explored, that the first sentence of section 13 directly applies to the "examination and commitment by a magistrate" prescribed by § 8 of article I and thereby lays down certain minimum requirements for the conduct of that examination.

is a fair inference that in making those additions the Legislature had in mind solely the principles enunciated in *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713, 715, in respect to "reasonable or probable cause" and aimed to give recognition to those principles in statutory form, coupled with the limitation that a defendant seeking the remedy of prohibition, when advised that there has been a lack of reasonable or probable cause, file his petition "in the appellate court within 15 days after a motion made under Section 995" on that ground (§ 999a), and the further limitation that the district attorney be given five days' notice of the application before an alternative writ may issue. In so doing, the Legislature left intact that clause of section 995 which declares and ever since 1880 has declared that an information "must be set aside by the court in which the defendant is arraigned, upon his motion," when it appears that before the filing of the information "the defendant had not been legally committed by a magistrate."

Let the peremptory writ of prohibition issue.

PETERS, P. J., and BRAY, J., concur.



157 Cal.App.2d 560

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Max RUBIN, Defendant and Appellant.
Cr. 6026.

District Court of Appeal, Second District,
Division 1, California.

Feb. 11, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, H. Burton Noble, J., for bookmaking and accepting a bet on a horse race, and he appealed. The District Court of Appeal,

Herndon, J. pro tem., held that the Horse Racing Act was not intended to repeal general law prohibiting general betting and registering of bets on horse races but was intended only to make an exception as to pari-mutuel betting conducted in manner and under conditions specified in Act; and held that the Business and Professions Code section derived therefrom did not supersede provisions of Penal Code section with respect to cases in which wagering involved horse racing in California and leave Penal Code section applicable only to wagering on horse races at meetings outside state.

Affirmed.

1. Gaming ☞98(3)

Convictions for bookmaking and accepting bet on horse race were sustained by evidence. West's Ann.Pen.Code, § 337a, subs. 1, 6.

2. Criminal Law ☞260(11)

Sole function of reviewing court is to determine whether or not there was substantial evidence from which trier of facts reasonably could draw necessary inferences and find facts constituting essential elements of offense charged; and it may not weigh evidence.

3. Criminal Law ☞304(2)

Understanding that, in context of their utterance, words "Give me 2 and 2 on Master Boing in the seventh" constituted an offer to wager on a horse race, that response "Okay" was an acceptance of offer, and that entry on scratch sheet was intended to be record of wager, was well within scope of common knowledge.

4. Criminal Law ☞317

Failure of defendant to testify or to offer any evidence in his own behalf could have been considered by trial court as tending to indicate truth of People's evidence, and as indicating that, among inferences that might be drawn therefrom, those unfavorable to defendant were more probable.

5. Gaming — 63(3)

The Horse Racing Act was not intended to repeal general law prohibiting general betting and registering of bets on horse races but was intended only to make an exception as to pari-mutuel betting conducted in manner and under conditions specified in Act; and the Business and Professions Code section derived therefrom did not supersede provisions of Penal Code section with respect to cases in which wagering involved horse racing in California and leave Penal Code section applicable only to wagering on horse races at meetings outside state. West's Ann.Pen.Code, § 337a; West's Ann.Bus. & Prof.Code, § 19662.

Nichols & O'Neill, Dan O'Neill, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

HERNDON, Justice pro tem.

In an information of two counts, defendant was charged with violations of Subdivisions 1 and 6 of Section 337a of the Penal Code, to-wit, of bookmaking and accepting a bet on a horse race, respectively. The defendant entered a plea of not guilty. A jury trial was waived and it was stipulated that the cause be submitted on the transcript of the preliminary hearing. Defendant was found guilty on both counts as charged. His motion for a new trial was denied. He has appealed from the judgment and from the order denying his motion for a new trial.

Appellant urges two contentions on this appeal: (1) that the evidence was insufficient to sustain the judgment, and (2) that so far as the present case is concerned, Section 337a of the Penal Code was superseded by Section 19662 of the Business and Professions Code and that, as a consequence, the trial court "had no jurisdiction over the cause". In view of the foregoing contentions it is necessary to summarize the evidence.

Officer May, attached to the Administrative Vice Division of the Los Angeles Police Department, was on duty on Friday, February 22, 1957, at approximately 4 p. m. He was in plain clothes. At about that time Officer May entered a place known as "Jack's Bar" located at 115 West Sixth Street. As he proceeded toward the rear of the barroom the officer saw appellant talking to someone at a table. The officer observed that appellant had in his hand what appeared to be a scratch sheet. The officer entered a restroom and on emerging therefrom observed a male customer who was seated at the bar, signal to appellant. As appellant approached the customer the officer followed and took a seat immediately to the left of the customer. The officer overheard the customer say to the appellant, "Give me 2 and 2 on Master Boing in the seventh". At this time appellant made some sort of notation on what appeared to be a scratch sheet, said, "Okay" and left the bar. This was at about 4:10 p. m. Officer May finished his drink, got up, and went to the car in which his associates, Officers Walters and Burks, were seated. This car was parked on Main Street just around the corner from Sixth Street. Officer May informed his associates of what had transpired.

Officer Walters, a stipulated expert in the manner in which bookmaking is conducted in Los Angeles County, entered Jack's Bar at about 4:20 p. m. He looked for appellant but appellant was not in the bar at the time. On turning to leave, Officer Walters observed appellant approaching the entrance to the bar. Officer Walters identified himself as a police officer and placed appellant under arrest for violating Penal Code Section 337a. The officer searched appellant. At the trial, in response to the question, "And did you find anything which might indicate that the defendant was bookmaking?" Officer Walters answered, "I found a National Daily Reporter's scratch sheet on the defendant."

Officer Walters examined the scratch sheet and found it contained information indicating that a horse named "Master Bo-

ing" was listed to run in the Seventh Race at Santa Anita, and the probable post time for that race was shown as 4:40 p. m. of the same day. The scratch sheet also revealed checks or dots opposite a horse by the name of "St. Vincent" listed to run in the Seventh Race, and opposite the horse named "Master Boing" also listed to run in the Seventh. Appellant did not testify nor did he offer any evidence in his own behalf.

[1,2] It is our conclusion that the evidence, as above summarized, is clearly sufficient to sustain the conviction. An appellate tribunal may not weigh the evidence. Our sole function is to determine whether or not there was substantial evidence from which the trier of the facts reasonably could draw the necessary inferences and find the facts constituting the essential elements of the offense charged. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. Bradford*, 95 Cal.App.2d 372, 380, 213 P.2d 37; *People v. Meade*, 109 Cal.App.2d 306, 309, 240 P.2d 680.

The following reference to earlier decisions contained in the recent decision of *People v. Jackson*, 152 Cal.App.2d 397, 313 P.2d 931, 934, indicates the sufficiency of the evidence in the case at bar: "In *People v. Burch*, 118 Cal.App.2d 122, 257 P.2d 44, 45, a woman said to defendant, 'Give me two dollars to win on Willow Way in the first race at Hollywood Park,' and defendant replied 'O. K.' This was held sufficient to show that defendant was engaged in bookmaking and accepted a wager on a race. In *People v. Chaney*, 147 Cal.App.2d 740, 305 P.2d 955, the officer heard the defendant say he wanted 'two to win on Jet Action in the eighth at Gulfstream,' and defendant's reply 'Okay.' This was held to clearly justify an inference that Fraser was placing a bet on the race in question and that defendant was accepting such bet. In the *Burch* case, *supra*, the court pointed out that a volume of gambling is unnecessary to establish the offense, and that accepting one wager constitutes a violation of the code section."

In *People v. Meade*, *supra* [109 Cal.App.2d 306, 240 P.2d 681] a conviction was sustained upon evidence similar to that here presented. In that decision the court commented: "The testimony hereinabove narrated discloses that at the time of his arrest, appellant was in possession of betting paraphernalia, to-wit: a piece of scratch sheet, containing pencilled notations respecting various horses running in races at Santa Anita on the day in question. Moreover, his telephone conversations in the presence of the witness Ward were directly related to these notations."

[3] Appellant argues that the cryptic language of the conversation overheard by Officer May was meaningless without explanation in the form of expert testimony. We think this argument is based upon an unrealistic premise. In recent years, the advertising and reporting of horse racing events and the discussions of the terms and results of wagering thereon, have become so extensive in every modern medium of communication that it would be a rare individual of adult years who had not by now acquired, either voluntarily or involuntarily, a fairly adequate understanding of the essential elements of these wagering contracts and of the terms in which they are made. See *People v. Overman*, 149 Cal. App.2d 125, 131, 307 P.2d 1000. Even if he did not understand the precise terms of the wagering contract as expressed in the language of the testimony, the average individual would at least understand that, in the context of their utterance, the words "Give me 2 and 2 on Master Boing in the seventh" constituted an offer to wager on a horse race; that the response, "Okay" was an acceptance of the offer, and that the entry on the scratch sheet was intended to be a record of the wager. Such understanding, we are sure, is well within the scope of common knowledge in this jurisdiction. *People v. Race*, 151 Cal.App.2d 678, 685, 312 P.2d 322.

[4] The failure of the appellant to testify or to offer any evidence in his own behalf could have been considered by the trial

court "as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." *People v. Adamson*, 27 Cal.2d 478, 490-491, 165 P.2d 3, 9; *People v. Smith*, 113 Cal.App.2d 416, 419, 248 P.2d 444; *People v. Goldstein*, 139 Cal.App.2d 146, 155, 293 P.2d 495; *People v. Race*, supra, 151 Cal.App.2d at page 686, 312 P.2d 322.

[5] Appellant's contention that the trial court lacked jurisdiction is equally untenable. Although not clearly articulated, the essence of the argument seems to be this: that Section 19662 of the Business and Professions Code, being a later and special enactment, superseded the provisions of Penal Code Section 337a with respect to cases in which the wagering involved horse racing in California, and that said Penal Code section remains applicable only to wagering on horse races at meetings outside the state. Business and Professions Code Section 19662 provides that, "Any person wagering upon the results of a horse race, except in the pari-mutuel or mutual method of wagering, when the wagering is conducted by a licensee and upon the grounds or inclosure of the licensee, shall be punished as provided in the Penal Code."

The foregoing statute was enacted in 1941 and derives from the Horse Racing Act, Statutes of 1933, ch. 769 (In re Goddard, 24 Cal.App.2d 132, 136, 137, 74 P.2d 818). The Horse Racing Act from which were derived the statutory enactments relied upon by appellant "merely provided one exception under which one form of betting on horse races was permissible in California. It is clear from a study of the act of 1933, as amended, that the Legislature not only did not intend to repeal the general law prohibiting general betting and registering of bets on horse races, but intended that the law remain in force subject to one exception, namely, that pari-mutuel betting be permitted if conducted in the manner and under the conditions specified in the act." *People v. Torrey*, 16 Cal.App.2d 470, 472, 60 P.2d 900, 902; see also,

People v. Pierce, 14 Cal.2d 639, 643, 96 P.2d 784.

The judgment, and the order denying motion for a new trial are, and each is affirmed.

WHITE, P. J., and FOURT, J., concur.



157 Cal.App.2d 360

D. Ellen HENRY, also known as D. Ellen Dollar, Plaintiff and Appellant,

v.

Mae S. WEINMAN, Paul Pritchett, and Frank Mergenthaler, Defendants and Respondents.

Civ. 22559.

District Court of Appeal, Second District, Division 1, California.

Feb. 3, 1958.

Action for damages for breach of contract and for fraud. The Superior Court, Los Angeles County, A. A. Scott, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Herndon, J. pro tem., held that evidence, including testimony that plaintiff actually received property equal in value to that which she would have received either as a result of a successful will contest or the assertion of her rights as a widow, sustained finding of trial court that plaintiff suffered no detriment as a result of alleged breach of agreement by a defendant to turn over all of plaintiff's deceased husband's estate to plaintiff if she would allow his will to be probated without contest.

Judgment affirmed.

1. Estoppel ⇨85

Doctrine of promissory estoppel is applicable to a promise which a promisor should reasonably expect to induce action or

forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance, and injustice can be avoided only by enforcement of the promise.

2. Estoppel ⇐119

The existence of an estoppel is a question of fact, unless but one inference can be drawn from the evidence.

3. Estoppel ⇐55, 58

Basic elements of estoppel are reliance and injury.

4. Wills ⇐741

In action for damages for breach of contract and for fraud, evidence, including testimony that plaintiff actually received property equal in value to that which she would have received either as a result of a successful will contest or the assertion of her rights as a widow, sustained finding of trial court that plaintiff suffered no detriment as a result of alleged breach of agreement by a defendant to turn over all of plaintiff's deceased husband's estate to plaintiff if she would allow his will to be probated without contest.

5. Evidence ⇐594

Trier of facts is entitled to disbelieve all or any part of a witness' testimony even though uncontradicted, if there is any rational ground for doing so.

N. E. Youngblood, and Anthony T. Carola, Beverly Hills, for appellant.

Eugene S. Ives, Los Angeles, for respondents.

HERNDON, Justice pro tem.

Plaintiff appeals from a judgment that she recover nothing upon her alleged causes of action seeking damages for breach of contract and for fraud. The cause was tried before the court without a jury. In its findings of fact, the trial court found that the alleged contract was non-existent and that the allegations of fraud were untrue.

Plaintiff and Alexander Dollar, herein-after sometimes referred to as the testator,

were married in 1945. Alexander Dollar died on June 21, 1952, leaving a will which antedated his marriage to plaintiff. It is undisputed that as to plaintiff the will was revoked by the subsequent marriage, Section 70 of the Probate Code being clearly applicable.

By the terms of his will dated December 8, 1942, testator left his entire estate to the defendant Mae Weinman, and named her executrix. Testator's former wife, Ruth, who had died in 1942, was defendant Weinman's daughter. It appears that the relationship between the testator and his mother-in-law always was a very close one and that a substantial part of his estate had its origin in gifts from Mrs. Weinman to her daughter, Ruth, and was inherited by him upon Ruth's death. After Alexander Dollar's death, his will was found in his safety deposit box and was contained in an envelope bearing the inscription in testator's handwriting: "Not Valid. It is my intention to replace this existing Will with one that will be current and up to date. Alexander Dollar, 5-29-52."

On July 28, 1952, the will was admitted to probate without contest and Mrs. Weinman was appointed executrix. Plaintiff appeared as a witness at the probate hearing and testified to her wish that the will be admitted. It is undisputed that the testator's surviving heirs, other than plaintiff, were certain brothers and sisters and a nephew. It is further agreed that had the will been successfully contested and denied probate, distribution of the estate under the laws of succession would have given plaintiff all the community property and one-half of the separate property, with the balance going to the brothers, sisters, and nephew. Defendant Weinman would have taken nothing from the estate under the laws of succession. Although all the heirs were given due notice of the proceedings, no contest was filed.

At the trial of the instant action, plaintiff testified that she was induced to refrain from contesting the will by certain promises made by defendant Weinman to the effect that if plaintiff would allow the will to be

probated without contest Mrs. Weinman would turn over to her all of the distributable estate. According to plaintiff's testimony, this promise was first made by Mrs. Weinman in the course of a conference with the defendant Mergenthaler at the latter's law office, prior to the probate hearing and some two weeks after the will was found.

Mr. Mergenthaler, the attorney who filed the petition for probate of the will, was joined as a party defendant in the cause of action alleging fraud. It is undisputed that he had been Mrs. Weinman's attorney for many years. He had acted as the attorney in the settlement of the estate of her daughter, Ruth, and of her former husband, William Sampson.

Plaintiff further testified that on July 28, 1952, she went to court with Mr. Mergenthaler and Mrs. Weinman to attend the hearing on the petition for probate of the will, and that immediately before the hearing, while waiting in an ante-chamber of the courtroom, Mrs. Weinman repeated her promise to turn over the assets of the estate to plaintiff. According to plaintiff, Mr. Mergenthaler was present at the time of this conversation.

Mr. Mergenthaler's testimony is substantially at variance with that of plaintiff. He denied that Mrs. Weinman was present at any conference with plaintiff at his office before the probate hearing. He testified that plaintiff came alone to his office to deliver the original will a few days after Mr. Dollar's death. His version of his conversation with her on that occasion was as follows:

"I told Mrs. Dollar that in my opinion the inscription on the envelope did not revoke the will; where a testator made a will before marriage and then died without making a provision in the will for any after acquired wife, that the will was good except as to the new wife; that as to her, it was invalid. I told her at the time that most of Alex' property had been given to Ruth Dollar, the daughter of Mrs. Weinman, by Mrs. Weinman, and under Ruth's will, Alex Dollar received about \$42,000 of property

from Ruth Dollar's estate and consequently there was a great amount or I thought there was a great amount of separate property in the estate.

"I also informed her that Alex Dollar had left a number of brothers and sisters in the east; I think some seven or eight; and that if the will had been revoked by that writing, the brothers and sisters would be entitled to one-half the separate property, and that if she contested the probate of the will and was successful in establishing that writing on the envelope as a revocation of the will, they would be entitled to one-half the separate property; that she would be entitled to all of the community property and the other half of the separate property."

Mr. Mergenthaler testified that nothing was ever said about plaintiff's right to a family allowance and that the only conversation between plaintiff and Mrs. Weinman relating to distribution of the estate which he overheard occurred upon their return to his office immediately after the hearing in the probate court when the will was admitted. He related Mrs. Weinman's statement on that occasion, as follows: "They came to my office and Mrs. Weinman said that she regarded Ellen as her daughter; she had entertained Alex Dollar and Mrs. Dollar frequently at her Arrowhead house and she looked on Mrs. Ellen Dollar as her daughter. She stated that—'I don't care anything about this estate and I intend to give it to Mrs. Dollar.'" Later on the same day, Mergenthaler wrote plaintiff a letter confirming this conversation and containing the following paragraph:

"As Mrs. Weinman informed you today, it is her intention to turn over to you any interest that she might have in Alex' estate under the will, but not as a creditor. I pointed out there was a possibility there might be a gift tax on any amount of the estate which would pass under an assignment from Mrs. Weinman to you and I thought that if there was such a tax, it should be paid by you and you agreed to this idea."

As above indicated, the will was admitted to probate and letters testamentary were issued to Mrs. Weinman on July 28, 1952. No contest after probate was filed. Between July of 1952 and October of 1953, such proceedings were taken in the probate matter that by the latter date the estate of Alexander Dollar was ready for distribution. Early in October of 1953, Mr. Mergenthaler drafted a document entitled, "Agreement as to Distribution of Assets". He testified that it was his purpose in drafting the agreement to provide for a distribution of assets to plaintiff equal in value to the interest which she would have been entitled to receive under the laws of succession. In drafting the agreement he utilized his personal knowledge of the source of the assets and their character as separate or community property.

Mr. Mergenthaler mailed the agreement to Mrs. Weinman at her home at Lake Arrowhead. Mrs. Weinman signed it and asked her son-in-law, Paul Pritchett, to take it to plaintiff for her signature. Plaintiff testified that Pritchett told her the agreement was "for record purposes" and that Mrs. Weinman would return the assets to her after the estate was settled.

Thereafter, Mr. Mergenthaler prepared Mrs. Weinman's final account and report as executrix, and her petition for distribution. Pursuant to the agreement, a decree of distribution was accordingly entered on November 4, 1953. No appeal was taken from this decree and it became final long before the commencement of this action. Mr. Mergenthaler wrote a letter to plaintiff, dated November 19, 1953, enclosing a copy of the decree of distribution, and a receipt for her distributive share, which he requested her to sign and return. In this letter he undertook to explain in some detail the apportionment of the assets, the adjustment of tax payments, etc. A few days later Mergenthaler mailed plaintiff a copy of the final account, report and petition for distribution.

Although plaintiff refused to sign the receipt for distribution, it appears that she received the assets given her by the decree.

According to plaintiff's testimony, she and her husband, John Henry, visited Mrs. Weinman at the latter's home during December, 1953. On this occasion plaintiff inquired when she would receive the remainder of the estate, whereupon, according to plaintiff, Mrs. Weinman became annoyed and indicated that "she hadn't made up her mind".

On February 28, 1955, plaintiff filed her original complaint for declaratory relief, breach of contract, fraud, conspiracy, account, and money damages. The action went to trial on the third amended and supplemental complaint which, according to its prayer, sought money damages for breach of contract and fraud.

In substance, the complaint alleged that plaintiff agreed not to contest the will of Alexander Dollar, refrained from exercising her right to contest, and gave up her right to a family allowance in reliance upon promises and representations made by Mrs. Weinman, by her attorney, Mergenthaler, and by her son-in-law, Pritchett, to the effect that, after distribution, all assets of the estate would be delivered over to plaintiff. The fraud count alleged additionally that these promises and representations were made falsely and with the intent to deceive.

Although the third amended complaint is cast in the form of an action at law for damages, plaintiff's attorney, at the beginning of the trial, characterized the case as "an independent action in equity based upon extrinsic fraud". Both at the beginning and during the trial, defendant's counsel demanded that plaintiff elect between the contract and fraud causes of action. Addressing the court at the conclusion of the trial, defendant's counsel stated his understanding "that the plaintiffs have elected now to proceed only on the contract", to which the trial judge responded, "It is certainly the court's understanding." Mr. Youngblood then commented, "That does not mean, however, Your Honor, that we do not contend there was fraud involved in connection with the contract."

The detailed findings of fact found untrue the essential allegations of the complaint with respect to (1) the existence of a contract, (2) plaintiff's reliance upon the alleged promises and representations, (3) the intent of the defendants to deceive or defraud plaintiff, and (4) resultant damage to plaintiff.

The essence of plaintiff's position on this appeal is that she is entitled to recover as a matter of law under the doctrine of promissory estoppel, and that the findings of fact of the trial court, insofar as they negate the essential elements of that doctrine, are without support in the evidence. Although it appears to us, from a review of the record, that appellant's theory of the case, as now advanced on this appeal, is substantially different from that presented by her in the trial court, we shall deal with her present contentions on their merits.

[1] The doctrine of promissory estoppel is defined as follows in Section 90 of the Restatement of Contracts: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." This doctrine is recognized in California and has been applied in a variety of factual situations. *Burlingame v. Rowland*, 77 Cal. 315, 19 P. 526, 1 L.R.A. 829; *Kinsell v. Thomas*, 18 Cal.App. 683, 124 P. 220; *Churchill v. Russell*, 148 Cal. 1, 82 P. 440; *Carpy v. Dowdell*, 115 Cal. 677, 47 P. 695; *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am. St.Rep. 154; *Wilk v. Vencill*, 30 Cal.2d 104, 180 P.2d 351; *Hunter v. Sparling*, 87 Cal.App.2d 711, 727, 197 P.2d 807.

[2,3] It is settled that the existence of an estoppel is a question of fact, unless but one inference can be drawn from the evidence. *General Motors Acceptance Corporation v. Gandy*, 200 Cal. 284, 253 P. 137; 18 Cal.Jur.2d 413. Basic elements of estoppel are reliance and injury. In re

Estate of Jackson, 112 Cal.App.2d 16, 245 P.2d 684; *Pomeroy's Equity Jurisprudence*, 5th ed., vol. III, p. 230, section 812; 18 Cal.Jur.2d 410, section 12. When, as in the instant case, the findings of fact of the trial court are attacked on the ground that they lack evidentiary support, the power of the appellate court begins and ends with the determination as to whether there is any substantial evidence to sustain the challenged findings (*Primm v. Primm*, 46 Cal.2d 690, 693, 229 P.2d 231).

[4,5] We conclude that the present record contains substantial evidence of facts and circumstances from which the trial court reasonably could infer and find that appellant did not suffer any substantial detriment as a result of reliance upon any promise or representation by the defendant. In the first place, it is to be noted that during the course of the probate proceedings appellant signed an agreement for distribution which gave her property equal in value to that which she would have gotten by way of a successful contest. Appellant testified that when this agreement was presented to her by defendant Pritchett for her signature she objected that "it wasn't according to the way I had understood the distribution of the estate to be", but that she signed the agreement in reliance upon Pritchett's assurance that "for record purposes it had to be that way" and that Mrs. Weinman would return the assets to her after the estate was settled. Pritchett's version of the conversation was somewhat different. He testified that in response to appellant's statement that she understood she was to receive all the assets of the estate, he said, "I do not know anything about that. You will have to get that information from Mrs. Weinman." Appellant's asserted reluctance to sign the agreement indicated recognition of the apparent inconsistency between the terms of the agreement and the terms of the alleged promise. The terms of the agreement and the fact that appellant signed it afforded the basis for an inference that appellant had not relied upon any inconsistent promises, representations, or under-

standings. The trier of the facts is entitled to disbelieve all or any part of a witness' testimony, even though uncontradicted, if there is any rational ground for doing so. *Hicks v. Reis*, 21 Cal.2d 654, 659, 134 P.2d 788; *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868; *Hamilton v. Abadjian*, 30 Cal.2d 49, 53, 179 P.2d 804. In these circumstances the trier of the facts was not bound to accept appellant's testimony as to her reliance.

But even if we could hold as a matter of law that appellant's reliance was conclusively established by her forbearance to contest the will, there would still remain the question of fact whether this forbearance resulted in any substantial detriment to appellant. Since appellant actually received property equal in value to that which she would have received either as a result of a successful will contest or through assertion of her unquestioned rights under Section 70 of the Probate Code, it seems clear that the finding of the trial court that she suffered no detriment is substantially supported. Indeed, it appears that by the procedure followed appellant was saved the substantial costs, expenses, attorneys fees, delays and difficulties which a will contest would have entailed.

Appellant has argued that she suffered an additional detriment in that she failed to assert in the probate proceedings her right to a family allowance in reliance upon the so-called promise. The evidence does not compel a finding that she did so. The evidence is uncontradicted that there was no discussion of the subject of a family allowance between appellant and Mrs. Weinman or with Attorney Mergenthaler. Appellant's own testimony goes no further than to indicate that she was uninformed of her right to such an allowance. In short, the record does not establish as a matter of law that there was any such change of position on appellant's part as would call into play the doctrine which she now seeks to invoke.

Our conclusions, as above indicated, render it unnecessary for us to discuss respondent's further contentions: (1) that the so-called "promise" constituted nothing more than a declaration of intention to make a future gift; and (2) that the decree of distribution in the probate matter is *res adjudicata*. Appellant has not challenged the judgment insofar as it runs in favor of the defendants Mergenthaler and Pritchett.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



157 Cal.App.2d 483

Clifford Felix O'CONNOR and Margaret Foster O'Connor, Plaintiffs, Cross-Defendants and Appellants,

v.

RUMIANO BROTHERS COMPANY, a California corporation, John Rumiano and Rose Rumiano, his wife, Richard Rumiano and Leontine Rumiano, his wife, Defendants, Cross-Complainants and Respondents.

Civ. 9192.

District Court of Appeal, Third District,
California.

Feb. 5, 1958.

Rehearing Denied Feb. 27, 1958.

Hearing Denied April 2, 1958.

Action by owners of land adjacent to west bank of river to quiet title to land located on eastern bank of river. Defendants filed cross-complaint to quiet title to land up to eastern bank of river. The Superior Court, Tehama County, Curtiss E. Wetter, J., upheld defendants' claims and plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence established that defendants' predecessors in title had used land in controversy for pasturing cattle from period long before 1919 to present time and that such

use was plainly observable by plaintiffs' predecessors in interest at time they brought action against unknown persons in 1919 to quiet title to lands, including lands involved in present controversy, and defendants and their predecessors in interest were not bound by quiet title decree based on publication of summons insofar as such decree applied to land in controversy.

Affirmed.

1. Boundaries ⇨14

Where original government patents granting lands adjacent to navigable river contained references to river as being boundary of lands conveyed and also contained meander courses along banks of river, the banks of the navigable river constituted true boundaries of land conveyed.

2. Navigable Waters ⇨44(2)

In action by owner of land adjacent to west bank of navigable river to quiet title to land located on east bank of river, evidence was sufficient to support trial court's finding that additions to land along eastern bank had been brought about by constant, gradual and imperceptible changes in banks of river over the years, involving erosion and accretion. West's Ann.Civ. Code, § 1014.

3. Judgment ⇨671

Parties ⇨72

A quiet title action against unknown defendants does not affect persons known to plaintiff to claim an interest in land described; persons who are in actual and open possession of the property embraced within the action and hold record title thereto will not be regarded as unknown persons. West's Ann.Code Civ.Proc. § 749.

4. Judgment ⇨957

In action by owners of land adjacent to west bank of navigable river to quiet title to land located on eastern bank of river, evidence established that defendants' predecessors in interest had used land in controversy for pasturing cattle for period long before 1919 to present time and that

such use was plainly observable by plaintiffs' predecessors at time of their action in 1919 against unknown persons to quiet title to lands, including land involved in present controversy. West's Ann.Code Civ.Proc. § 749.

5. Judgment ⇨17(1)

Where defendants' predecessors were using land in controversy for pasturing cattle at time plaintiffs' predecessors filed action against unknown persons to quiet title to lands, including land involved in controversy, and such use of land was plainly observable by plaintiffs' predecessors, defendants and their predecessors in interest were not bound by quiet title decree based on publication of summons insofar as such decree applied to land in controversy. West's Ann.Code Civ.Proc. § 749.

John V. Lewis and George Olshausen,
San Francisco, for appellants.

Ware & Kutz, Chico, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment in favor of defendants and cross-complainants in a quiet title action. The parties own land through which the Sacramento River flows. Appellants brought the action to quiet title to land lying east of the present bank of the river. Respondents claimed title up to the bank. The trial court upheld the claims of respondents and this appeal followed.

Appellants deraigned title from (1) a patent from the United States to the Central Pacific Railroad, dated March 17, 1875, and (2) a patent from the State of California to Jacob Dungan, dated August 29, 1877. The descriptions in these patents refer to lots shown on the government survey. The surveys show a meander line along the west bank of the river with courses and distances given. The chain of title shows that appellants' predecessors described the property in their various conveyances by reference to the same surveys until July 23, 1903, when a deed from

Foster to Foster Company described the land according to a recorded subdivision map of Maywood Colony No. 23. Thereafter, conveyances referred to this map until August 15, 1906, on which date an amended map was filed. Thereafter, conveyances in appellants' chain of title referred to the amended map.

Respondents' chain of title originated in a patent from the United States under date of December 3, 1858. By this patent a previous Mexican grant was confirmed. The lands were referred to as lying along the Sacramento River on the east bank thereof, and as being bounded on the west by the Sacramento River. The point of beginning is described as being "A.G.T. No. 14 on the bank of the Sacramento River," and the description continues, "thence up the left bank of the Sacramento River with the meanders thereof." It appears that in this area the river has constantly changed its course so that it now is not located as it was when the government surveys were made. The movement in the area involved herein has been to the west, so that land formerly west of the river is now east of the river. The land thus added to the area east of the river is claimed by respondents under the doctrine of accretion. Appellants claim that the doctrine is not applicable and that their easterly boundary has not been affected by the changes in the river. They also claim that their title to the land east of the present course of the river was quieted in them against the predecessors of respondents and that their claims to the disputed area are therefore *res judicata*.

The trial court found that respondents' property had, at all times since the original patent, been bounded on the west by the east or left bank of the Sacramento River and that appellants' property had at all times been bounded by the river on the east; that the river flows between the lands of the respective parties; that over the years from the time the lands left the public domain, the course of the river had gradually and by imperceptible degrees variously and continuously altered and changed; that during

that period there had been erosion and accretion from natural causes from the action of the river at various points along its banks affecting the lands of the parties; that the lands in dispute left by the river in its westerly movement had been formed by accumulation and accretion along the east bank of the river; that the lands added to the lands of respondent as the river moved toward the west had been in the exclusive possession and control of respondents and their predecessors in interest.

Appellants contend that the original government patents did not grant the right to future accretion to respondents' predecessors; and that, assuming the right to future accretions was granted, the proof failed to show that the change in the course of the Sacramento River was such that the land left behind on the eastern bank constituted accretion. Appellants say that the burden of proving that the change was by accretion rather than through a shift of the waters themselves without changes in land conformation was not borne by respondents upon whom the burden of proof rested. The points require a summary recital of the testimony, but we will first consider the nature of the patents as granting or as withholding rights to accretion.

[1] The original patents granting the subject lands on the west of the river to the predecessors of the appellants, as well as the original patent issued to the predecessors of respondents, contained references to the river as being the boundary of the lands conveyed and also contained meander courses along the banks of the stream. The questions presented by such government grants has often received the attention of the Supreme Court of the United States. The test by which to determine whether the grant stops at the meander line or goes to the water, which test has long been adhered to, is stated in *St. Paul & Pacific R. Co. v. Schurmeier*, 7 Wall. 272, 19 L.Ed. 74, at page 78. Said the court:

"Meander lines are run in surveying fractional portions of the public

lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as a means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

"In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water-course, and not the meander line, as actually run on the land, is the boundary.

"* * * [T]he better opinion is, that proprietors of lands bordering on navigable rivers, under the titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be and remain public highways. Grants of land bounded on rivers above tide water, says Chancellor Kent, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum*, as a public highway. * * *

"The views of that commentator are, that it would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river, because, as the commentator insists, the stream, when used in a grant as a boundary, is used as an entirety to the center of it, and he, consequently, holds that the fee passes to that extent. Decided cases of the highest authority affirm that doctrine, and it must, doubtless, be deemed correct in most or all jurisdictions where the rules of the common law prevail, as understood in the parent

country. Except in one or two States, those rules have been adopted in this country, as applied to rivers not navigable, when named in a grant or deed as a boundary to land. Substantially the same rules are adopted by Congress as applied to streams not navigable; but many Acts of Congress have provided that all navigable rivers or streams in the Territory of the United States offered for sale, should be deemed to be, and remain public highways. * * *

"* * * [T]he court decides to place the decision, in this case, upon the several Acts of Congress, making provision for the survey and sale of the public lands bordering on public navigable rivers, and the legal construction of the patents issued under such official surveys. Such a reservation, in the Acts of Congress, providing for the survey and the sale of such lands, must have the same effect as it would be entitled to receive if it were incorporated into the patent, especially as there is nothing in the field notes, nor in the official plat or patent inconsistent with that explicit reservation. Rivers were not regarded as navigable in the common law sense, unless the waters were affected by the ebb and flow of the tide, but it is quite clear that Congress did not employ the words 'navigable' and 'not navigable,' in that sense, as usually understood in legal decisions. On the contrary it is obvious that the words were employed without respect to the ebb and flow of the tide, as they were applied to territory situated far above tide-waters, and in which there were no salt water streams.

"Viewed in the light of these considerations, the court does not hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that

the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways."

In *Hardin v. Jordan*, 140 U.S. 371, 11 S.Ct. 808, 811, 35 L.Ed. 428, 433, the court said:

"* * * It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered, and that the waters themselves constitute the real boundary."

We are convinced by the foregoing authorities and in view of the form of the governmental grants here involved that on both sides of the river, which is a navigable stream where it passes between the lands of respondents and appellants, the meander lines do not constitute the boundaries of the lands granted, but, on the contrary, that the banks of the river constitute the true boundaries. Therefore, the law of accretion expressed in Civil Code, section 1014, applies, provided, of course, that, as found by the court, the accumulation of material on the eastern bank constituted alluvion as required by that section. The section reads as follows:

"Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by ac-

cumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank."

[2] The record supports the trial court's finding that the land along the river's former easterly bank, which is the subject of this controversy, was deposited under such circumstances as to cast the title thereto in the owners of the east bank, that is, in the respondents. The various maps and aerial photographs, the language of the conveyances and the chains of title indicate that the banks of the river have undergone constant, gradual and imperceptible changes over the years, involving erosion and accretion. There was testimonial evidence to the same effect. One witness testified from long observation of the river that in the area involved the river changed its course constantly and slowly from side to side and in various ways as the result of erosion and accretion. Appellant Clifford O'Connor stated that the changes in the river's banks took place over the years. A Mr. Stanley, who was in charge of the United States Army survey party which obtained the data for a governmental map, testified from personal knowledge and observation of the river from 1917 to 1933 that it was subject to gradual and constant changes of its course. Another witness testified to the same during the period 1935 to 1952, although he said that there were no noticeable changes in the river, that is to say, no big changes during that period. Another witness, describing the changes in the river between 1908 and 1915 and between 1926 and 1933, testified that there were no sudden changes in the bank of the river in the area involved. The evidence was ample to support the trial court's finding that the additions to the land along the eastern bank added by change in the course of the river had been brought about factually in such a manner as to require the application of Civil Code, section 1014. Unless, therefore, the title of the respondents was in a sense divested by the decree of the court

above referred to, made in a former quiet title action, the judgment of the trial court that the respondents own the land in controversy must be affirmed.

[3] During the earlier 1900's, as heretofore stated, the land to the west of the river was, by the predecessors in interest of appellants, subdivided and two subdivision maps thereof were filed of record. Thereafter, transfers were made in accordance with these maps and by references thereto. Although the maps contained a meander line along what purported to be the west bank of the river, nevertheless, the courses and distances called for in the maps were such that if the grid of those maps be superimposed upon the government survey of the land in controversy, the result is that there is a very material overlapping and the overlap includes the land here in controversy. Such were the circumstances when again using the descriptions contained in the subdivision maps appellants' predecessors in interest brought an all persons suit to quiet title. The subdivision map descriptions were used in the complaint and summons. The prayer of the complaint was that the title of the plaintiffs in that action be quieted as to all lands within the descriptions used. Notwithstanding the fact that the land to the east of the river had been in private ownership, as before related, since 1858, the quiet title action did not name parties living on and possessing and using land on the easterly shore of the river. No service of process was made upon them and such efficacy as the decree has must rest upon the theory that they were sued and served as persons unknown claiming some right, title, or interest in the land embraced within the descriptions used in the complaint. A quiet title action against unknown defendants does not affect persons known to plaintiffs to claim an interest in the land described. Such persons will not be regarded as unknown persons if they are in actual and open possession of the property embraced within the action and hold record title thereto. Code of Civ.Proc., sec. 749; *Manuel v. Kiser*,

94 Cal.App.2d 540, 210 P.2d 918. Said the court in that case 94 Cal.App.2d at page 545, 210 P.2d 921:

"The question thus narrows down to the more precise one of whether a decree entered in an action brought pursuant to section 749 of the Code of Civil Procedure against 'unknown defendants' based upon publication of summons directed to such defendants is binding upon a person claiming an interest in the land and as to whom the plaintiff has actual knowledge.

"By the provisions of section 749 of the Code of Civil Procedure a defendant known to the plaintiff must be served in the manner set forth in sections 405-418 thereof which sections in general require personal service subject to certain exceptions not applicable herein. Thus it would follow that Manuel was entitled to personal service by the very terms of the foregoing sections and such a conclusion is in accord with the general rule that a party in the actual possession of real property cannot be regarded as an 'unknown' person so as to be bound by a decree based upon published service. *Killian v. Hubbard*, 69 S.D. 289, 9 N.W.2d 700, 146 A.L.R. 713; *Harris v. Barnes*, 137 Neb. 905, 291 N.W. 721, 128 A.L.R. 114."

[4,5] But appellants contend that the evidence herein was not sufficient to support a finding by the trial court, express or implied, that plaintiffs in the quiet title action could not sue respondents' predecessors in interest as unknown persons and bind them by the decree based on publication of summons. We do not agree. The suit was brought in 1919. There was testimony by witnesses having personal knowledge concerning the use and occupation of the disputed lands by the predecessors in interest of respondents, as follows: The disputed lands consisted of a low-lying gravel and sand deposit, a good deal of it bare along the water's edge, then came an area on which grasses grew

suitable for pasture for livestock, then an area covered by brush and trees. Long before the suit was brought the property on the east was owned by Stanford University, and one witness, who had helped to care for the cattle raised upon the property by the university, testified that every season during the spring months the university's cattle, consisting of around 150 head of Holstein cows, were regularly pastured over the entire area. The cattle found good feed along the area just beyond the trees and bushes and in decreasing amounts on toward the river and watered in the river. The land was regularly devoted to that seasonal use. There were other witnesses to the same effect and it is apparent from the testimony, without quoting further, that this seasonal use was open, obvious and continuous. From this testimony the court could infer that a continuous use of the land insofar as permitted by its character was made throughout the years from a period long before the suit was brought down to the present time. Appellants seek to escape the effect of the evidence of use by stating that there is a gap of seven years in the testimony. The point is without merit. The evidence we have referred to was sufficient grounds for an inference by the trial court that notwithstanding there may have been gaps in the testimonial proof of use, yet, from the fact that so much time was covered by the testimony, the use could be held to have continued and to have been existing and to have been plainly observable by appellants' predecessors in interest when they brought their suit. There was a complete absence of any testimony that appellants or their predecessors in interest had ever made any use of the land lying to the east of the river. It could hardly be supposed that the people using lands on the west would not have been aware of the use by those to the east of the land on that side of the river down to the water's edge. We conclude that the court was fully justified in finding that respondents and their predecessors in interest were not bound by the quiet title decree insofar

as it applied to the lands here in controversy.

The judgment appealed from is affirmed.

PEEK, J., and WARNE, J. pro tem,
concur.

Hearing denied; CARTER, J., dissenting.



157 Cal.App.2d 338

Lena BUEHLER, Plaintiff and Appellant,

v.

**J. B. REILLY and Vera Reilly, Defendants
and Respondents.**

Civ. 22333.

**District Court of Appeal, Second District,
Division 1, California.**

Feb. 3, 1958.

Rehearing Denied March 3, 1958.

Hearing Denied April 2, 1958.

Action was brought for injunction, and defendants filed a cross-complaint to quiet title to driveway for joint use of plaintiff and defendants. The Superior Court of Los Angeles County, William E. Fox, J., entered judgment in favor of the defendants, and the plaintiff appealed. The District Court of Appeal, White, P. J., held that agreement, which granted to adjoining landowners a right of way over a strip on each side of their common boundary line, so as to create easements appurtenant to their adjoining properties, did not create an easement in gross or easement for the benefit of realty subsequently acquired.

Judgment reversed and cause remanded with directions.

I. Easements ◀27

Where all owners of lots in tract, including adjoining landowners, executed a quitclaim deed to adjoining landowners of their right, title, and interest in and to easterly two-thirds of driveway strip, adjoining landowners became joint owners of fee title to and easement over the easterly

two-thirds of the driveway strip, and the easement theretofore existing over that portion of the driveway was thus merged in the fee.

2. Easements ⇨14(2)

Evidence ⇨461(5)

In written agreement between adjoining landowners, to whom portion of driveway had been quitclaimed, that common boundary line between their properties should be as set out, and that each released and quitclaimed to the other small piece of property, the one on which defendant landowners had encroached, to them, and comparable portion of their property to plaintiff landowner and her late husband "excepting and reserving therefrom for the joint use of the parties heretofore road purposes the following described strip of land", quoted words reserved easement right of way, and did not create such ambiguity in agreement as to require or authorize court to consider extrinsic evidence as to meaning of written agreement.

3. Contracts ⇨152

Written agreement, unless it is ambiguous, must be construed by consideration of its own terms.

4. Appeal and Error ⇨842(1)

Contracts ⇨176(1)

Meaning and intent of unambiguous written agreement is a question of law, and reviewing court is not bound by trial court's findings and conclusions respecting such intent and meaning.

5. Easements ⇨3(2)

Where agreement granted to adjoining landowners a right of way over a strip on each side of their common boundary line, easements so created were appurtenant to adjoining properties. West's Ann.Civ. Code, § 662.

6. Easements ⇨3(2)

Agreement which granted to adjoining landowners a right of way over a strip on each side of their common boundary line, so as to create easements appurtenant to their adjoining properties, did not create an easement in gross or easement for the

benefit of realty subsequently acquired. West's Ann.Civ.Code, § 662.

Hill, Farrer & Burrill, Leon S. Angvire, Los Angeles, for appellant.

Fleming, Robbins & Tinsman, C. S. Tinsman, Clay Robbins, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff and cross-defendant, Lena Buehler, appeals from a judgment that plaintiff is not entitled to an injunction and that she take nothing; that defendants' and cross-complainants' "right, title and interest in and to said joint and common roadway * * * be quieted for the joint use of cross-complainants and cross-defendant"; that cross-defendant be "forever enjoined and debarred from asserting the claim that said road is owned by cross-defendant"; and that cross-complainants own "an easement over, across and along the following described parcels of land in Tract 4600, as per map recorded in Book 49, page 93, of Maps, Records of Los Angeles County, California: (Description of the driveway along the southerly and easterly boundaries of appellant's Lot 7) for road purposes jointly and in common with cross-defendant; that said easement is appurtenant to Lot 8 of said Tract 4600 and to the portion thereof owned by cross-complainants, and cross-complainants have an easement in gross over said (driveway) * * which they may use for the benefit of their residential property, which includes not only said portion of Lot 8 of Tract 4600 but also Lot 3 of Harvey and Lindleys Addition to Whittier, which is owned by cross-complainants, and that cross-complainants have the right to use said roadway without interference from cross-defendant, and that cross-defendant be forever enjoined and debarred from asserting the claim that said easement and road is owned solely by cross-defendant" and that defendants and cross-complainants recover their costs. (Emphasis added in portion of judgment above quoted.)

Respondents' portion of Lot 8 is directly east of appellant's portion thereof and her Lot 7, upon which she resides. The west line of Lot 7 borders Alta Avenue, which is a dedicated street ending in a cul-de-sac at the northwest corner of appellant's Lot 7 and the southwest corner of respondents' Lot 3. The driveway here in dispute runs from the southwest corner of Lot 7 around the south and east curved boundaries of said Lot 7 to its northeast corner. Respondents' portion of Lot 8 has an area of about 20,000 square feet. In December, 1954, respondents added to their property Lot 3 of Harvey and Lindleys Addition to Whittier, which is over 100,000 square feet in area. The southwest corner of Lot 3 adjoins the north end of Alta Avenue, and the southerly line of Lot 3 coincides with the northerly line of Lots 7 and 8. In 1955, respondents moved their residence from Lot 8, relocated it on Lot 3 about 70 feet north of the north line of Lot 8, and constructed a garage and service building about 25 by 75 feet in area to the east of their new residence location, partially on said Lot 3 and partially on an avocado grove to the east of Lot 8 and Lot 3. Said grove is owned by a closed family corporation controlled by respondents, and it extends from Lot 8 to Beverly Boulevard. Since moving their residence from Lot 8, respondents have constructed a new driveway joining the old one at the southeast corner of appellant's Lot 7, thence around the south and east of respondents' former residence site on Lot 8, into the southeast corner of Lot 3, to their new garage and service building where it is connected with a dirt road across their corporation's avocado grove to Beverly Boulevard, said new driveway then turns, passes south and west of respondents' new residence, curves into the northwesterly portion of said Lot 3, then west and south and connects with the north end of Alta Avenue. The portion of said driveway on said Lot 3 is about 720 feet of curved and graded roadway connecting the new driveway across their Lot 8 with their corporation's dirt road from the southeast corner of their Lot 3 to Beverly and with the

north end of Alta Street at the southwest corner of their said Lot 3.

The record does not show the size of the respondents' avocado grove to the east of their said Lots 8 and 3, or the length of the dirt road across said grove from respondents' garage to Beverly. The findings are, however, that said grove is accessible to the driveway here involved "but there was and is no evidence to show that any person entered the joint and common roadway established by the parties in October of 1936 from the said dirt roadway * * *."

It was stipulated at the trial that the roadway from Lot 8 to Alta Avenue will not be used for ingress to or egress from the avocado grove and will be used "only for the ingress and egress to their residence property and garage and Lot 8 which is a part thereof, in the manner heretofore used by them, and that an injunction may issue enjoining the use of said roadway from Lot 8 to the Street of Alta for purposes other than the servicing of and ingress and egress to and from their said properties in the manner heretofore used by them"; that "at the present time Lot 8 does not have any structure thereon; has been landscaped and is being used primarily for the purpose of a garden, a footpath and a roadway connecting the driveway from the boundary of Mrs. Buehler's property to Lot 3 of Harvey & Lindley's Addition to Whittier"; that since the moving of respondents' house, the driveway across Lots 7 and 8 to said Lot 3 "has been used by guests, servants, employees, trades people, commercial trucks and vehicles, members of the household, the Reillys and others".

No issue is raised by the pleadings, at the trial, or on this appeal, as to respondents' ownership of an easement appurtenant to their portion of Lot 8 of Tract 4600. Respondents resided on said portion of Lot 8 from 1928 until 1955, and during that period their only means of ingress and egress was over said easement. The judgment is claimed to be erroneous only with respect to the "easement in gross * * * for the benefit of (respondents') residential property, which includes * * * Lot 3 of

Harvey and Lindleys Addition to Whittier
* * *."

In 1922 appellant bought Lot 7 and the southwesterly portion of Lot 8, and in 1924 respondents bought the remainder of Lot 8, Tract 4600. The conveyances to each of them referred to the subdivision map, upon which a strip substantially the same as the one here involved was shown as a driveway, and said conveyances were expressly subject to the rights of the owners of all the lots in said tract, to use said strip as a driveway.

In 1936, appellant discovered that respondents' lawn and curb encroached upon said easement along the common boundary of Lots 7 and 8. On October 10, 1936, they executed three separate documents.

First, a quitclaim deed to the respondents and to appellant and her late husband "as joint owners" was executed by all the owners of lots in Tract 4600, including the grantees. The quitclaim deed released all their respective "right, title and interest in and to: A portion of land * * * (description of the portion of the driveway east of Lot 5) * * * said strip of land by endorsement upon said map having been reserved for the perpetual and irrevocable use of the owners of each of the lots shown upon said map and to their heirs and assigns as appurtenant to each of the said lots."

Second, an agreement, reciting that appellant and her late husband were the owners of Lot 7 and a portion of Lot 8; that the respondents were the owners of the remainder of Lot 8; and that the owners of the other lots in Tract 4600 had quitclaimed to appellant, her late husband and respondents their interest in the driveway; and agreeing that the common boundary line between their respective properties shall be as set out; that each released and quitclaimed to the other a small piece of property, the one upon which the respondents had encroached, to them, and a comparable portion of their property to appellants, "Excepting and reserving therefrom for the joint use of the parties hereto for road purposes the following described strip of land * * *."

Third, a document signed by appellant, her late husband, and respondents, reciting that they have established the common boundary line of their respective properties in Tract No. 4600, and

"Whereas, said agreement reserves for road purposes a strip of land and grants unto the respective parties hereto the common use of said strip of land for road purposes, and

"Whereas, the construction of said road upon said strip requires the construction of a retaining wall along the Southerly side thereof, * * *". By said agreement respondent agreed to and did pay the cost of a retaining wall, and appellant, her late husband, and respondents agreed to and did bear equally the expenses incidental to "the preparation and fulfillment of this agreement and the aforementioned agreement of October 10, 1936, such as fees and charges paid to the Title Company, Attorney, Engineering and Surveying expenses, and Recording fees. * * *"

The driveway as so improved was used by appellant, her husband and the respondents from 1936 to 1955, while they resided on Lots 7 and 8 of Tract 4600.

[1] By the quitclaim deed of October 10, 1936, appellant, her husband and respondents became joint owners of the fee title to and the easement over the easterly two-thirds of the driveway strip. The easement theretofore existing over that portion of the driveway was thus merged in the fee. Therefore, as to that portion of the driveway, we need not consider the arguments based upon the original deeds by which the parties acquired Lots 7 and 8 in 1922 and 1924.

From respondents' use of said driveway in connection with Lot 3 since 1955 no grant of an easement can be implied. No claim is or can be made that said driveway is a way of necessity for the enjoyment of Lot 3.

The nature and extent of the respondents' rights in said easterly portion of the driveway is governed by the provisions of the three documents of October 10, 1936, here-

inbefore set out, all of which are parts of the same agreement.

[2] That agreement besides extinguishing the easement created by the deeds to the parties from their grantors with reference to the map of Tract 4600, changes the boundary between respondents' and appellant's respective properties herein referred to as Lots 8 and 7, respectively, by describing the new boundary and conveying to respondents the fee of the portion of said driveway strip north and east, and to appellant and her husband the fee of the portion south and west of the new line. If, by said agreement the fee of the driveway strip of land had not been transferred to the respective parties, but had been excepted and retained in the joint ownership of the four parties, there would have been no common boundary and their statement therein that they "have established the common boundary line of their respective properties" would be untrue. The words "excepting and reserving * * * the strip of land * * * for road purposes * * *" is a reservation of an easement of right of way, and does not create such an ambiguity in said agreement as to require or authorize the court to consider extrinsic evidence as to the meaning of the written agreement between the parties. This is particularly true, when consideration is also given to the later portion of their written agreement wherein it is said that the agreement "grants unto the respective parties hereto the common use of said strip of land for road purposes". The three documents of October 10, 1936, considered together and in their entirety, clearly indicate the intention to grant the fee title to the land underlying said driveway to the respective parties and to reserve an easement only for their common use.

[3,4] A written agreement, unless is it ambiguous, must be construed by consideration of its own terms. The meaning and intent thereof is a question of law, and an appellate tribunal is not bound by the trial court's findings and conclusions respecting such intent and meaning. *Brant v. California Dairies, Inc.*, 4 Cal.2d 128, 133, 48 P.2d 13.

[5] Where, as in the instant action, the agreement to be so construed recites that the parties are owners of adjoining lots and the agreement grants to each a right of way over a strip on each side of their common boundary line, the law of California is well settled that the easements so created are appurtenant to their adjoining properties. *Hopper v. Barnes*, 113 Cal. 636, 45 P. 874; *Elliott v. McCombs*, 17 Cal.2d 23, 29, 109 P. 2d 329; *Wright v. Best*, 19 Cal.2d 368, 383, 121 P.2d 702.

In the instant action, that construction is concurred in by all parties and by the trial judge. However, respondents urged and the court adjudged that, in addition to such easement appurtenant, respondents are the owners of an easement in gross "for the benefit of" their Lot 3, which was acquired by some 18 years after the execution of the agreement creating the easement. At the trial the parties stipulated that in 1936 the respondents owned no property in the vicinity of said driveway except their said portion of Lot 8.

A way "is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit". Civ.Code, section 662. The judgment in the instant action that respondents "have an easement in gross * * * for the benefit of their residential property, which includes * * * Lot 3 of Harvey and Lindleys Addition to Whittier * * *" ignores the provision of said section 662 that when an easement is used for the benefit of land it is appurtenant thereto.

[6] The three documents of October 10, 1936, contain no language which can be construed as a grant of an easement in gross or an easement appurtenant to said Lot 3. Respondents, in their brief, urge that while the findings respecting such easement in gross for the benefit of Lot 3 may not be supported by the agreements "on their face", the judge having personally inspected the properties such view is presumed to support the finding and it cannot be disturbed on appeal. We are satisfied that the court's view of the premises in 1956 and all other evidence in the instant action is in-

sufficient to support the finding and conclusion that the parties intended to and did by said writings in 1936 create an easement in gross or an easement "for the benefit of" or appurtenant to property in which neither party then, or for 18 years thereafter, had any interest.

The judgment is reversed and the cause remanded with directions to the court below to make new findings in accordance with the views herein expressed and to render judgment in accordance therewith.

FOURT, J., and DRAPEAU, J. pro tem.,
concur.



157 Cal.App.2d 548

**Emma Kozak CAMPBELL, Plaintiff and
Appellant,**

v.

**William Giles CAMPBELL, Houghton-Mifflin
and Company, a corporation, et al.,
Defendants,**

William Giles Campbell, Respondent.

Civ. 22682.

District Court of Appeal, Second District,
Division 1, California.

Feb. 11, 1958.

Action by former wife to quiet title to certain personalty, and for a declaration of a one-half interest in a certain publication written in part by her. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., entered judgment dismissing the action and former wife appealed. The District Court of Appeal, Fourt, J., held that property settlement agreement entered into by former husband and wife and incorporated into a part of their interlocutory judgment of divorce, providing for disposition of their community property interest in each and every book, article, and manuscript of the husband, operated as a bar to

relitigation of title to any such book, article or manuscript, under doctrine of res judicata.

Judgment affirmed.

1. Pleading ⚡216(1)

A demurrer reaches only to the contents of the pleading and such other matters as may be considered under the doctrine of judicial notice.

2. Pleading ⚡214(1)

As against a demurrer, only facts which are well pleaded are regarded as true, and facts alleged which are contrary to those facts of which judicial notice is taken cannot be regarded as true.

3. Judgment ⚡564(1)

Generally, a final judgment is res judicata of the issues involved therein where the trial court had jurisdiction.

4. Divorce ⚡255

Evidence ⚡43(3)

Where a former judgment in a divorce action between the parties was pleaded in an action by former wife for a declaration of her right to an interest in a certain publication written in part by former husband, such divorce judgment, supplemented by pleadings therein of which court could take judicial notice, could be considered in determining whether such judgment was res judicata of the alleged cause of action.

5. Divorce ⚡255

Property settlement agreement entered into by former husband and wife and incorporated into a part of their interlocutory judgment of divorce, providing for disposition of their community property interest in each and every book, article, and manuscript of the husband, operated as a bar to relitigation of title to any such book, article or manuscript, under doctrine of res judicata.

6. Pleading ⚡252(1)

Generally, superseded pleadings are disregarded after amended pleadings have been filed, but, if a prior pleading contains allegations which make it fatally defective, the defect cannot be cured merely by omit-

ting said allegations in an amended pleading without proper explanation.

7. Pleading ☞252(1)

Where in an action by former wife for a declaration of a one-half interest in a certain publication written in part by former husband, former wife alleged in her original complaint that a property settlement agreement included in interlocutory divorce decree between the parties failed to provide for future rights of the parties in and to said publication, and such allegation was contrary to terms of such agreement, original complaint was fatally defective because of such allegation, and omission of such allegation from subsequent amended complaints without explanation, rendered subsequent pleadings defective.

8. Limitation of Actions ☞177(2), 187

An affirmative allegation of absence from the state is required for a pleading to state a ground for tolling the statute of limitations. West's Ann.Code Civ.Proc. § 351.

Marvin Gross, Beverly Hills, for appellant.

Bertram L. Linz, Hollywood, for respondent.

FOURT, Justice.

This is an appeal from a judgment dismissing an action under the provisions of section 581, subdivision 3 of the Code of Civil Procedure after plaintiff had failed to amend, demurrers having previously been sustained to the original, first amended, second amended, third amended and fourth amended complaints.

The fourth amended complaint to which the demurrer was sustained with leave to amend set forth two counts. The second count for an accounting, having been directed against a non-appearing defendant, is conceded by appellant not to be pertinent in this appeal.

The first count to quiet title to personal property alleged the marriage of the parties, that the wife obtained an interlocutory decree of divorce on the 16th day of April, 1946, which decree became final in May,

1947, and prayed judgment declaring wife to have a good and valid one-half interest in the manual or publication entitled "A Form Book for Thesis Writing." The fourth amended complaint contained the following allegations:

"IV.

"That during the married life of plaintiff and said William Giles Campbell in the State of California, the said plaintiff and William Giles Campbell acquired and developed as community property and as a result of their joint labor and efforts, a manual or publication entitled 'A Form Book for Thesis Writing', hereinafter referred to as 'publication'; that for the purpose of convenience said publication was authored under the name of William Giles Campbell; that at all times herein mentioned, plaintiff and said William Giles Campbell treated and considered said publication as their community property and that the authorship of said publication under said name was for the convenience of plaintiff and William Giles Campbell and not otherwise.

"V.

"That pursuant to and in contemplation of said divorce action as hereinabove stated, plaintiff and defendant William Giles Campbell entered into a Property Settlement Agreement, which agreement provided, *inter alia*:

"I

"The Husband represents and warrants that the following described property constitutes all of the property now held or owned by the parties:

* * * * *

"(f) Royalties from books written by Husband (estimated) \$300. This is a potential asset only.'

that at the time that the property settlement agreement was signed by the parties the parties were receiving royalties for some time from one book written by defendant, and it was in-

tended by the parties at the time of the signing of the property settlement agreement that the husband was to receive the royalties from the said books to the extent of \$300 and that said royalties became a part of his separate property, and as a result Paragraph (f) was incorporated into the property settlement agreement and signed by the parties. At the time of the signing of the said property settlement agreement the parties did not take into consideration that there was existing a community interest in a publication manual entitled 'A Form Book for Thesis Writing', and as a result there was no intention on the part of the parties to divide the community interest of said manual; no other arrangements or provisions were made for the division of said thesis manual as said parties had completely overlooked the existing community rights of said manual, and as a result no provision was made in the property settlement agreement which was later incorporated into the Interlocutory Judgment of Divorce; as a result of the omission on the part of the parties to consider the community interests of said thesis manual the said manual continues to be the property of plaintiff herein to the extent of a one-half interest therein."

It is contended in this appeal that the fourth amended complaint stated a good and sufficient cause of action and that it was error to sustain a demurrer thereto for the following reasons:

1. the doctrine of res judicata does not apply;
2. it was the affirmative duty of the husband to disclose the existence of this asset;
3. it is immaterial whether the husband fraudulently or mistakenly failed to disclose this asset; and
4. the Statute of Limitations is tolled by the allegation that defendant has continuously resided outside the State of California from the time of the divorce.

The appellant has oversimplified the problems presented in this appeal. It is first stated that it is fundamental that allegations of a complaint are admitted by a demurrer thereto. From this, appellant argues that inasmuch as the doctrine of res judicata applies only to issues actually litigated and determined, the court must proceed to a hearing of the case and must determine as a question of fact whether the asset consisting of a manual or publication entitled "A Form Book for Thesis Writing" was in fact covered by the Property Settlement Agreement or the prior judgment.

[1-3] The correct rule is that a "demurrer reaches only to the contents of the pleading *and such other matters as may be considered under the doctrine of judicial notice.*" Weil v. Barthel, 45 Cal.2d 835, 837, 291 P.2d 30, 31. (Emphasis added.) In addition, it is only facts which are well pleaded which are regarded as true (see *Livermore v. Beal*, 18 Cal.App.2d 535, 64 P.2d 987); and "facts alleged, which are contrary to those facts of which judicial notice is taken, cannot be regarded as true." *Arnold v. Universal Oil Land Co.*, 45 Cal. App.2d 522, 529, 114 P.2d 408, 412.

With reference to the doctrine of res judicata, "it is the general rule that a final judgment is res judicata *of the issues involved therein* where the trial court had jurisdiction." Weil v. Barthel, *supra*. (Emphasis added.)

[4] In the instant case the former judgment in the divorce action between the parties is pleaded. Such judgment, supplemented by the pleadings therein of which the court may take judicial notice, may be considered in determining whether it is res judicata of the alleged cause of action.

The verified cross-complaint for separate maintenance filed in the former action by this appellant on August 21, 1945, contains the following allegation:

"As to that portion of community property of which cross-complainant has knowledge, cross-complainant alleges that the parties hereto are the

owners of community property described as follows:

* * * * *

"(h) Accounts Receivable and royalties due from the sale of books and articles written by cross-defendant, of the approximate value of \$10,000 or more."

The contested divorce trial commenced on April 2, 1946, and both parties appeared and were represented by competent counsel. Subsequently on April 8, 1946, "pursuant to stipulation in open court by and between the respective parties, * * * defendant and cross complainant was granted leave to file an Amended and Supplemental Cross Complaint for divorce herein; * * * that the matter could proceed as a default hearing upon the Amended and Supplemental Cross Complaint of cross complainant, * * *."

A property Settlement Agreement entered into by the parties on April 8, 1946, together with the supplement thereto of even date, each of which had been approved by their respective counsel, were specifically incorporated into and made a part of the Interlocutory Judgment of Divorce. Said property settlement agreement contains the following statement: "The Husband represents and warrants that the following described property constitutes all of the property now held or owned by the parties:

* * * * *

"(d) Unsold books published by Husband of the value of \$1,275.

"(e) Accounts receivable from sales of books, amounting to \$724.

"(f) Royalties from books written by Husband (estimated) \$300. This is a potential asset only.

* * * * *

"(v) Unfinished manuscript (offered in Court), April 4, 1946."

The appellant wife was awarded as her sole and separate property cash in the amount of \$637.50 representing the cash equivalent of a one-half interest in and to the unsold books published by husband, and

the unfinished manuscript offered in court April 4, 1946.

The respondent husband was awarded, subject to payment to wife of \$637.50 in cash, the entire interest in and to unsold books published by husband of the value of \$1,275; accounts receivable from sales of books, amounting to \$724; and royalties from books written by husband (estimated) \$300.

In the supplement to the property settlement agreement, the respondent husband specifically agreed not to use or cause to be used the particular manuscript awarded to appellant wife, or to use any portion thereof.

[5] One of the major issues involved in the property settlement agreement incorporated in the judgment pleaded by appellant was the disposition of their community property interest in each and every book, article, and manuscript of husband, whether published or unpublished. The provisions of the property settlement agreement relating to unsold books published by husband, accounts receivable and the unfinished manuscripts are facts which the trial court could consider under the doctrine of judicial notice in ruling on the demurrer. The doctrine of *res judicata* operates as a bar to the relitigation of title to any such book, article or manuscript, including the publication manual entitled "A Form Book for Thesis Writing."

[6] Appellant also contends in the reply brief that, in determining whether a cause of action has been stated, the court cannot refer to superseded pleadings. As a general rule, superseded pleadings are disregarded after amended pleadings are filed. However, if a prior pleading contains allegations which make it fatally defective, the defect cannot be cured merely by omitting said allegations in an amended pleading without proper explanation. This precise question was considered in the case of *Hicks v. Corbett*, 130 Cal.App.2d 87, 278 P.2d 77, in which the court ruled that the trial court was fully justified in consider-

ing the allegations of the original complaint. See also, *Slavin v. City of Glendale*, 97 Cal. App.2d 407, 217 P.2d 984; *Rogers v. Bank of America*, 140 Cal.App.2d 228, 294 P.2d 959; *Gaglione v. Coolidge*, 134 Cal.App.2d 518, 286 P.2d 568; *Owens v. Traverso*, 125 Cal.App.2d 803, 271 P.2d 164.

In the instant action, with respect to the manual or publication entitled "A Form Book for Thesis Writing," it was alleged that the property settlement agreement "failed to provide for the *future* rights of the parties in and to said publication and that therefore the said publication continues to be the property of the plaintiff herein to the extent of a one-half interest therein." (Emphasis added.)

[7] This allegation is contrary to the terms of the property settlement agreement. The original complaint is fatally defective because of this allegation, which, having been omitted without explanation, infects the subsequent pleadings.

Appellant has attempted to impose a fiduciary obligation upon the respondent husband on the basis of the warranty provision of said property settlement agreement. In the recent case of *Collins v. Collins*, 48 Cal.2d 325, 309 P.2d 420, involving this issue, the Supreme Court at page 331 of 48 Cal.2d, at page 422 of 309 P.2d, stated the applicable law to be as follows: " * * * when the parties to a marriage are negotiating a property settlement agreement with recognition that their interests are adverse and are dealing at arm's length, neither spouse owes to the other the duty of disclosure which he or she would owe if their relation remained in fact a confidential one. (Citing cases.) They do not need to be embittered toward each other to act at arm's length; temperate negotiation of adverse interests is much more likely than rancorous combat to produce a fair property settlement agreement. It is a long recognized rule that such settlements between husband and wife (of course in the absence of fraud) are highly favored in the law. (Citing cases.)"

[8] With respect to appellant's contention that the Statute of Limitations has been tolled, suffice it to say that the language of section 351, Code of Civil Procedure, makes no reference to place of residence. We are of the opinion that an affirmative allegation of absence from the State would be required to toll the running of the Statute of Limitations.

We find no ground upon which to order a reversal of the judgment of dismissal. The judgment is affirmed.

WHITE, P. J., and HERNDON, J.
pro tem., concur.



157 Cal.App.2d 293

George HECKENKAMP, Plaintiff and
Appellant,

v.

ZIV TELEVISION PROGRAMS, Inc., a corporation, Guy Daniels, KTTV, Inc., a corporation, Rod Mays & Co., Roderick Mays, Barker Bros., a corporation, General Electric Company, a corporation, Defendants and Respondents.

Civ. 22259.

District Court of Appeal, Second District,
Division 3, California.

Jan. 30, 1958.

Hearing Denied March 26, 1958.

Action for damages for wrongfully appropriating and using an idea and format for series of radio and television programs, and for other relief. From adverse judgment of the Superior Court, Los Angeles County, Leon T. David, J., the plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that complaint, which alleged that plaintiff conceived idea of dramatizing and fictionizing experiences of California highway patrol for presentation as a series of radio and television programs and that he registered script of

half hour teleplay with Screen Writers Guild and that he submitted his script in confidence through proper channels to get approval of California Highway Patrol and that defendants appropriated and copied his idea and used it for a television series and refused to pay plaintiff for the right to copy and use his idea, was insufficient to state a cause of action for using plaintiff's unpublished idea and information revealed in confidence.

Judgment affirmed.

1. Literary Property ☞9

Complaint, which alleged that plaintiff conceived idea of dramatizing and fictionizing experiences of California highway patrol for presentation as a series of radio and television programs and that he registered script of half hour teleplay with Screen Writers Guild and he submitted his script in confidence through proper channels to get approval of California Highway Patrol and that defendants appropriated and copied his idea and used it for a television series and refused to pay plaintiff for right to copy and use his idea, was insufficient to state a cause of action for using plaintiff's unpublished idea and information revealed in confidence. West's Ann.Civ.Code, § 980.

2. Trade-Marks and Trade-Names and Unfair Competition ☞92

Petition, which alleged that plaintiff conceived idea of dramatizing and fictionizing experiences of California Highway Patrol for presentation as a series of radio and television programs and that defendants used plaintiff's ideas in preparation and production of a television series and that he copied plaintiff's idea and passed it off as their own and committed gross acts of unfair competition against plaintiff in that they turned his own property against him, was insufficient to state a cause of action for unfair competition. West's Ann.Civ.Code, § 980.

Trippet, Yoakum, Stearns & Ballantyne, and F. B. Yoakum, Jr., Los Angeles, for respondents Ziv Television Programs, Inc., and KTTV, Inc.

Edmund G. Brown, Atty. Gen., and Delbert E. Wong, Deputy Atty. Gen., for respondent Guy Daniels.

PARKER WOOD, Justice.

[1] Action for damages for wrongfully appropriating and using an idea and format for a series of radio and television programs; and for an injunction and an accounting. Demurrers of defendants Ziv, KTTV, and Daniels were sustained without leave to amend. Plaintiff appeals from a judgment of dismissal, based upon the order sustaining the demurrers. Motions of said defendants to strike certain portions of the complaint were granted. Appellant states that this appeal is not directed to the propriety of granting the motions.

The allegations of the first cause of action (after the motions to strike were granted) are, in substance, as follows: Early in 1953 plaintiff, a California Highway Patrol officer, conceived the idea of dramatizing and fictionizing the experiences of the California Highway Patrol for presentation as a series of radio and television programs. On September 25, 1953, he registered a written expression of his radio and television format, program idea, and working title with the Radio Writers Guild. On February 5, 1954, he registered his complete 26-page script of a half-hour teleplay entitled, "Roadblock," with the Screen Writers Guild. Said script was intended to be a representative script of plaintiff's projected television series based on the exploits and official files of the California Highway Patrol. Early in 1954 plaintiff conceived the idea of broadening the scope of his series to encompass the activities of similar organizations of other states based on their official files. On April 21, 1954, he registered this development of his format and program idea and a 24-page script of a half-hour teleplay entitled, "Mountain Patrol," with the

Arthur S. Katz, Hollywood, and Thomas J. Jeffers, Jr., Montrose, for appellant.

Screen Writers Guild. The written expression of plaintiff's format, idea, working title, and scripts are referred to thereafter in the complaint as plaintiff's "property." Plaintiff is the author and owner of said property, which property has not been published. It is impractical, by reason of the nature and bulk of said property, to attach copies thereof to the complaint, and copies will be produced upon order of the court. Plaintiff desired the approval of the California Highway Patrol to use material from its files in the exploitation of his property, and he "submitted through proper departmental channels, and in confidence, his script entitled 'Roadblock.'" Several months passed without plaintiff receiving any word from the commissioner of the California Highway Patrol. During this period plaintiff discussed the matter of departmental approval with defendant Daniels, who was and is the Los Angeles public information officer of the patrol. "Plaintiff, in discussing his submission with defendant Daniels, and in confiding to him all the details of, and information about plaintiff's property did so in reliance on the fact that defendant Daniels was an employee in the department who was vested with appropriate authority with respect to the matter involved and who was in the direct channel of communication and command through which plaintiff's submission must travel. Plaintiff's sole purpose in making his submission and in discussing the details and scope of his property was to obtain the approval of the department to use its files, and was made for no other purpose. Plaintiff intended at no time to dedicate his property to the public, to abandon his rights therein or to gratuitously give them away. By a letter dated April 2, 1954, plaintiff was informed by Commissioner Caldwell [of the patrol] that he could not be given access to the department's files as a matter of policy. Some weeks later the script which plaintiff had submitted through departmental channels months earlier was personally handed to plaintiff by defendant Daniels who was then fully familiar with its contents and with

that of plaintiff's other property." Before and during the period plaintiff discussed the matter with Daniels, he (Daniels) was associated in various ventures with Ziv. Daniels intentionally and wilfully misappropriated plaintiff's property and used the secret information "thus obtained" for his own benefit and wrongfully divulged said property and secret information to Ziv. Ziv awarded Daniels by appointing him a technical advisor for the television series entitled, "Highway Patrol," based on plaintiff's property, and placed him on its payroll during the filming of the series. Before Ziv publicly announced its intention to produce the television series, "Highway Patrol," based on plaintiff's property, plaintiff met with a vice-president of Ziv and with the producer of said series to discuss plaintiff's rights. In July 1954, notwithstanding that Ziv had been given early notice by plaintiff that its contemplated television series was based on plaintiff's property, Ziv announced in motion picture trade papers that the first film in the series entitled, "Highway Patrol," would be made on August 19, 1954. Ziv and Daniels have continued to copy and use plaintiff's property in the preparation and production of their television series entitled, "Highway Patrol," and have refused to pay plaintiff for the right to copy and use his property. Ziv and Daniels have produced at least 39 half-hour television films based upon, copying, using and embodying plaintiff's property and have distributed said films in the United States, Canada, and in many foreign countries. Commencing October 3, 1955, said films have been shown in Los Angeles over KTTV's television station. Unless Ziv and Daniels are enjoined from producing and distributing the series "Highway Patrol," they will continue to profit from copying and using plaintiff's property. Unless KTTV is enjoined from telecasting said series and from selling advertising in conjunction therewith, the "already materially depleted value of plaintiff's property will be totally diluted and destroyed." Plaintiff has not been able to obtain Ziv's and Daniels' copies of television series

"Highway Patrol" for the purpose of attaching the same to the complaint pursuant to the provisions of section 426, subdivision 3, of the Code of Civil Procedure. By reason of their intentional and oppressive acts as aforesaid, Ziv and Daniels have misappropriated plaintiff's property and have destroyed its value to plaintiff. Plaintiff has been damaged thereby in the amount of \$350,000, which is the reasonable value of the television rights in plaintiff's property, and plaintiff has been damaged in an additional amount of \$100,000, which is the reasonable value of other exploitation rights in plaintiff's property. All the aforesaid acts of Ziv and Daniels are continuing wrongs, and unless said defendants are enjoined from producing and distributing "Highway Patrol" they will irreparably damage plaintiff's opportunities to exploit his property. All the aforesaid acts of Ziv and Daniels were intentional and oppressive and were the result of a scheme and conspiracy of said defendants to enrich themselves by appropriating and using plaintiff's property. By reason of those acts Ziv and Daniels have acquired substantial profits and they should account to plaintiff therefor.

[2] The second cause of action incorporates, by reference, all the allegations of the first cause of action, except the allegations as to damages. Additional allegations therein are: On January 18, 1954, plaintiff entered into a written agreement with Mr. Corcoran and Mr. Gundelfinger whereby they undertook to represent him in the exploitation of his property. Plaintiff and his representatives expended time, money and effort in order to interest others in producing or distributing or sponsoring plaintiff's property as a television series. As a result of the deliberate and intentional acts "as aforesaid," Ziv and Daniels misappropriated plaintiff's property and passed it off as their own, and they copied, used and embodied its elements in the production and distribution of their "Highway Patrol" series. They thereby committed gross acts of unfair competition against plaintiff "in that they turned his own property against

him." Since Ziv's announcement of its intention to produce the "Highway Patrol" television series, plaintiff and his associates have lost the interest of persons who, before such announcement, had manifested an interest in plaintiff's property. Plaintiff has been unable to create any new interest in his property. By reason of their gross acts of unfair competition, as aforesaid, Ziv and Daniels usurped and occupied the then undeveloped television area which plaintiff's property was designed to fill, thereby "diluting the value of said property." The value of said property "will be irreparably damaged" if Ziv and Daniels be permitted to unlawfully exploit plaintiff's property by using, copying, and embodying its elements in their television series entitled, "Highway Patrol." On September 21, 1955, some weeks before Ziv's and Daniels' "Highway Patrol" series began its first television run in Los Angeles, plaintiff advised KTTV of his property rights. KT TV chose to proceed with the telecasting of Ziv's and Daniels' television series, and is now telecasting said series, and KTTV thereby became an active and continuing participant with said defendants Ziv and Daniels in their scheme and conspiracy to misappropriate plaintiff's property and to use it to his detriment. Defendants Barker Bros. and General Electric Company, as sponsors of said "Highway Patrol" series, and defendants Roderick Mays and Rod Mays & Co., as advertising agents of said sponsors, are paying KTTV for the right to advertise the wares of said sponsors on the "Highway Patrol" series. No defendant has offered to pay plaintiff for the use of his property. Plaintiff has been damaged in the amount of \$350,000, which is the reasonable value of the television rights in plaintiff's property, and plaintiff has been damaged in the additional amount of \$100,000, which is the reasonable value of other exploitation rights in plaintiff's property. The foregoing acts of unfair competition by Ziv, Daniels and KTTV were intentional and oppressive.

The prayer is for compensatory and punitive damages, and for an accounting; and

to enjoin Ziv and Daniels from producing, distributing and exploiting the "Highway Patrol" television series; and to enjoin KTTV from telecasting the series; and to enjoin Barker Bros. and General Electric from advertising in conjunction with telecasting the series.

Ziv, Daniels and KTTV demurred to the complaint upon the grounds that neither of the alleged causes of action stated facts sufficient to constitute a cause of action, and that both of the alleged causes of action were uncertain, ambiguous and unintelligible. Said defendants also filed motions to strike certain portions of the complaint, and to require plaintiff to comply with section 426, subdivision 3, of the Code of Civil Procedure, by filing scripts with the court.

Subsequently, plaintiff delivered scripts of "Roadblock" and "Mountain Patrol," and the defendants delivered 19 scripts of "Highway Patrol," to the trial court.

In a memorandum filed by plaintiff with the trial court, plaintiff stated: "Plaintiff does not contend that any of defendants' scripts copy the mode of expression of any portion of plaintiff's two 'sample scripts'. Nor does plaintiff contend that in copying plaintiff's idea for a program series that defendants have copied the arrangement of the words in which the idea is couched. There are no copyright or plagiarism issues involved."

The motions to strike portions of the complaint were granted in part. The demurrers were sustained without leave to amend, and the action was dismissed. In a memorandum of ruling, with reference to the motions to strike and the demurrers, the trial judge stated: "The allegations of the complaint are broad enough to charge misappropriation of plaintiff's scripts 'Roadblock' and 'Mountain Patrol' [citation of references to complaint], which scripts have been tendered to the Court under C.C.P. 426(3) with copies of defendants' 19 scripts allegedly involved, under the caption 'Highway Patrol.' Examination pursuant to that section produces the conclusion that there is no infringement, in and

to plaintiff's rights, in the sense of plagiarism or literary pirating. In the numerous memoranda filed, plaintiff himself has abandoned such allegations, claiming that the 'idea' of such a series, as alleged in par. VI (a), was property; and was revealed in confidence to defendant Daniels, who thereafter, with the other defendants, proceeded to use it in violation of plaintiff's rights. Essentially, this involved the presentation in dramatized form of actual cases developed by the Highway Patrol. In such a development it seems clear plaintiff could not have a property right. If, for instance, the Department itself undertook such publicity, could it be enjoined because an employee thereof made the suggestion? The idea of dramatizing the operations of peace officers generally is certainly not unique. Consequently, it seems necessary to hold that no cause of action is purported to be stated except for plagiarism, which upon examination of scripts I reject; and which plaintiff also disclaims (C.C.P. 426(3).) As to the claim of an asserted property right, it appears that plaintiff has none, and if that is so, there cannot be breach of a fiduciary relationship through implementation of the 'idea,' which seems to be completely in the public domain."

Appellant contends that the first cause of action states a cause of action "for the disclosure and use of unpublished ideas and information revealed in confidence." He states that he has not attempted to plead an action based upon copyrightable material; that there is no copyright infringement or plagiarism herein; that defendants are not charged with copying portions of his script; that only the program idea was taken and such a taking is not actionable under statutory copyright principles; that he could never show, by comparing parallel columns of expression in the scripts, an actionable copying of his work "which copyright would protect." He states that his action is for unauthorized copying and use, in breach of confidence, of his idea for a television program; that the copying

he refers to is not the copying of his script but is the copying of his idea which he revealed in confidence; that if, after comparing the scripts, the over-all impression is that the format of defendants' program is like plaintiff's format, the plaintiff has stated a cause of action; and that where a plaintiff's intellectual production is obtained in breach of trust the law punishes the wrongful act of obtaining the idea "rather than consciously to protect the 'property' of the plaintiff." Appellant argues further that a cause of action for breach of confidence is stated by the allegations that his program idea was given to Daniels in confidence, and that Daniels disclosed the idea to Ziv, and that Ziv used the idea with knowledge of appellant's "rights." It seems to be appellant's argument that if an idea which is not protectible is disclosed to a person in confidence, the idea then becomes protectible.

Section 980 of the Civil Code, as amended in 1947, provides in part: "The author or proprietor of any composition in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition." In *Weitzenkorn v. Lesser*, 40 Cal.2d 778, at page 789, 256 P.2d 947, at page 956, the court said: "The 1947 amendment to section 980 has eliminated the protection formerly given to 'any product of the mind'. The statute as it now exists, and as it read at the time this cause of action arose, provides protection only 'in the representation or expression' of a composition. The Legislature has abrogated the rule of protectibility of an idea and California now accepts the traditional theory of protectible property under common law copyright." See also *Desny v. Wilder*, 46 Cal.2d 715, 732, 299 P.2d 257.

The allegations show that the files which were the basis for plaintiff's program idea were files of a department of state government; and that plaintiff did not have per-

mission to use the files for his personal commercial purposes or at all. It seems to be his position that if a person expresses, in confidence to an employee of the government, an idea with reference to a commercial use of government files that the person thereby establishes a legal position favorable to himself whereby he can prevent the employee, or others, or the government itself, from using the files in a manner suggested by him, except with his consent. It was not shown that plaintiff had a contract, express, or implied in fact or implied in law, with Daniels or anyone. Plaintiff asserts that his action sounds in tort. There is no allegation that Daniels accepted, in confidence, the disclosure of the idea. Plaintiff had no property right in the idea with respect to use of the government files for commercial purposes. He states that a question of property does not enter into the matter where there is a confidential relationship, but that an exclusive property right might be a prerequisite for legal relief when there is no relationship between the parties. He argues, however, that his idea was a property right. The alleged first cause of action did not state facts sufficient to constitute a cause of action.

Appellant contends that his second cause of action sets forth facts sufficient to constitute a cause of action for unfair competition in that it shows "that defendants have surreptitiously misappropriated plaintiff's work product, have tortiously interfered with his prospective contractual relations, and have unjustly enriched themselves thereby." The cases cited above, with reference to the first cause of action, are applicable here. Also, the above discussion is applicable here. The alleged second cause of action does not state facts sufficient to state a cause of action.

The court did not err in sustaining the demurrers without leave to amend.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

157 Cal.App.2d 515

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Alan Kent GORG, Defendant and Appellant.
Cr. 3341.

District Court of Appeal, First District,
Division 1, California.

Feb. 10, 1958.

Hearing Denied April 9, 1958.

Prosecution for illegal possession of narcotics. The Superior Court, Alameda County, William J. McGuiness, J., entered judgments of conviction and one of the defendants appealed. The District Court of Appeal, Peters, P. J., held that facts as disclosed by record which showed that police officers had information from informant that defendants were using apartment for sale of narcotics, justified arrest without a warrant, and subsequent search of premises on basis of warrant was valid.

Affirmed.

1. Arrest ⇨63(4)

Whether an arrest accomplished without a warrant of arrest is legal depends on whether or not police had reasonable cause to believe that person arrested was committing or had committed a felony.

2. Arrest ⇨63(4)

Reasonable or probable cause to believe person was committing or had committed a felony so as to justify arrest without a warrant is such a state of facts as would lead a man of ordinary caution and prudence to believe, and conscientiously to entertain a strong suspicion, that person accused is guilty.

3. Arrest ⇨63(4)

Reasonable cause to justify an arrest without warrant may consist of information obtained from others and is not limited to evidence that would be admissible at trial on issue of guilt.

4. Arrest ⇨63(1)

Just as a search without a warrant cannot be justified by what it turns up, an ar-

rest without a warrant cannot be justified by what is subsequently discovered.

5. Arrest ⇨63(4)

Where officers received information from reliable informant that defendant was trafficking in marijuana at a certain address and such address was kept under surveillance by officers who saw known narcotic users frequent premises, and officers knew of defendant's past record for narcotic conviction, they had reasonable cause to arrest defendant, trying to leave premises, without a warrant.

6. Searches and Seizures ⇨3(1)

Where police officers had been told by reliable informants that defendant was engaging in marijuana traffic at a certain address and such premises were kept under surveillance by police officers, who saw known narcotic users enter, police officers had reasonable grounds for search of premises without a warrant.

7. Criminal Law ⇨419(3)

Fact that information from informant giving probable cause for arrest without warrant was told from informant to one police officer who in turn told another officer, who actually arrested defendant, did not constitute hearsay upon hearsay and was admissible in hearing on probable grounds for arrest without warrant.

8. Witnesses ⇨221

Where at preliminary hearing respecting legality of arrest without a warrant, defendant raised question as to identity of confidential informants which court refused to compel the disclosure of, and thereafter defendant sought writ of prohibition challenging validity of arrest and of search and seizure, and upon denial of application for writ case proceeded to trial without defendant making further demands for names of informants, defendant waived objections in failing to disclose names, if any. West's Ann.Pen.Code, § 995.

9. Criminal Law ⇨245

In giving one aggrieved at preliminary hearing remedy of motion to set aside indictment or information as well as appli-

cation for writ of prohibition, it is contemplated that preliminary proceedings should be challenged at that time and failure to do so will constitute waiver of any alleged error. West's Ann.Pen.Code, § 995.

10. Criminal Law Ⓒ1036(2)

If accused does not request name of informer at preliminary or at trial, failure to disclose informer's identity is waived and cannot be raised on appeal.

11. Criminal Law Ⓒ419(3)

Where policeman, without objection of defendant, testified on trial as to information it secured from unnamed informers, there was nothing objectionable per se in testimony, and although it was hearsay, it was admissible hearsay.

12. Searches and Seizures Ⓒ3(8)

Where lower flat consisted of three separate bedrooms having unlocked doors, each occupied by a different tenant, and kitchen and other rooms were used in common by all of the tenants, warrant authorizing search of lower flat and naming one of the tenants as person occupying premises authorized search of entire premises, including bedrooms occupied by other tenants.

13. Searches and Seizures Ⓒ3(8)

While search warrant for one building on tract of land occupied by a named person will not justify a search of another separate building on the same tract of land occupied by another person, or will not justify search of a separate floor of the same building occupied by an unnamed tenant, such rule is applicable only where there are separate and distinct living quarters occupied by different persons.

Charles R. Garry, San Francisco, Julius M. Keller, San Francisco, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice. 1960 T61

Defendant Alan Kent Gorg and one Norman Fontaine were jointly charged with the illegal possession of narcotics. Gorg admitted a prior narcotic felony conviction. The two were separately tried, and both were found guilty. Gorg appeals from the judgment of conviction and from the denial of his motion for a new trial. His contentions are that his arrest without a warrant was illegal, that such illegality tainted the subsequent search of his premises even though such search was based on a warrant, and that, in any event, the search warrant was a "blanket" or "general" warrant and, as such, invalid.

The facts as disclosed by the record are as follows: Gorg, Fontaine and one Hyde, for some months prior to June 1, 1956, when the arrest and search were made, lived in the lower flat of a two-story building located in Berkeley. The flat consisted of three bedrooms, a bathroom, a kitchen and a living room. The owner testified that each tenant paid his rent separately to her in differing amounts. Each tenant had his own bedroom, which was never locked, and the three occupants shared the utility expenses, and the other rooms of the apartment. Each of the three bedrooms opened into one of the areas occupied in common by the three tenants.

On March 21, 1956, Inspector Braumoeller of the Bureau of Narcotic Enforcement received a phone call from a reliable informant who told the inspector that he believed that Gorg and Fontaine were trafficking in marijuana at the address in question; that he had obtained a marijuana cigarette in the bathroom of the establishment; that there was considerable traffic to and from the apartment; that he believed marijuana was being sold from the premises and that marijuana parties were being held there. The informant did not say that he saw Gorg place the marijuana cigarette in the bathroom, or that he had seen Gorg sell or make any marijuana cigarettes. The inspector was familiar with the fact that Gorg had a prior felony con-

viction for a narcotic offense. *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469. He transmitted that knowledge and the information received from the informer to the Berkeley Police Department. That department placed the premises under surveillance for a period of about three months. Officer Reppas testified that during this period he observed several known narcotic offenders visit the premises, but he never saw these persons in the presence of appellant. Inspector McBee, at the preliminary examination, testified that in talking with several informers he heard appellant's name mentioned as being involved in the narcotic traffic, heard that appellant was associated with narcotics at his residence, and heard that narcotics could be obtained there from either Fontaine or appellant. He refused to identify these informers. He also stated that a Youth Authority officer informed him that a person on parole had purchased narcotics from Fontaine at the residence. The person on parole and the Youth Authority officer were both identified.

On the evening of May 31, 1956, Inspector McBee supplied an informer with funds, observed him enter the premises in question, and when he came out he delivered to the inspector six marijuana cigarettes. Appellant testified that he was in Los Angeles from May 26th to 11 p. m. on May 31, 1956, attending the funeral of his father.

On June 1, 1956, the police obtained a search warrant which named Fontaine and which authorized a search of the lower flat in question "including all rooms and buildings used in connection with the premises and adjoining same, and in any receptacle or safe therein." At about 9 p. m. a number of people were observed leaving the premises. Shortly thereafter appellant was observed backing his automobile out of the premises. Fontaine and another person were with him. Officer Reppas placed appellant under arrest. Appellant then reached in his shirt pocket for a cigarette that looked like and was wrapped in the same manner as a marijuana cigarette. A scuffle ensued, during which appellant swallowed

the cigarette. The arresting officer, in the presence of appellant, told another officer that appellant had swallowed a marijuana cigarette, and appellant remained silent. A search of the automobile disclosed the remains of a marijuana cigarette on the floor. Then the police asked Fontaine to unlock the premises, which he did, and then the police served the search warrant on Fontaine. A search of the premises was quite rewarding. A cellophane bag of marijuana seeds and two marijuana cigarette butts were found in an ash tray in the living room. In Fontaine's bedroom two bottles of marijuana were found, as well as several marijuana cigarette butts. In appellant's bedroom, under a bookcase, a cardboard box containing marijuana was found. Fontaine testified that all of this marijuana belonged to him. A search of appellant's clothing disclosed traces of marijuana in the debris from the pockets.

Appellant first contends that his arrest was illegal, and that such illegality tainted the subsequent search of the automobile and the premises, even if the search of the premises was based on a valid search warrant. Based on this premise it is urged that all of the evidence against him, that is the exhibits found in his automobile and on his person, or in his apartment, the evidence of the scuffle and his swallowing a cigarette, and the evidence of his silence in the face of an accusation was inadmissible.

[1-4] Whether the arrest was a legal one, since it was accomplished without a warrant of arrest, depends upon whether or not the police had reasonable cause to believe that appellant was committing or had committed a felony. *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531; *People v. Cannon*, 148 Cal.App.2d 163, 306 P.2d 589. Reasonable or probable cause is such a state of facts as would lead a man of ordinary caution and prudence to believe, and conscientiously to entertain a strong suspicion that the person accused is guilty. *People v. Soto*, 144 Cal.App.2d 294, 301 P.2d 45. Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would

be admissible at the trial on the issue of guilt. *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535; *People v. Cannon*, 148 Cal. App.2d 163, 306 P.2d 589. Just as a search without a warrant cannot be justified by what it turns up (*People v. Gale*, 46 Cal. 2d 253, 294 P.2d 13; *People v. Goodo*, 147 Cal. App.2d 7, 304 P.2d 776), an arrest without a warrant cannot be justified by what is subsequently discovered. *People v. Brown*, 45 Cal.2d 640, 290 P.2d 528.

How do these rules apply to the present case? The important considerations are whether the officer, before the search, has reasonable cause to make the arrest, and whether the subsequent search is reasonably justified as an incident of that arrest. *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531.

[5,6] In the instant case the officers had ample evidence upon which to base the search of the premises even without a warrant, and the same evidence constituted ample information upon which to arrest the appellant. They had the information received from the various informers which was, of course, admissible on the issue of reasonable cause. They knew of appellant's past record. They saw known narcotic addicts going in and out of the premises. An identified person on parole had given them pertinent information. When they were about to serve the search warrant they saw appellant and Fontaine trying to leave the premises. The facts known to them constituted reasonable grounds to warrant the arrest and search. See *Willson v. Superior Court*, 46 Cal.2d 291, 294 P.2d 36; *People v. Cannon*, 148 Cal. App.2d 163, 306 P.2d 589; *People v. Hood*, 150 Cal. App.2d 197, 309 P.2d 856; *People v. Gannett*, 148 Cal. App.2d 280, 306 P.2d 571; *People v. Sayles*, 140 Cal. App.2d 657, 295 P.2d 579; *People v. Maddox*, 46 Cal.2d 301, 294 P.2d 6.

[7] Appellant contends that the relay of information from the informer to Braumoeller to the Berkeley police who arrested him constitutes hearsay upon hearsay, and

was inadmissible. This point is without merit. *People v. Hood*, 150 Cal. App.2d 197, 309 P.2d 856, is precisely in point. There an informant gave information to a parole officer who relayed it to her superior officer who relayed it to the narcotic detail of the police department and so on to the arresting officer. At page 201 of 150 Cal. App.2d, at page 858 of 309 P.2d the court stated: "The police were reasonably justified in relying on this information because it came from an official source, * * * Defendant, however, would deprecate the reliability of the information because it passed through several hands before it reached Officer MacGregor. The fact that the information did not come from the informant directly to the officer who made the arrest does not prevent reliance on its trustworthiness since it reached him through official channels. The arrest of Hood was therefore legal."

[8] On the oral argument, on the suggestion of this court, the point was raised for the first time that reversible error might have been committed by the sustaining of objections to questions seeking the identity of certain of the confidential informants. This question about the refusal to disclose the name of the informers is a most serious one, and has been discussed in many cases. If the problem involved in those cases were here involved, a most serious question would be presented. But we do not think it is involved under the circumstances of this case. That is so for the following reasons:

At the trial it was stipulated by all concerned that in addition to the testimony already introduced at the trial the transcript at the preliminary hearing could be considered by the trial court on the issue of the claimed unlawful search and seizure. The record at the preliminary shows that Officer McBee testified as to certain information that he had secured from certain informers and about the use of the informer on May 31, 1956, to make a buy at the premises in question. The record shows that counsel for appellant on cross-exami-

nation of McBee sought to secure the names of these informers. The witness and prosecutor claimed privilege. They were sustained by the court, the judge refusing to compel the divulging of this information. It may be assumed that these rulings were erroneous when made.

Thereafter, the appellant sought a writ of prohibition challenging the validity of the arrest and of the search and seizure. In that proceeding before the other division of this court appellant did not in any way discuss or raise the question as to the validity of these rulings. The court denied the application for the writ.

The case then proceeded to trial. Inspector Braumoeller of the State Bureau of Narcotic Enforcement testified, as already pointed out, that he had received a telephone call on March 21, 1956, from an informer, deemed to be reliable, telling him that Gorg and Fontaine were dealing in marijuana at their apartment, and giving Braumoeller the other information described in the first part of this opinion. The information so secured started the police on their surveillance of the apartment and constituted part of the information upon which the search, seizure, and arrest were subsequently made. In his cross-examination of Braumoeller counsel for appellant made no demand at all for the name of the informer.

After appellant was convicted, on this appeal, in his opening and closing briefs, not one word was said about the failure of the court to compel the disclosure of the identity of the informants. The first time that the point was mentioned, after the preliminary hearing, was when this court requested that the point be briefed when the cause was first placed on the calendar for oral argument in August of 1957.

[9-11] Under these circumstances, even if it be assumed that appellant was entitled to the name of the informer when requested at the preliminary hearing, and that it was error to deny it, such error has clearly been waived. The law gives one aggrieved at the preliminary hearing the remedy of a

motion under section 995 of the Penal Code and the application for a writ of prohibition. Appellant availed himself of these remedies, but did not see fit to raise the point under discussion at that time. That is the time the law contemplates the preliminary proceedings should be challenged. Then, at the trial, appellant saw fit to permit Braumoeller to testify about the informer without challenge. There was nothing objectionable *per se* in the testimony about the information secured from the informers. Such testimony, although hearsay, is admissible hearsay. *People v. King*, 140 Cal. App.2d 1, 294 P.2d 972. Unless, on cross-examination, a request is made for the identity of the informer on penalty of having the evidence stricken, there is nothing upon which the trial court can rule. The evidence is admissible, and is alone sufficient to warrant the arrest and search. No objection to it was made. It is now too late to make the objection at this late date. It is well settled that if the accused does not request the name of the informer at the preliminary or at the trial, the failure to disclose the informer's identity is waived and cannot be raised by writ or appeal. *Lorenzen v. Superior Court*, 150 Cal.App.2d 506, 310 P.2d 180; *Robison v. Superior Court*, 49 Cal.2d 186, 316 P.2d 1. The same rule applies when the request is made at the preliminary and denied, and the appellant does not see fit to challenge it by motion or by writ, or by his briefs on appeal. Whatever rights appellant may have had were waived. The fact that appellant apparently believed that he had waived this point, or that it was unimportant, is substantiated by the fact that in his opening and closing briefs the point was not raised or discussed. The failure to pursue the issue, and his failure to make any request for the name of Braumoeller's informant constituted a waiver of any right that he may have possessed for the disclosure of the identity of the informer.

The last point raised by appellant is that the search was illegal because based on a warrant for a search of the premises occupied by Fontaine, and a search was made of

the bedroom occupied by Gorg. It is contended that a warrant issued in the name of one tenant of a house does not authorize the officers to search those parts of the premises not occupied by the person named in the warrant. Otherwise, so it is contended, the warrant would be a "blanket" search warrant and void. See *Williams v. State*, 95 Okl.Cr. 131, 240 P.2d 1132, 31 A.L.R.2d 851.

[12] There are two answers to this contention. The first is that, independent of the warrant, the officers, for reasons already stated, had reasonable grounds upon which to make the arrest and search without a warrant. Therefore, even if the search warrant were void, which it was not, the arrest and search can be justified on these facts known to the officers. In the second place, the warrant was not void. It was issued for a search of the lower flat in question, and Fontaine was named as the one occupying the named premises. Actually three people lived in this flat, sharing the living room, kitchen, bath and halls. The three bedrooms opened on these rooms and were not locked. All of the rooms constituted one living unit.

[13] While a search warrant for one building on a tract of land occupied by a named person will not justify a search of another separate building on the same tract of land occupied by another person (*Combs v. State*, 94 Okl.Cr. 206, 233 P.2d 314; *Wallace v. State*, 89 Okl.Cr. 365, 208 P.2d 190), and will not justify a search of a separate floor of the same building occupied by an unnamed tenant (*Linthicum v. State*, 66 Okl.Cr. 327, 92 P.2d 381; *United States v. Innelli*, D.C., 286 F. 731), such rule only applies where there are separate and distinct living quarters occupied by different persons. A rule of reason must be applied. Here the living unit was one distinct unit occupied by three persons. When the police, pursuant to the warrant, searched the living room and found marijuana, and then searched Fontaine's bedroom and found marijuana, they acted as reasonable and prudent men in searching the other two

bedrooms that were unlocked and an integral part of the same living quarters.

The appeals from the order denying the motion for a new trial and from the judgment of conviction are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.



157 Cal.App.2d 507

C. L. GRIFFIN and Etna L. Griffin, his wife, Plaintiffs and Respondents,

v.

COUNTY OF MARIN, a political subdivision of the State of California, Defendant and Appellant.

No. 17398.

District Court of Appeal, First District,
Division 1, California.

Feb. 10, 1958.

Proceedings involving question whether amendatory ordinance to county zoning ordinance, in so far as it applied to landowners' property, was discriminatory, arbitrary, capricious, confiscatory and oppressive. The Superior Court, County of Marin, Dudley G. McGregor, J., entered judgment for landowners and county appealed. The District Court of Appeal, Peters, P. J., held that where landowners' property had been classified as light industrial district, county planning commission approved plans submitted for construction of gasoline station on corner of property county building inspector issued permit, and, immediately after permit was issued, a contractor was employed to clean surface and level off high places in reliance on permit, action, of county board of supervisors thereafter, in rezoning landowners' property from light industrial to one-family residence and in instructing county building inspector to revoke permit

amounted to a discriminatory, arbitrary, capricious, confiscatory and oppressive use of police power and constituted an unreasonable exercise of police power.

Affirmed.

1. Counties $\S$ 21½

Where county planning commission approved plans submitted for construction of gasoline station on corner of property, county building inspector issued permit to landowners and petroleum corporation, and, immediately after permit was issued, contractor was employed to clean surface and level off high places in reliance on permit, action, of county board in thereafter rezoning landowners' property from light industrial to one-family residence and in instructing county building inspector to revoke permit amounted to a discriminatory, arbitrary, capricious, confiscatory and oppressive use of police power.

2. Counties $\S$ 21½

In action by landowners against county based on theory that amendatory zoning ordinance, which reclassified landowners' land from light industrial to one-family residence, confiscated landowners' property, plan for gasoline service station, which was prepared by petroleum corporation which had purchased part of landowners' property, was admissible to show an invalid attempt by county to interfere with rights which had vested under permit issued by county building inspector to both landowners and petroleum corporation to construct service station.

3. Appeal and Error $\S$ 1047(1)

Where trial court had found that an amendatory ordinance to county zoning ordinance, in so far as it applied to landowners' property, was discriminatory, arbitrary, capricious, confiscatory and oppressive and unconstitutional and an unreasonable exercise of police power, even if some rulings relating to evidence were erroneous, rulings could not affect validity of judgment.

4. Counties $\S$ 21½

In action by landowners against county based on theory that amendment to county zoning ordinance, in so far as it applied to landowners' property, was confiscatory, oppressive and unconstitutional, in that it reclassified landowners' property from light industrial zone to one-family residence, evidence, introduced by county on theory of unclean hands to effect that, when landowners purchased property and when board of supervisors rezoned it, landowners represented that they intended to use property for a woodworking furniture shop and that they would reside on premises and would use it for no other purpose was properly excluded.

5. Counties $\S$ 21½

Where county had zoned landowners' property for light industrial use, county several years later and when landowners had contracted to sell portion of land for purposes of constructing gasoline service station, could not impeach unambiguous terms of its own zoning ordinance by parol evidence of intentions of the members of the board when they passed it.

6. Counties $\S$ 21½

The police power to zone property may not be limited by private agreement.

Leland H. Jordan, County Counsel,
County of Marin, San Rafael, for appellant.

Kennedy, Bloom, Fletcher & Burbank,
Leonard J. Bloom, James M. Fletcher, San
Rafael, for respondents.

PETERS, Presiding Justice.

The County of Marin appeals from a judgment in favor of C. L. and Etna L. Griffin, declaring an amendatory ordinance to the county zoning ordinance, insofar as it applies to the Griffin's property, to be "discriminatory, arbitrary, capricious, confiscatory and oppressive, and the same is unconstitutional, null and void, and constitutes an unreasonable exercise of police power on the part of defendant County of

Marin," and holding that the Griffins were entitled to use their land in accordance with its original industrial zoning, and restoring to them their permit to construct a gasoline service station on the property.

On February 17, 1946, the respondents offered to purchase from its then owners the piece of real property here involved, which fronts on Tiburon Boulevard, a heavily traveled road in Marin County. The offer contained this provision: "this offer is conditional upon the above property being zoned for light highway business and said application being approved." On March 27, 1946, the Marin County Planning Commission, on application of the seller of the property, reclassified the property from a suburban agricultural district to a light industrial district, designated as M-1. On April 22, 1946, the Marin County Board of Supervisors amended the then zoning ordinance by reclassifying the property to an M-1 zone. Extensive property to the south of respondents' property was already classified as being in a light industrial district—M-1—and had been used for a number of years as a lumber yard and planing mill. The property to the north was classified as being in a limited roadside business district.

Respondents completed the purchase of the property and, immediately thereafter, pursuant to permits issued by appellant, constructed on the northern portion of their property a furniture manufacturing and repair factory. In April of 1951, also pursuant to permit, a real estate office was constructed on the southeast corner of respondents' property.

The property immediately across the street from respondents' property was classified as suburban-agricultural. On July 28, 1953, the Board of Supervisors reclassified that property to a retail business district. The real estate office, above mentioned, was then moved to this property. On the same day other property across the street from respondents' property was reclassified from suburban-agricultural to light industrial. That property is used as a lumber storage

yard for the lumber yard-planing mill above mentioned.

On December 4, 1953, respondents contracted to sell the southeast corner of their property to the Wests for \$18,750 for use as a gasoline service station to be constructed and operated by the General Petroleum Corporation. On February 23, 1954, the State Division of Highways entered into a contract with the County of Marin which contemplated the construction of a cloverleaf where Tiburon Boulevard intersects Highway 101 and the widening of Tiburon Boulevard where it runs past respondents' property. This construction contemplated the condemnation of a portion of respondents' property.

On April 6, 1954, the County Planning Commission approved the plans submitted by the respondents for the construction of a gasoline service station on their property, but at the same meeting recommended that respondents' property be rezoned from light industrial, to first residential, that is, to one-family residential, and that the property north of respondents' property be reclassified from a limited roadside business district to a one-family residential district.

About two weeks later, that is, on April 21, 1954, the Marin County Building Inspection Department issued a building permit to respondents and to General Petroleum Corporation for the erection of the gasoline service station, and issued a utility permit for the installation of the necessary utilities. Prior to this date the respondents and General Petroleum had the property surveyed and also had prepared the plans and specifications for the gasoline service station. Immediately after securing the permits the permittees employed a contractor with a bulldozer who cleaned off the surface of the ground and at one end of the property levelled off a high area. Then, on May 4, 1954, the Board of Supervisors passed a resolution of intention to rezone the property from light industrial to one-family residence, and, at the same meeting, instructed the County Building Inspector to revoke the building permit. Several weeks later, on May 25, 1954, the Board reclassi-

fied respondents' property and the land north of respondents' property, as a one-family residence area. Respondents' permit was then revoked.

Experts called by respondents testified that the best and highest use of their property was for commercial and industrial use, and that the property was undesirable as residential property. One expert testified that as residential property it was worth but \$8,500, while as industrial property it was worth over \$50,000. Another fixed the residential value at \$6,500 and the commercial or industrial value at \$71,225. All of respondents' experts fixed the commercial value of the property far in excess of its residential value.

Shortly after the rezoning of the property to a one-family residence area the State of California filed a condemnation proceeding against respondents to condemn a portion of their property for highway purposes. As to this portion of the property sought to be condemned the only effect of the rezoning would be that if the rezoning is upheld the state would pay for the property at its residential instead of its commercial value. The state is not a party to this proceeding, but the county knew of the state's plans before it attempted to rezone the area. Obviously, as to the condemned property, the rezoning had no reasonable connection with the public health, safety or general welfare.

On this evidence the trial court found that the purported reasons for rezoning respondents' property were mere pretexts and without reference to the public health, safety or general welfare; that the rezoning deprives respondents of valuable property rights without justification; that the ordinance of May 25, 1954, as to respondents was discriminatory, confiscatory and unconstitutional. The court concluded that the property was still in a light industrial zone and that the revocation of the building permit was void and unconstitutional. Judgment was entered accordingly. The County of Marin appeals.

The parties argue many points in their briefs, most of them relating to the rulings

of the trial court on the admissibility or exclusion of evidence. These rulings are all immaterial if the finding that the rezoning ordinance was unconstitutional is supported by the evidence or by the law.

Under the evidence, the finding in question is amply supported. After the respondents and General Petroleum Corporation had changed their position in reliance on the then zoning ordinance and upon the issuance of the permit, performing a material amount of work thereunder, the respondents had a vested right in the permit, and the county had no legal right to revoke it.

In *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14, the property owner successfully enjoined a zoning ordinance that purported to abolish an existing use, the court holding that the classification in the ordinance was reasonable in prohibiting new businesses of the character involved, but was invalid insofar as it purported to affect existing lawful businesses. The court held that the police power, which is, of course, the basis for zoning ordinances, did not justify the destruction of existing businesses. In so holding the Supreme Court cited, relied upon, and quoted from the case of *Pelham View Apartments v. Switzer*, 130 Misc. 545, 224 N.Y.S. 56. In that case a building permit for an apartment house was issued to respondent on October 6, 1926. On April 26, 1927, the city amended the zoning ordinance to prohibit the construction of apartment houses in the area. The permit was revoked. In the interim, in reliance on the permit, the respondent had completed the purchase of the property, employed an architect, had the property surveyed and started to excavate for the cellar. The court held that the revocation of the permit was invalid. In so holding, the court stated (p. 224 N.Y. S. at page 58):

"It was beyond the power of the common council to enact an ordinance to invalidate the permit issued and acted upon. It was likewise beyond the jurisdiction of the building inspector to revoke such permit,

basing his revocation upon a subsequently enacted ordinance.

"Where a permit to build a building has been acted upon, and where the owner has, as in this instance, proceeded to incur obligations and to in good faith proceed to erect the building, such rights are then vested property rights, protected by the federal and state Constitutions. [Citing a case.] * * *

"While it is unfortunate that the erection of this apartment house may be distasteful to people living in the neighborhood, and while perhaps it is unfortunate that their property should be thus affected, yet the protection of such rights must be legally done, and the public officials representing the people cannot legally be permitted to change the zoning law, and cancel a permit previously issued under the original zoning act, where an innocent purchaser of real estate has in good faith acted upon such official action of the city, and has thereby acquired vested rights under his permit.

"* * * It would be nothing short of confiscation, and a complete disregard of constitutional rights, if a municipality could revoke a building permit issued under the conditions as presented in this case."

The Jones case, *supra*, after citing and quoting from many cases from various jurisdictions in support of these principles, concluded (211 Cal. at page 321, 295 P. at page 22) as follows:

"Our conclusion is that where, as here, a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of police power. * * *

"It follows that the present ordinance * * * is invalid in its application to these plaintiffs."

The rule of the Jones case has been consistently followed not only where existing uses are attempted to be abolished by a zoning ordinance, but also to the situation discussed by the Pelham View Apartments v. Switzer case, *supra*, namely, where a permit has been issued and work has been

done under it in good faith before revocation. One of the leading cases is *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal.App.2d 776, 194 P.2d 148. There a municipality sought to revoke a permit to drill an oil well after the permittee had started preparatory work to drill the well in reliance on the permit. The court held this was an attempt to take private property without due process. In so holding the court stated (85 Cal.App.2d at page 783, 194 P.2d at page 152):

"It is not, nor could it be, claimed that a city council exercises unlimited discretion in the matter of revoking permits. A permit having issued, the power of a municipality to revoke it is limited. If the permittee does nothing beyond obtaining the permit or fails to comply with reasonable terms or conditions expressed in the permit granted, the proper authorities may revoke it. [Citations.] If a permittee has acquired a vested property right under a permit, the permit cannot be revoked. The principle is stated in 9 Am.Jur., sec. 8, p. 204: 'By the weight of authority, a municipal building permit or license may not arbitrarily be revoked by municipal authorities, particularly where, on the faith of it, the owner has incurred material expense. Such a permit has been declared to be more than a mere license revocable at the will of the licensor. When, in reliance thereon, work upon the building is actually commenced and liabilities are incurred for work and material, the owner acquires a vested property right to the protection of which he is entitled.'"

The court cited many authorities in support of this position, including the Pelham View Apartments case, *supra*. (See as particularly pertinent *Sandenburgh v. Michigamme Oil Co.*, 249 Mich. 372, 228 N.W. 707; *City of Buffalo v. Chadeayne*, 134 N.Y. 163, 31 N.E. 443.)

In *San Diego County v. McClurken*, 37 Cal.2d 683, at page 691, 234 P.2d 972, 977; the Supreme Court summarized the rule involved as follows:

"If an owner has legally undertaken the construction of a building before the effec-

tive date of a zoning ordinance, he may complete the building and use it for the purpose designed after the effective date of the ordinance. [Citing a Michigan and a New York case.] Protection of an undertaking involving the investment of capital, the purchase of equipment, and the employment of workers, is akin to protection of a nonconforming use existing at the time that zoning restrictions become effective. The same principle underlies the rule that a permittee who has expended substantial sums under a permit cannot be deprived by a subsequent zoning ordinance of the right to complete construction and to use the premises as authorized by the permit. [Citing the Trans-Oceanic Oil Corp. case, *supra*, and 4 out-of-state cases.]”

[1] These cases are conclusive in the instant appeal. Just before the permit was issued on April 21, 1954, and in anticipation of its issuance, the respondents and General Petroleum had the property surveyed. Plans and specifications were drafted. Immediately after the permit was issued a contractor was employed to clean the surface and to level off the high places—all done in reliance on the permit. While the work on construction had not progressed to the extent it had in most of the cited cases, the work had progressed at a material cost to respondents. The trial court was justified in finding that these expenses had been incurred in good faith reliance on the permit and that respondents’ rights had therefore vested. Whether the work had progressed to a point sufficient to warrant the estoppel was a trial court question.

[2] Appellant urges that it was error to admit evidence of the plans for the service station, for the reason that such plans were prepared by General Petroleum Corporation and not by respondents. But the evidence also shows that Mr. Griffin spent a considerable amount of time in consultation with General Petroleum Corporation’s engineers and actually assisted in the preparation of the plans. The building permit ran to both respondents and General Petroleum Corporation. There was a valid out-

standing contract with General Petroleum Corporation and the plans of the proposed building were obviously a link in the chain of evidence to establish that the rezoning was an invalid attempt to interfere with vested rights. There was no error in the admission of these plans.

[3] Inasmuch as we are of the opinion that the judgment must be upheld on the ground that the revocation of the permit and the rezoning invalidly attempted to interfere with vested rights, none of the other points relating to the admission and exclusion of evidence raised by the parties need be discussed because none of these related to evidence on this basic ruling. Even if erroneous, and most of them were not, they could not affect the validity of the judgment.

[4, 5] The only other point necessary to discuss is appellant’s contention that the trial court erred in excluding evidence relating to the defense of “unclean hands.” The appellant attempted to show that when respondents purchased the property in question in 1946, and when the Board of Supervisors rezoned it so as to make it a part of a light industrial zone, respondents represented to the Board that they intended to use the property for a woodworking furniture shop and that they would reside on the premises and would use it for no other purpose. Appellant urges that to now try to change the nature of the use is bad faith and amounts to coming into court with unclean hands. The evidence was properly excluded. The County cannot, at this late date, impeach the unambiguous terms of its own zoning ordinance by parol evidence of the intentions of the members of the Board when they passed it. *Childress v. Peterson*, 18 Cal.2d 636, 117 P.2d 336; *In re Estate of Sloan*, 7 Cal.App.2d 319, 46 P.2d 1007.

[6] The trial court correctly held that it could not permit evidence to be introduced contrary to the clear wording of the ordinance classifying the respondents’ property as light industrial. The police power to zone property may not be limited by pri-

vate agreement. *Acker v. Baldwin*, 18 Cal. 2d 341, 115 P.2d 455. Nor can the Board properly show that the ordinance was conditioned upon a secret agreement with the property owner. Such an agreement would be illegal and against public policy. *Houston Petroleum Co. v. Automotive Products Credit Ass'n*, 9 N.J. 122, 87 A.2d 319. Recognition of the defense of unclean hands under such circumstances would result in the enforcement of an illegal agreement. For these reasons the evidence was properly excluded.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



**WYOMING PACIFIC OIL COMPANY, a
corporation, Plaintiff and Appellant,**

v.

Edward J. PRESTON et al., Defendants,

George B. Bush, Respondent. *

Civ. 22070.

District Court of Appeal, Second District,
Division 2, California.

Feb. 11, 1958.

Hearing Granted April 9, 1958.

Action for cancellation of instruments. Plaintiff appealed from orders of the Superior Court of Los Angeles County, Aubrey N. Irwin and A. A. Scott, JJ., granting defendants' motion to dismiss and denied plaintiff's motion to vacate order of dismissal. The District Court of Appeal, Fox, P. J., held that fact order for service on resident defendant by publication recited that defendant was concealing himself in order to avoid service of process was not res judicata on question, and records sustained finding that defendant had not

* Opinion vacated 329 P.2d 489.

concealed himself to avoid service of summons.

Affirmed.

1. Judgment ⇨17(1)

No one shall be bound or concluded by a judgment unless he has had his day in court by which is meant that he has been duly cited to appear and has been afforded an opportunity to be heard, and upon such hearing to offer evidence in support of his cause.

2. Process ⇨98

Fact that order authorizing service on resident defendant by publication recited that defendant was concealing himself in order to avoid service of process, was not binding upon defendant or the court in so far as it purported to be an adjudication of question of defendant's concealment to avoid service. West's Ann.Code Civ.Proc. § 581a.

3. Dismissal and Nonsuit ⇨73

In proceeding on motion to dismiss action as against defendant for failure to serve process within three-year statutory period, wherein defendant had originally filed notice of motion to quash and on day before hearing on motion filed a supplemental motion to dismiss action, there was no error by trial court in ordering dismissal of action without giving plaintiff, who had made no request therefor, additional time in which to argue out-of-state exception to statute requiring service within three years. West's Ann.Code Civ.Proc. § 581a.

4. Appeal and Error ⇨931(1), 1011(1)

On appeal, affidavits favoring contentions of prevailing party establish the facts stated therein, and where there is a substantial conflict in the facts stated, determination of controverted facts by trial court will not be disturbed.

5. Dismissal and Nonsuit ⇨71

In proceeding on defendant's motion to dismiss action for failure to serve process on him within three years, evidence sus-

tained finding of trial court that resident defendant had not concealed himself in order to avoid service of process. West's Ann.Code Civ.Proc. § 581a.

6. Appeal and Error ⇨982(1)

Judgment ⇨363

Application under statute permitting relief from order or judgment taken by mistake is addressed to the sound discretion of the trial court, and an appellate court will not interfere unless there is a clear showing of an abuse thereof, whether the motion to vacate is granted or denied. West's Ann.Code Civ.Proc. § 473.

7. Dismissal and Nonsuit ⇨81(6)

Where summons is not served within the three-year period, dismissal is mandatory unless resident defendant is absent from the state or has concealed himself, and this precludes relief under statute allowing relief against judgment or order taken by mistake unless an exception to the statute requiring service within three years did in fact exist but was not presented to court at hearing to dismiss because of some mistake, inadvertence, surprise, or excusable neglect. West's Ann.Code Civ.Proc. §§ 473, 581a.

8. Judgment ⇨370

The "surprise" referred to in statute granting relief from orders or judgments entered by mistake, surprise etc. refers to a condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own and which ordinary prudence could not have guarded against. West's Ann. Code Civ.Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Surprise".

9. Dismissal and Nonsuit ⇨81(6)

Where defendant moved to quash service of summons and on day before hearing on motion defendant also moved to dismiss for failure to serve summons within

three years, and affidavits and authorities cited by parties showed that plaintiff's counsel was aware of the absence from state exception to statute requiring service within three years, there was no "surprise" as would require trial court to vacate dismissal. West's Ann.Code Civ.Proc. §§ 473, 581a.

10. Attorney and Client ⇨77

Judgment ⇨368

Generally a client is chargeable with negligence of his attorney, and mere fact that attorney does not make a skillful presentation of client's case will not warrant relief under statute granting relief for orders and judgments entered by mistake, surprise, etc. West's Ann.Code Civ.Proc. § 473.

11. Judgment ⇨363

To be entitled to relief from mistake under statute granting relief from orders and judgments entered under mistake, a party must prove some mistake either of fact or of law of himself or counsel. West's Ann.Code Civ.Proc. § 473.

12. Judgment ⇨363

Neither inadvertence nor neglect will warrant judicial relief under statute granting relief against orders and judgments entered under mistake, surprise, etc. unless such inadvertence or neglect may be reasonably classified as excusable upon sufficient showing. West's Ann.Code Civ.Proc. § 473.

Henry C. Clausen, Richard G. Burns, San Francisco, for appellant.*

No appearance for respondent.

FOX, Presiding Justice.

Plaintiff commenced this action for cancellation of instruments, damages and an accounting against several defendants on December 15, 1952. Summons was issued but no effort was made to serve any of the

* Neither of plaintiff's present counsel was the attorney who represented it at the

January 12, 1955 hearing, which is discussed in this opinion.

defendants for more than two years. The first defendant was served in February, 1955. Early in December, 1955, plaintiff began to make feverish attempts to serve defendant George Bush. The affidavits of several process servers indicate that constant efforts were made on every day commencing December 12, 1955, up to December 22, 1955, when Bush was finally personally served. Although several visits were made to his home and office between December 12 and December 15, Bush could not be located. On December 15, 1955, plaintiff obtained an order authorizing service by publication on the ground that defendant Bush was concealing himself to avoid service. Bush filed notice of motion to quash service on December 28, 1955. The hearing was set for January 3, 1956, but plaintiff's counsel obtained a continuance to January 12 because of the holidays. The day before the hearing on his motion, Bush filed an "amended and supplemental notice of special appearance and motion to quash summons and service thereof together with motion to dismiss action" as to him for failure to serve and return the summons within the three-year limit provided in Code of Civil Procedure, section 581a. Bush also filed an affidavit which asserted that he was readily accessible at his home and office on the days immediately prior to December 15, 1955, and was not concealing himself in any way. The court granted his motion to dismiss at the January 12 hearing, and entered an order of dismissal. Thereafter plaintiff made a motion to vacate the dismissal pursuant to Code of Civil Procedure, section 473 on the ground that the judgment was taken against plaintiff through the mistake, inadvertence, surprise or excusable neglect of plaintiff or its counsel. Plaintiff's affidavits in regard to this motion showed that plaintiff had been advised to delay service on parties other than the principal defendant, a nonresident, until he could be served. He was served in California in February, 1955. Plaintiff thereafter hired new attorneys in May, 1955. The chief at-

torney suffered a heart attack in July, 1955. Plaintiff went to other attorneys in August, 1955, and, while they were deciding whether or not to take the case, the case remained in the hands of a junior in the firm of the attorney who had suffered the heart attack, who was not familiar with the facts or record in the case. On December 1, 1955, plaintiff was first informed that service had to be made within three years. Immediate service on Bush was then sought. But service by December 15 was not achieved because of Bush's alleged concealment. It was also asserted that an adequate defense on the ground of Bush's absence from the state could have been established at the first hearing if plaintiff and its counsel had received adequate notice of the hearing. Plaintiff alleged that Bush's original motion to quash service had confined itself to the question of plaintiff's due diligence in obtaining service upon Bush, and that plaintiff's attorney therefore never researched or prepared proof as to Bush's absence from the state. At the hearing on the motion to vacate Bush took the stand and admitted that he probably had been out of the state a total of more than a month between December 15, 1952, and December 1, 1955. The court denied the motion to vacate. Plaintiff now appeals from the order dismissing the action as to Bush and from the order denying the motion to vacate the dismissal.

[1,2] In regard to the order granting defendant Bush's motion to dismiss, plaintiff contends that the trial court erred inasmuch as there was already a binding adjudication that Bush was concealing himself to avoid service of summons. This contention is without merit. Plaintiff is asking this court to rule that an ex parte order for publication of summons is res judicata on the issue of whether a defendant is concealing himself within the state to avoid service of summons. "It is a cardinal principle of our jurisprudence that one shall not be bound or concluded by a judgment * * * unless he has had his day in court, by which is meant until

he has been duly cited to appear and has been afforded an opportunity to be heard, and upon such hearing, to offer evidence in support of his cause." *California Filter Co. v. Superior Court*, 97 Cal.App. 99, 105, 274 P. 1012, 1014; see, also, *County of Los Angeles v. Winans*, 13 Cal.App. 234, 253, 109 P. 640. By analogy to this principle it seems clear that neither defendant Bush nor the court was bound by the *ex parte* order insofar as it purported to be an adjudication of the question of Bush's concealment to avoid service. See *Munro v. Post*, 2 Cir., 102 F.2d 686, 688; Annotation, 132 A.L.R. 14, 44-45. Obviously, Bush had not yet appeared in the action when the order was made and could not controvert the statements in the affidavits presented by plaintiff. To say that he could not later oppose these affidavits by his own in support of his motion to dismiss would border on the ridiculous. Plaintiff points out that Bush could have moved to set aside the order for publication of summons, but did not. This would have been a useless act since he was personally served on December 22, 1955. And to require that the court set aside the order for publication of summons before Bush could contest his alleged concealment within the state would merely waste the court's time since the same factual question would face the court on a motion to set aside that order as on the motion to dismiss. When it granted Bush's motion to dismiss, the court in effect ruled that he did not in fact conceal himself within the state to avoid service of summons.¹ Therefore, there was no error in granting the motion for dismissal merely because of the recital in the order for publication of summons that defendant Bush was concealing himself within the state to avoid service. Plaintiff cites *City of Los Angeles v. Oliver*, 102 Cal.App.

299, 325, 283 P. 298, for the proposition that an order made in the course of an action is binding on the litigants and the court so long as it has not been set aside. That case is inapplicable here since all the parties were before the court when the order was made.

[3] Plaintiff next contends that the trial court erred in granting the dismissal because less than a day's notice of the motion to dismiss was given and plaintiff's attorney was inadequately prepared to argue the concealment exception to section 581a and had overlooked the out-of-state exception. In light of the record in this case, we are unable to hold that the lower court was obligated to place credence in these contentions. Although Bush's notice of December 28, 1955 referred only to a motion to quash summons, it was clear from the memorandum of points and authorities and from the supporting affidavit that Bush was relying on the provisions of section 581a. That section was specifically cited and Bush's affidavit closes with the statement that the summons "could easily have been served upon this defendant and affiant within the three year period which the Legislature of the State of California says must be done and in the absence of which the Court must dismiss the suit, as to any defendant not so served within said three year period." Further proof of the preparedness of plaintiff's attorney lies in the fact that the memorandum in opposition to the motion to quash summons and service thereof, filed on the same day as defendant Bush's notice of motion to dismiss (January 11, 1956), discloses that counsel was relying specifically upon the concealment and out-of-state exceptions in section 581a. In fact the part of the statute containing those two exceptions was quoted in the memorandum.² Moreover, the mem-

1. It should be noted in this connection that the court did not have before it any evidence that Bush had been absent from the state.
2. On page six of his memorandum, plaintiff's counsel stated as follows: "Section 581a, C.C.P., specifically provides that:

'..... no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the State, or while he has secreted himself within the State to prevent the service of summons on him.' He goes on to state on page

orandum states that plaintiff's opposition to Bush's motion was based upon the affidavits filed December 15, 1955, in support of the order for publication of summons, as well as upon several other affidavits filed on January 3, 1956. All of these affidavits were directed to the issue of Bush's concealment to avoid service of summons. It is thus clear that plaintiff's counsel was amply prepared to argue the concealment exception at the hearing on January 12, 1956. And if counsel had wished to argue the out-of-state exception, he could have filed affidavits bearing upon that point. Any further doubt is dispelled by the fact that counsel did not even seek a continuance at the January 12 hearing in order to have more time to prepare as to the out-of-state exception. Thus, the trial court did not err by ordering a dismissal without giving plaintiff additional time (none having been requested) after notice of the motion to dismiss was received.

[4,5] Plaintiff's final contention with respect to the order of dismissal is that the court erred in granting the dismissal "when the record clearly shows that a defendant has been concealing himself to avoid service of summons." The argument on this point is directed merely to the weight of the evidence. The affidavits filed by defendant Bush were in direct conflict with those filed by plaintiff. "The rule on appeal is that those affidavits favoring the contention of the prevailing party establish * * the fact stated therein * * * and where there is substantial conflict in the fact stated, a determination of the controverted facts by the trial court will not be disturbed." *Obergfell v. Obergfell*, 134 Cal. App.2d 541, 546, 286 P.2d 462, 466; see, also, *Griffith Co. v. San Diego College for*

Women, 45 Cal.2d 501, 508, 289 P.2d 476, 47 A.L.R.2d 1349; *Hayutin v. Rudnick*, 115 Cal.App.2d 138, 140, 251 P.2d 707; *Wilson v. Leo*, 19 Cal.App. 793, 797, 127 P. 1043. The mere fact that plaintiff produced more affidavits to support its position than defendant Bush did to support his does not make the court's finding in favor of Bush an abuse of discretion. Since no error has been shown, the trial court's order of dismissal must be affirmed.

[6,7] Turning now to the order denying plaintiff's motion to vacate the order of dismissal, it contends that the court erred in light of the circumstances. This motion was made pursuant to the provisions of Code of Civil Procedure, section 473, and plaintiff argues that the facts clearly show that the failure to serve defendant Bush within three years and the dismissal resulting therefrom were caused by mistake, inadvertence, surprise and excusable neglect. "The law is well settled that an application for relief under section 473 is addressed to the sound discretion of the trial court, and that an appellate court will not interfere with the exercise of such discretion unless there is a clear showing of an abuse thereof." *Keller v. Keller*, 91 Cal. App.2d 39, 41, 204 P.2d 361, 362; see, also, *Baratti v. Baratti*, 109 Cal.App.2d 917, 921, 242 P.2d 22; *In re Estate of Rabino-witz*, 67 Cal.App.2d 840, 841, 155 P.2d 915; *Jackson v. DeBenedetti*, 39 Cal.App.2d 574, 577, 103 P.2d 990; *In re Estate of McCarthy*, 23 Cal.App.2d 398, 399-400, 73 P.2d 914. And this is true whether the motion to vacate is granted or denied. (See *Baratti v. Baratti*, supra, 109 Cal.App.2d at page 921, 242 P.2d at page 24; *In re Estate of McCarthy*, supra, 23 Cal.App.2d at page 399, 73 P.2d at page 915.) We must there-

seven: "It is obvious that the legislature recognized that, in the closing days of the three year period, many a defendant would be tempted to secrete or absent himself for a few days, until the three years had fully elapsed, and then to come in and ask for a dismissal. It is self-evident that this high probability was the tactic against which the legislature

sought to protect plaintiffs when the exceptions were included in the rule." Counsel then quoted from a case the statement that "plaintiffs might successfully resist a motion to dismiss made for want of service of summons by showing that defendant was absent from the state or concealed herself to avoid service."

fore consider the facts presented to the trial court to determine whether or not an abuse of discretion took place. Plaintiff alludes first to the circumstances which led to the failure to serve defendant Bush within the three year period, such as its hiring of new attorneys and the heart attack of the chief attorney. However, it is unnecessary for us to consider these facts in connection with the motion under section 473. The reason is that summons was not served within the three year period and dismissal under section 581a is mandatory unless the defendant is absent from the state or has concealed himself therein. *Gonsalves v. Bank of America*, 16 Cal.2d 169, 172, 105 P.2d 118; *Pease v. City of San Diego*, 93 Cal.App.2d 706, 709, 209 P.2d 843. This precludes relief under section 473 unless an exception to section 581a did in fact exist but was not presented to the court at the hearing to dismiss because of some mistake, inadvertence, surprise or excusable neglect. Therefore, only plaintiff's mistake, inadvertence, surprise or excusable neglect pertaining to the hearing and granting of the motion to dismiss would be a ground for relief under section 473.

Plaintiff next alludes to the facts surrounding Bush's alleged concealment to avoid service of summons between December 12, 1955, and December 22, 1955. Again we note that the affidavits which were presented for and against the motion to set aside the judgment were conflicting on the question of concealment. The situation is exactly the same as on the motion to dismiss, and we are again powerless to reject the conclusion of the trial court. "Since the evidence is conflicting upon which the motion to set aside the * * * judgment was denied, this court may not interfere with the discretion of the trial court with respect thereto." *Estate of McCarthy*, supra, 23 Cal.App.2d at page 401, 73 P.2d at page 917; *Zuver v. General Development Co.*, 136 Cal.App. 411, 413, 28 P.2d 939.

3. It is a matter of common knowledge among members of the legal profession in Los Angeles that oral testimony gen-

[8-10] Plaintiff contends principally that the record shows surprise and excusable neglect on the part of its counsel because of the short notice he had regarding Bush's intention to move to dismiss the action. Plaintiff argues that at the time of the January 12 hearing its counsel "was ignorant of the existence or scope of the absence-from-the-state exception" of section 581a as it pertained to defendant Bush. Yet, as we previously pointed out, counsel quoted this very exception in the memorandum which he had filed on the previous day. It does not appear that any attempt was made to continue the hearing to a later date so that evidence concerning the out-of-state exception could be produced. Also, it is interesting to note that counsel attempted to have defendant Bush take the witness stand so that he could be cross-examined. The court denied this request since the hearing was in the law and motion department where testimony generally is not permitted.³ Yet it has not been shown that counsel made any objection, sought a continuance, or attempted to have the hearing transferred to a department where oral testimony would be taken. Nor does it appear that counsel informed the court what he expected to show by defendant's testimony. The fact remains that plaintiff's counsel was aware of the absence-from-the-state exception and should have either presented affidavits on the point or requested that the hearing be in another department so that he could have cross-examined Bush. The "surprise" referred to in section 473 is defined as some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against. *Baratti v. Baratti*, supra, 109 Cal.App.2d at page 921, 242 P.2d at page 24; *Miller v. Lee*, 52 Cal.App.2d 10, 16, 125 P.2d 627. It is clear that the facts in the case at bar do not disclose such "surprise" as would require the trial court to grant relief under

erally is not permitted in the law and motion department of the Los Angeles Superior Court.

section 473. Nor can it be said that the facts disclose sufficient "excusable neglect." Plaintiff's counsel would have been apprised of Bush's reliance upon section 581a merely by reading the latter's original notice of motion, authorities and supporting affidavit. Counsel had sufficient opportunity to investigate the facts and prepare the evidence on either exception to section 581a, particularly since he had secured a continuance of the hearing from January 3 to January 12. Plaintiff is not entitled to relief merely because its counsel relied mainly upon the concealment exception rather than the out-of-state exception. It is the general rule that a client is chargeable with the negligence of his attorney. *Vartanian v. Croll*, 117 Cal.App.2d 639, 644, 256 P.2d 1022. And the mere fact that an attorney does not make a skillful presentation of a client's case will not warrant relief under section 473. *Vartanian v. Croll*, supra, 117 Cal. App.2d at page 644, 256 P.2d at page 1025.

[11,12] To be entitled to relief from mistake under section 473, a party must prove some mistake, either of fact or of law, of himself or his counsel. *Hewins v. Walbeck*, 60 Cal.App.2d 603, 609-610, 141 P.2d 241; *Bruskey v. Bruskey*, 4 Cal.App. 2d 472, 479, 41 P.2d 203. Plaintiff has failed to do this. The facts before us indicate that plaintiff's counsel was aware of both exceptions regarding a dismissal under Code of Civil Procedure, section 581a. And no mistake of fact on the part of plaintiff or its counsel has been shown. Plaintiff also suggests that the failure of its counsel to establish a defense to dismissal at the January 12 hearing was the result of inadvertence. However, as we have already pointed out, when counsel's request to examine defendant Bush was denied, it does not appear that counsel made any disclosure to the court of what he expected to prove, or any attempt to have the matter transferred to a department where oral testimony would be received. "The inadvertence contemplated by the statute does not mean mere inadvertence in the abstract. If it is wholly

inexcusable it does not justify relief." *Elms v. Elms*, 72 Cal.App.2d 508, 513, 164 P.2d 936, 939; see, also, *Shearman v. Jorgenson*, 106 Cal. 483, 485, 39 P. 863; *Couser v. Couser*, 125 Cal.App.2d 475, 476, 270 P.2d 496. Plaintiff has failed to establish any excuse for the inadvertence (if any existed) of its counsel. In fact, counsel's conduct would seem to constitute neglect rather than inadvertence. In any event, neither inadvertence nor neglect will warrant judicial relief unless it may reasonably be classified as excusable upon a sufficient showing. *Couser v. Couser*, supra, 125 Cal. App.2d at page 477, 270 P.2d at page 497; *Elms v. Elms*, supra, 72 Cal.App.2d at page 513, 164 P.2d at page 939; *Hughes v. Wright*, 64 Cal.App.2d 897, 901, 149 P.2d 392.

From the foregoing it is apparent that the circumstances surrounding the actions of plaintiff's counsel at the first hearing are not such as would require this court to rule that the trial court abused its discretion in denying relief under section 473.

Plaintiff's final argument is apparently that the trial court abused its discretion in denying the motion to vacate because it appeared that a conclusive defense to the dismissal existed. At the hearing on the motion to vacate, Bush was called upon to testify and admitted that he probably had been out of the state for a total of at least one month between December 15, 1952, and December 1, 1955. Plaintiff asserts that this testimony establishes conclusively the existence of the absence-from-the-state defense to dismissal under section 581a. Assuming this is true, plaintiff is still not entitled to relief under section 473. In effect the situation was that plaintiff's counsel had two possible defenses to Bush's motion but presented only one of them. Having been unsuccessful with the one defense, plaintiff now seeks to assert the second. This it may not do since it has not made a sufficient showing of a legal excuse for not presenting this defense at the January 12 hearing. The trial court has ruled against plaintiff and we are convinced that

such ruling did not constitute an abuse of discretion.

The orders are affirmed.

ASHBURN, J., and RICHARDS, J.
pro tem., concur.



157 Cal.App.2d 330

**Daniel E. O'CONNELL, Plaintiff and
Respondent,**

v.

**Frank ZIMMERMAN and Bertha Zimmer-
man, husband and wife, Defendants
and Appellants,**

Charles S. Moore, Defendant and Respondent.

**Charles S. MOORE, Cross-complainant and
Respondent,**

v.

**Frank ZIMMERMAN and Bertha Zimmer-
man, husband and wife, Cross-defendants
and Appellants,**

**Daniel E. O'Connell, Cross-defendant and
Respondent.**

Civ. 9318.

**District Court of Appeal, Third District,
California.**

Jan. 31, 1958.

Action in interpleader by escrow attorney who prayed judgment that sellers and buyer be required to interplead concerning their claim to property, wherein buyer filed cross-complaint for a specific performance of contract of sale. The Superior Court, Merced County, R. R. Sischo, J., rendered judgment for buyer for specific performance and allowed attorney costs incurred as escrow attorney and attorney's fee, and sellers appealed. The District Court of Appeal, Warne, J. pro tem., held that where contract for sale of business including on sale beer and wine license was severable and buyer who was denied license, was will-

ing to waive transfer of license, and still pay the consideration called for by terms of contract, buyer's failure to obtain license was not a failure of consideration insofar as sellers were concerned and buyer was entitled to specific performance, but that escrow attorney who brought action was not entitled to attorney's fee.

Judgment affirmed in part and reversed in part.

1. Sales ◊62

Where contract for sale of business for \$3,000 listed price of on-sale beer and wine license at \$50 and segregated items of real and personal property as to price, contract was susceptible of apportionment and therefore severable.

2. Specific Performance ◊10(1)

Where contract for sale of business including on-sale beer and wine license, was severable, and buyer, who was denied license, was willing to waive transfer of license and still pay the consideration called for by terms of contract, buyer's failure to obtain license was not a failure of consideration insofar as sellers were concerned and buyer was entitled to specific performance.

3. Vendor and Purchaser ◊187

Where creditors of business were to be paid after performance under escrow agreement by buyer and sellers, and sellers, by failing to execute and deposit deeds to real property as required in agreement, prevented recordation, and payment to creditors, sellers who sought to rescind contract of sale were in no position to complain of fact that disbursements to creditors were not made.

4. Sales ◊98

Where time was not of the essence in escrow agreement entered into in connection with sale of business, fact that beer and wine license of business was not transferred within 45 days as provided in agreement was not in and of itself vital and was insufficient reason for seller to rescind contract of sale.

5. Specific Performance $\Rightarrow$ 10(1)

Although escrow agreement, entered into in connection with severable contract for sale of business including on-sale beer and wine license, provided that no notice or change of instructions should be of any effect unless in writing, and buyer failed to obtain transfer of license, failure of buyer to notify sellers or escrow agent in writing that he was willing to accept property and business without license was not a breach of contract and buyer was entitled to specific performance. West's Ann.Civ. Code, § 3392.

6. Escrows $\Rightarrow$ 8(1)

Where buyer of business was to transfer a tractor to sellers, delivery of bill of sale for tractor to escrow agent constituted transfer of tractor pending consummation of escrow.

7. Appeal and Error $\Rightarrow$ 1010(1)

Where there is substantial evidence in record to sustain trial court's findings, reviewing court must sustain those findings.

8. Interpleader $\Rightarrow$ 35

Where escrow attorney filed action and interpleaded sellers and buyer for determination of their rights, attorney did not incur liability to pay an attorney fee since he represented himself, and was not entitled to such fee. West's Ann.Code Civ.Proc. §§ 386, 386.6.

9. Costs $\Rightarrow$ 172

When an attorney represents himself in an action he may not recover the reasonable value of his fee, for he has paid no fee nor has he incurred any liability to pay an attorney fee. West's Ann.Code Civ. Proc. §§ 386, 386.6.

10. Appeal and Error $\Rightarrow$ 883

Where defendants and interpleader had fully litigated their claims without objection, they were deemed to have consented to remedy invoked and might not on appeal object that complaint did not state cause of action for interpleader.

Daniel E. O'Connell, Turlock, for plaintiff-respondent.

Gilbert Moody, Turlock, and A. M. Frad, Modesto, for appellants.

John A. Swenson, Turlock, for defendant-respondent.

WARNE, Justice pro tem.

This is an appeal by Frank and Bertha Zimmerman from a judgment in favor of the respondent, Charles S. Moore, for specific performance, allowing Moore damages for wrongful withholding of real property and for certain rentals and also allowing the respondent, Daniel E. O'Connell, costs incurred as escrow attorney and an attorney fee.

The appellants, Frank and Bertha Zimmerman, entered into an agreement whereby they agreed to sell to the respondent, Charles S. Moore, a business known as "Frank & Ma's Houseful of Fun" located in the City of Irwin, together with the fixtures, equipment, license and good will of the business and the premises on which the business was conducted, and also a "California State Board of Equalization On Sale Beer, and Wine License" issued to the sellers at the said place of business. The agreed price was \$3,000 payable as follows: respondent Moore was to transfer an International tractor which was valued at \$700; cash in the amount of \$500, and a promissory note for \$1,800 payable within one year and secured by a first deed of trust on the real property being sold. The agreement provided: "It Is Further Agreed that the consideration price is to be allocated as follows:

Land	\$2,000.00
Business	150.00
On-Sale License	50.00
Fixtures and Equipment	800.00
	\$3,000.00"

The escrow agreement provided: (1) that "No notice, demand, or change of instructions shall be of any effect unless in writing." It also authorized "* * * the escrow attorney * * * [to] terminate the escrow and return papers and consideration for failure (1) to supply mer-

chantable title, or (2) to deposit consideration." It also provided that " * * * recording shall be within 45 days, but may be thereafter if no contrary demand is made" and for payment of creditors within a reasonable time of the transfer of the license to respondent Moore. Respondent Charles S. Moore deposited with O'Connell, the escrow attorney, the \$500 in cash, a bill of sale for the tractor and his note for \$1,800 secured by a first deed of trust in favor of appellants as required by the agreement. The parties then applied to the Department of Alcoholic Beverage Control for a transfer of the on-sale beer and wine license. This application was denied on May 24, 1956.

Thereafter, on June 18, 1956, the escrow attorney received from the appellants a purported rescission of the contract reading as follows:

"You are hereby notified that the undersigned cancel and terminate their escrow with you entitled as above and request return of their papers. This cancellation and termination is for the reason, among others, that Moore has been denied permit for transfer to him of Beer and Wine License, thus reducing sellers' security on the transaction."

Apparently in answer to the above communication, the escrow attorney, on June 28, 1956, by letter advised the Zimmermans as follows:

"Please be advised that Mr. Charles S. Moore has signed and executed all necessary instruments in order to consummate the sale and transfer as provided for in your escrow agreement entered into April 3, 1956. He advised me, as escrow attorney, that he is quite willing to pay the purchase price as agreed, even though the restricted 'A' license covering beer and wine has been temporarily denied.

"It is my opinion that the escrow should be closed on the terms agreed upon and that your letter dated June

15, 1956, relative to cancellation of the escrow is without merit.

"You will please be advised that unless I hear from you within five (5) days from this date, I will file an action in the Superior Court of Merced County and interplead yourselves and Mr. Moore for legal determination of your respective rights.

"I trust you will give this matter your immediate attention."

Thereafter, on July 13, 1956, attorney Lin Griffith, representing the Zimmermans, wrote a letter to the escrow attorney, stating that the Zimmermans wished to stand on their rescission, and giving as their only reason the fact that Moore's application for transfer of the beer and wine license was denied. The respondent escrow attorney then brought this action in interpleader wherein he prayed judgment that the parties be required to interplead together concerning their claim to the real and personal property and that he be awarded his costs and at reasonable attorney fee for labor and services in the matter of the escrow and for prosecuting this action. The appellants and respondent Moore each filed an answer to the complaint, and respondent Moore with his answer filed a cross-complaint against the appellants for specific performance of the agreement and damages for withholding possession of the property.

Judgment was entered in favor of respondent O'Connell for his costs, one-half to be paid by appellants and one-half to be paid by respondent Moore, and also that appellants pay to O'Connell an additional sum of \$100 as an attorney fee. Judgment was also in favor of respondent Moore as prayed for, except that the judgment excluded the California State Board of Equalization On-Sale Beer and Wine License.

Appellants contend that the trial court erred in not permitting them to rescind after respondent Moore was denied a li-

cense by the Department of Alcoholic Beverage Control, and in support of this contention they urge that "the contract of the parties was entire in its nature and not intended to be severable as to its parts, [and therefore] * * * in an entire contract when a portion thereof becomes impossible in performance, the entire contract is void and a party may rescind it." In support of this contention they cite the case of *Lenchner v. Chase*, 98 Cal.App.2d 794, 220 P.2d 921, and argue that when there is an agreement to sell a business including a beer and wine license, and the Department of Alcoholic Beverage Control refuses to issue a license to the vendee, there is a total failure of consideration as to the seller. The cases indicate that this is true as to the buyer. However in that case it was found by the court that the parties contemplated that the consideration would be payable only if the license could be transferred and held that transfer of title to a licensed business can only coincide with the transfer of the license. There was no such finding in the instant case, and we do not believe that the contract or the facts bring it within the rule stated in *Lenchner v. Chase*, supra.

In the instant case the record shows that respondent Moore was buying not only a beer and wine license but also real and personal property which was apportioned in the contract. Further, the building was constructed so that it could be used for living quarters, and he testified that he intended to live on the premises. The contract price of the on-sale beer and wine license was only \$50, while the price of the remaining real and personal property amounted to \$2,950, and as we have stated, the items of the real and personal property were segregated as to price. In *Pacific Wharf etc. Co. v. Dredging Co.*, 184 Cal. 21, 25, 192 P. 847, 849, the court said: "The rule is well settled that, where several things are to be done under a contract, if the money consideration to be paid is apportioned to each of the items to be performed, the covenants are ordinarily regarded as severable and independent." And in *Simmons*

v. Cal. Institute of Technology, 34 Cal.2d 264, 275, 209 P.2d 581, 587, the court held: "Generally speaking, the test of whether a contract is divisible is that if the consideration is single, the contract is entire, but if the consideration is apportioned, the contract may be regarded as severable. *Traiman v. Rappaport*, 3 Cir., 41 F.2d 336, 71 A.L.R. 475. And a contract may be severable as to some of its terms, or for certain purposes, but indivisible as to other terms, or for other purposes * * *" The items in the instant contract are so apportioned. See also *Gross v. Maytex Knitting Mills*, 116 Cal.App.2d 705, 254 P.2d 163.

[1,2] The nature and purpose of the contract being such as to make it susceptible of apportionment and therefore severable, the trial court did not err by impliedly so finding. Nor could there be a failure of consideration insofar as appellants are concerned since Moore was willing to waive the transfer of the on-sale beer and wine license and still pay the \$3,000—the consideration called for by the terms of the contract. The judgment so provided.

Appellants next contend that the buyer did not comply with the escrow agreement so as to enable the buyer to obtain specific performance.

[3-5] One of the conditions of the escrow agreement was that disbursement to creditors was to be made within a reasonable time after transfer of the on-sale beer and wine license. The agreement also provided for recording within 45 days thereafter if no contrary demand was made. Neither condition was complied with. However, appellants by failing to execute and deposit with the escrow attorney a grant deed to the real property prevented recordation, thereby preventing payment to the creditors, since the provision unquestionably meant that the creditors were to be paid after performance by both sides. Therefore, appellants are in no position to complain of a breach of a duty brought about by their default. Nor is the mere fact that the license was not transferred within 45 days in and of itself vital since

time was not of the essence of the escrow agreement. *Jameson v. Shephardson*, 83 Cal.App. 596, 257 P. 157. Appellants also contend that since respondent Moore did not notify them or the escrow agent in writing that he was willing to accept the property and business without the on-sale beer and wine license, he was breaching the terms of the agreement and was therefore not entitled to specific performance. We do not believe that there is any merit in this contention. Section 3392 of the Civil Code provides: "Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default." The contract being severable, this case falls clearly within the exception mentioned in the code section. Respondent Moore's failure to obtain an on-sale beer and wine license was at most only a partial failure of performance resulting in no loss or damage to appellants. Moore was the only loser thereby. Nor was there any change of instructions required to be in writing involved in the transaction. Moore merely waived a benefit to which he alone was entitled, that is the transfer of the on-sale beer and wine license to him.

[6] It is next contended by appellants that respondent Moore should have delivered the tractor to them. We assume that they mean an immediate physical delivery of the tractor itself. That was not required by the contract. The contract states: "The Buyer is to transfer to Sellers one (1) International Tractor * * *" The trial court found that Moore did deliver a bill of sale for the tractor to the escrow agent. Such constituted transfer of the tractor pending consummation of the escrow.

[7] Appellants next argue that the rental value of the premises and the amount

of damages were improper. Since there is substantial evidence in the record to sustain the trial court's finding concerning these matters, this court must sustain those findings.

Appellants also contend that the allowance of an attorney fee and costs to the escrow attorney is improper. The court allowed the respondent O'Connell \$194.38 costs as escrow agent and the further allowance of \$100 as a reasonable attorney fee. The respondent O'Connell is an attorney at law and engaged in the practice of law in this state, and the record shows that he appeared in propria persona in bringing and prosecuting this action in interpleader.

[8, 9] Section 386.6 of the Code of Civil Procedure (added in 1955) so far as pertinent, provides: "A party to an action who follows the procedures set forth in Section 386 or 386.5 [Code of Civil Procedure] may insert in his * * * complaint * * a request for allowance of his costs and reasonable attorney fees incurred in such action." The section further provides that: "* * * the court may, in its discretion, award such party his costs and reasonable attorney fees from the amount in dispute which has been deposited with the court." Section 386 of the Code of Civil Procedure has to do with interpleader. It is to be noted that only such reasonable attorney fees as have been "incurred" may be requested. Respondent O'Connell did not incur a liability to pay an attorney fee since he represented himself, and the allowance of such was improper. When an attorney represents himself in an action he may not recover the reasonable value of his fee, for he has paid no fee nor has he incurred any liability to pay an attorney fee. *City of Long Beach v. Sten*, 206 Cal. 473, 474, 274 P. 968; *Patterson v. Donner*, 48 Cal. 369.

[10] Lastly appellants contend that this action was not a proper case for interpleader. Since the appellants did not raise

the issue of the right of the plaintiff to use the remedy of interpleader while litigating this matter before the trial court, the question may not be raised on appeal. Where the defendants and interpleader have fully litigated their claims without objection, they will be deemed to have consented to the remedy invoked and may not later object that the complaint did not state a cause of action for interpleader. *Connor v. Bank of Bakersfield*, 183 Cal. 199, 202-203, 190 P. 801.

The judgment is affirmed except that portion thereof which allows the respondent Daniel E. O'Connell \$100 attorney fees and as to that portion the judgment is reversed. It is further ordered that respondent Charles S. Moore, recover from appellants his costs on appeal and that respondent Daniel E. O'Connell suffer his own costs on appeal.

VAN DYKE, P. J., and PEEK, J., concur.

49 Cal.2d 701

Angela CHAVEZ, widow of deceased employee, Jose Chavez; Rita M. Chavez, Roberta M. Chavez, Jose Gilberto Chavez and Jose Alberto Chavez, by their guardian ad litem and trustee, Angela Chavez, Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA, Vernon Paving Company, a corporation; Casualty Insurance Company of California, a corporation, Respondents.

L. A. 24576.

Supreme Court of California,
In Bank.

Feb. 14, 1958.

Proceeding by employee's surviving widow and children for annulment of Industrial Accident Commission's order disapproving a compromise and for annulment of award of certain benefits. The Supreme Court, Spence, J., held that where employee died prior to the commission's approval of compromise agreement executed by employee and insurance carrier and death was basis for commission's disapproval of the agreement, the commission's disapproval would not be disturbed, in view of statute making every compromise invalid until it is approved.

Award and order disapproving compromise affirmed.

Carter, J., Gibson, C. J., and Traynor, J., dissented.

Opinion, 307 P.2d 985, vacated.

1. Workmen's Compensation § 1123

In enacting section of workmen's compensation law providing that no release of liability or compromise agreement is valid unless it is approved by the Industrial Accident Commission, a panel, commissioner or referee, the Legislature was primarily concerned with protecting workmen who might agree to unfortunate compromise because of economic pressure or lack of competent advice. West's Ann.Labor Code, § 5001.

2. Workmen's Compensation § 1123

Under the workmen's compensation law, every compromise agreement is invalid until it is approved by the Industrial Accident Commission, a panel, commissioner, or referee. West's Ann.Labor Code, § 5001.

3. Workmen's Compensation § 1123

Where employee died prior to Industrial Accident Commission's approval of compromise agreement executed by employee and workmen's compensation insurance carrier and the death was the basis of commission's disapproval of the agreement, the commission's disapproval would not be disturbed, in view of statute making every compromise invalid until it is approved by commission. West's Ann.Labor Code, §§ 4700, 5001.

Levy, Russell & DeRoy and George DeRoy, Los Angeles, for petitioners.

Everett A. Corten, San Francisco, Edward A. Sarkisian, Talbott & Thompson and George Thompson, Los Angeles, for respondents.

SPENCE, Justice.

Petitioners, who are the surviving widow and children of Jose Chavez, seek annulment of the respondent commission's award to them of certain benefits and of the commission's order disapproving a compromise.

The employee, Jose Chavez, suffered an industrial injury in 1955. His employer furnished medical treatment and made temporary disability payments for approximately three months. Thereafter, the employee filed an application for adjustment of compensation, and the commission conducted a hearing on February 27, 1956. An oral agreement of compromise for \$2,250 was reached by the employee and the employer's insurance carrier on the following day.

The insurer prepared a written compromise agreement on a form supplied by the commission and sent it to the employee, who executed it on March 10, 1956. It was received by the insurer on March 14. On March 12, however, the employee died of

a nonindustrial heart condition. The carrier signed the compromise and forwarded it to the commission for approval before learning of the employee's death. The commission, through its referee, after learning of the death and at the insurer's request, disapproved the compromise. The order stated, in part, that the "Commission, having considered the entire record, now finds that it is not for the best interests of the parties to approve * * * [the] Compromise and Release and that it should be disapproved, applicant having died prior to approval thereof. * * *" The findings and award simply reiterated that the death was the basis for such action. The widow and dependent children were granted benefits consisting principally of unpaid compensation payments which were found to have accrued in favor of the employee prior to his death. Their petition for reconsideration was thereafter denied.

The employee's dependents contend that although the employee died, there was still adequate consideration to support the compromise. While this may be true, it is not controlling on the question of the effectiveness of the unapproved compromise or the question of the propriety of the commission's refusal to approve it in view of section 5001 of the Labor Code. That section provides: "Compensation is the measure of the responsibility which the employer has assumed for injuries or deaths which occur to employees in his employment when subject to this division. *No release of liability or compromise agreement is valid unless it is approved by the commission, a panel, commissioner, or referee.*" (Emphasis added.)

[1,2] Undoubtedly the Legislature, in enacting this section, was primarily concerned with protecting workmen who might agree to unfortunate compromises because of economic pressure or lack of competent advice. (See 1 Hanna, *The Law of Employee Injuries and Workmen's Compensation*, p. 154.) However, the effect of the section, by its clear wording, is to make every compromise invalid until it is approved. *Employee's Credit Co. v. Indus-*

trial Acc. Comm., 177 Cal. 46, 169 P. 1001; *Massachusetts etc. Co. v. Industrial Acc. Comm.*, 176 Cal. 488, 168 P. 1050. In conformity with the section, the written compromise agreement here contained an express provision making its effectiveness dependent upon approval by the commission.

[3] Approval of the compromise by the commission, therefore, was clearly essential to its effectiveness. At the time that the compromise was before the commission for approval or disapproval, the commission knew of the employee's intervening death, which death would normally terminate any right to disability payments. Labor Code, § 4700. Under these circumstances the ruling of the commission disapproving the compromise cannot be disturbed.

The award made by the commission and the order disapproving the compromise are affirmed.

SHENK, SCHAUER and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

This case comes to us on a petition to review an order of the Industrial Accident Commission (hereinafter called the commission) disapproving a compromise agreement made between an employee and employer. The majority correctly notes that a compromise agreement to be valid must be approved by the commission, and absent this approval the agreement is invalid (Lab. Code, § 5001). From this proposition the majority concludes that where there is a disapproval of a compromise agreement by the commission there is nothing for an appellate court to review and the order of disapproval will not be disturbed. In reaching such conclusion the majority avoids the very question we were asked to review: Were the grounds stated by the commission in disapproving the compromise erroneous as a matter of law and thereby in excess of jurisdiction?

At the outset there is the preliminary question of whether an order by the com-

mission disapproving a compromise agreement is subject to review at all, and if so, does its scope include the question we are here asked to review. According to the provisions of section 5950 of the Labor Code, any person affected by an order of the commission may apply to the courts for a writ of review. It is clear that an order approving or disapproving a compromise and release comes within the provisions of section 5950 and a writ of review is available to a person adversely affected by such order (see, *Silva v. Industrial Acc. Comm.*, 68 Cal.App. 510, 515, 229 P. 870).

However, in reviewing an order of the commission disapproving a compromise and release, appellate courts will not annul it in the absence of an abuse of discretion (*Stegeman v. Ind. Acc. Comm.*, 6 Calif. Comp.Cases 256; *Dubendorf v. Ind. Acc. Comm.*, 7 Calif.Comp.Cases 191). To state an appellate court's authority in this connection in terms of the statute defining the scope of review (Lab.Code, § 5952), questions of law are open to court review on the ground that an erroneous ruling on matters of law is in excess of jurisdiction (see, *National Auto etc. Co. v. Industrial Acc. Comm.*, 80 Cal.App.2d 769, 772, 182 P.2d 634). Therefore, the question presented by petitioners, and which is now before us, is a proper one for review.

The sole issue, then, is whether the grounds stated by the commission in denying petitioners' application for reconsideration are erroneous as a matter of law. I refer specifically to the application for reconsideration, since that is, in essence, the final order and the one which we are reviewing. (See, Lab.Code, § 5901; *Liberty Mutual Ins. Co. v. Ind. Acc. Com.*, 15 Calif.Comp.Cases, 226.)

The pertinent parts of the commission's order denying the application for reconsideration revealing the grounds are as follows: "While it appears that the amount offered in settlement constituted a compromise of defendants' [employer and insurance carrier] liability for any additional temporary disability indemnity, yet it ap-

pears that the main portion of the settlement sum was a compromise of liability for permanent disability. Since death terminates disability (Labor Code section 4700) it would appear that the consideration for the settlement for permanent disability residuals had in a large part failed upon the employee's death. It is true that the parties had entered into an executed contract as between themselves but the Compromise and Release would not become effective unless and until approved by this Commission. A party to a contract may rescind if the consideration fails in a material respect for any cause (Civil Code Sec. 1689-4) and it thus appears that a party may rescind a contract otherwise valid, when the consideration in whole or in part fails before the contract has been fully performed.

"The Panel is of the opinion that the referee acted correctly in disapproving the Compromise and Release, upon defendants' notice of rescission thereof."

A reading of this order leaves no doubt but that the commission in affirming the referee's order disapproving the compromise agreement and their denial of the application for reconsideration was predicated upon the belief that there was a failure of consideration, thus justifying the rescission under section 1689(4) of the Civil Code. Furthermore it is evident that there is no dispute concerning the facts, and hence this issue of whether or not the death of the employee constituted a failure of consideration is a question of law and thereby a proper matter for review (see, *Reinert v. Industrial Acc. Comm.*, 46 Cal.2d 349, 358, 294 P.2d 713; *Winter v. Industrial Acc. Comm.*, 129 Cal.App.2d 174, 178, 276 P.2d 689).

That the death of the employee did not constitute a failure of consideration is clear. The survival of the employee, Chavez, was not in any way a material part of the consideration in the compromise agreement. Consideration is usually expressed as the "bargained for exchange" (Rest.Contracts, § 75). The compromise release states that Chavez released his rights to any perma-

ment disability payments in exchange for \$2,250.00 he was to receive from his employer's insurance carrier; no mention is made that the employer or his insurance carrier is expecting Chavez to survive for any particular length of time. The employer and insurance carrier were obviously bargaining for this release; the whole object of the compromise was to obtain Chavez' release of his rights arising from the injury, anything else would have been pointless. In addition it is reasonable to assume that both parties were aware that if Chavez died his right to any disability payments would cease, and hence contracting with this in mind, the employer assumed the risk that Chavez might die before his period of permanent disability ran out. The fact that Chavez died before the right to any permanent disability payments accrued, did not affect the fact that he released the right to receive payments had he lived. The employer got exactly what he bargained for: Chavez releasing his claims against the employer arising from his injury.

Having established that the grounds on which the commission based its order were incorrect as a matter of law, the order should be annulled and the cause remanded for appropriate commission action.

This conclusion is not affected, as the majority opinion appears to imply, by the fact that the compromise agreement was not approved by the commission at the time of death of the employee Chavez. In other words the parties to a compromise agreement which has been submitted to the commission for approval cannot unilaterally rescind the agreement prior to the commission's approval or disapproval. It is true that Labor Code section 5001 states that the compromise agreement is not valid unless it is approved by the commission, but this does not mean that the agreement is ineffective and either party is permitted to rescind it at will simply on the ground that the agreement is not valid until approved. To state it another way, the statute declaring a compromise not valid unless the commission approves it is not intended

to afford a ground for rescission once the agreement is submitted to the commission. To permit rescission on such basis would disrupt the orderly administration of justice and would be contrary to the principles for the conservation of the time and energy of the commission, and place each party at the caprice of the other in that rescission might occur any time after submission of the agreement to the commission but prior to the latter's action. Obviously, the commission could not disapprove such an agreement without legal or just cause. In other words the commission may not validly act arbitrarily or do what would amount to the same thing—base its conclusion on non-existent facts or inapplicable rules of law. But this is just what the commission has done in this case and the majority here has approved its unauthorized action.

For the foregoing reasons I would annul the order.

GIBSON, C. J., and TRAYNOR, J., concur.



49 Cal.2d 714

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Elmer WILBURN and Oswald R. Atkinson,
Defendants.

Oswald R. Atkinson, Defendant and
Appellant.

Cr. 6161.

Supreme Court of California,
In Bank.

Feb. 14, 1958.

Rehearing Denied March 12, 1958.

Defendants were convicted of armed robbery and first degree murder which occurred in commission of robbery. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgment of conviction.

tion and order denying motion for new trial, and one of the defendants appealed. The Supreme Court, Carter, J., held that whether fatal shot was fired by appellant or by retired police officer was a question for jury under the evidence and that, since the evidence was sufficient to show that shot was fired by appellant, whether appellant could be guilty of first degree murder under felony-murder rule, if fatal shot had been fired by retired police officer, was immaterial.

Judgment and order affirmed.

Opinion, 314 P.2d 590, vacated.

1. Homicide §18(5)

A killing, which occurred in commission of armed robbery, constituted first-degree murder, if shot which caused death was fired by a participant in robbery. West's Ann.Pen.Code, §§ 187, 189.

2. Homicide §268

In prosecution for murder which occurred in commission of armed robbery as result of exchange of shots with retired police officer, whether fatal shot was fired by retired officer or by participant in robbery was a question for jury under the evidence. West's Ann.Pen.Code, §§ 187, 189.

3. Criminal Law §1171(1)

Remarks made by deputy district attorney in demanding reply to question asked defendant on cross-examination in prosecution for murder did not constitute prejudicial misconduct. West's Ann.Pen.Code, §§ 187, 189.

4. Criminal Law §641(1), 1144(18)

On appeal from conviction for first-degree murder, record sustained finding that defendant had been adequately and competently represented by counsel and did not show that trial court failed to give adequate consideration to defendant's motion for new trial, in view of presumption to the contrary, though defendant's motion to substitute public defender had been denied and his motion for new trial was not argued. West's Ann.Code Civ.Proc. § 1963, subd. 15; West's Ann.Pen.Code, §§ 187, 189.

5. Homicide §329

Where evidence in prosecution for murder which occurred in commission of armed robbery was sufficient to show that fatal shot was fired by defendant, whether defendant would be guilty of first-degree murder under felony-murder rule, if fatal shot had been fired by retired police officer in exchange of shots with defendant, was immaterial. West's Ann.Pen.Code, §§ 187, 189.

Morris Lavine, Nathan Kline, Los Angeles, for appellant.

Ellery E. Cuff, Public Defender, Erling J. Hovden, Chief Deputy Public Defender, and Richard B. Goethals, Deputy Public Defender, Los Angeles, as amici curiae on behalf of appellant.

Edmund G. Brown, Atty. Gen., and Miles J. Rubin, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendants Wilburn and Atkinson were charged in four counts: Count 1, murder of Walter James and counts 2, 3 and 4, armed robbery; it was charged also that they were armed with revolvers during the commission of the crimes. They pleaded not guilty to all counts but later pleaded guilty to the armed robbery (counts 2, 3 and 4) and admitted being armed with revolvers when the robberies were committed. The killing of James occurred in the commission of the robberies. Defendants were found guilty of first degree murder and the jury fixed the penalty at life imprisonment. Defendant Atkinson only appeals.

Between 9:30 and 10:00 p. m. on June 4, 1956 defendants approached a liquor store which they planned to rob and which was being operated by Willie James, a clerk. Wilburn who entered the store and purchased a soft drink observed three people in the store—Willie, his brother Walter, who was helping Willie, and Thomas Wright, a patron. Wilburn left the store and suggested to Atkinson that the time

was not right since there were three people in the store but told Atkinson that none of the three had a gun and Atkinson suggested they proceed as planned. Defendants entered the store, loaded revolvers in their hands, Wilburn with a .32 caliber Smith and Wesson and Atkinson with a .38 caliber Colt. Atkinson told the persons in the store to keep their hands still, go to the back of the store and keep their backs toward the front of the store or they would get a bullet. The three went to the rear of the store to the storage room and were forced to bend over liquor cases there and valuables were removed from their persons. According to Atkinson's instructions, Willie and Wright then laid face down on the floor and were warned that if they moved they would get a bullet in the back. Wilburn took Walter to the cash register toward the front of the store, and had him open the register and put the money in a paper bag. About that time Thomas Watson, a retired police officer, armed with a loaded .45 caliber Colt automatic on his person, entered the store to make a purchase. He saw Wilburn with a gun and Walter behind the counter at the cash register and Atkinson standing in the customers' aisle opposite the register. Watson was told by Atkinson to go to the back of the store and he took a couple of steps in that direction, having sized up the situation as a hold-up. Atkinson glanced toward the front of the store and when he turned back toward Watson the latter had drawn his automatic which he fired, hitting Atkinson, spinning him around. Watson stepped over to a soft drink case and fired again at Atkinson. In the meantime Atkinson was firing his revolver. Watson moved to another area and fired two shots at Wilburn. A few seconds later defendants fled from the store, and Walter stumbled toward Watson and fell. Defendants were later apprehended. Five shots were fired by Atkinson, none by Wilburn. An examination of the store accounted for four of Atkinson's bullets.

[1] Atkinson contends that the evidence is insufficient to establish that a bullet from his gun caused the death of Walter James; that it is inherently improbable that it came from his gun. There is no question but that the killing occurred in the commission of a robbery being perpetrated by Atkinson and Wilburn and that therefore it was murder of the first degree (see, Pen. Code, §§ 187, 189) if shown that Walter was shot by Atkinson, and the question is not presented as to whether it would nevertheless be first degree murder although Walter was killed by a shot from Watson's gun, he being the only other one to fire a gun.

The scene of the robbery is a liquor store with its length running east and west. The customers' entrance to the store was at the south end of the east side. Extending west along the south wall is a beer display, stock rack and liquor cases. Immediately north of that is a customers' aisle. Along the north side of the aisle and extending west is a cigar counter, a merchandising counter on the west end of which is a cash register, and then a display refrigerator for soft drinks. At the end of that is an aisle running north for access to shelves of liquor and a storage room along the north side of the store. Along the wall to the west of that aisle is a refrigerator and more cases. Behind and to the north of the counter and soft drink refrigerator is an aisle called clerk's aisle and then a row of shelves for liquor display against the wall separating the store proper from the storage room. As seen, access from the storage room is gained from the north-south aisle.

[2] As before stated, Atkinson and Wilburn entered the store carrying guns and had Willie James and Wright lie face down in the storage room. Wilburn and Walter went to the cash register in the aisle between it and the liquor shelves, standing side by side. Walter was to the east of but right next to the cash register drawer. Wilburn was east of him. When Watson entered, Atkinson was in the customers'

aisle and in front of the cash register counter and Wilburn and Walter were standing at the counter in the clerk's aisle. Watson was facing northwest. He was southeast of Wilburn and Walter. He took two paces going between Atkinson and the counter and Atkinson, hearing a noise at the entrance door, turned his head that way. When he turned back Watson had his gun pointed at him and Watson fired, striking Atkinson in the stomach. That spun Atkinson around toward his left and Atkinson was shooting generally in the direction of Walter as he spun. Additional shots were thereafter fired as above mentioned. There was a cigarette case above the cash register. While the evidence is not entirely clear that a bullet from Atkinson's gun could have struck Walter, there is expert testimony to the effect that the kind of bullets used by Atkinson would leave more copper residue in passing through cloth than those fired by Watson, and the residue in Walter's clothes where the bullet passed through was considerably like that which would be caused by Atkinson's rather than Watson's bullets. It is true that Watson fired at Wilburn when he was with Walter but saw no visible effects from his shots. Walter was partly stooped over after Watson fired but how far does not appear. Walter did not fall until about 20 seconds after the shooting started. The autopsy revealed that the fatal shot had struck Walter in the chest 19¾ inches below the top of his head (Walter was 5 feet 6½ inches tall); it travelled upward through his body. There is evidence that if Walter had been struck by a .45 caliber bullet he would spring or recoil from the impact; but as seen, Walter did neither. Therefore, it is reasonable to infer that the bullet which hit Walter's upraised arm while he was facing the rear of the store caused him to turn and expose his side to Atkinson's line of fire. Rather than being impossible that a shot from Atkinson's gun killed Walter, the evidence points to that conclusion and the jury so found. While contrary inferences could have been

drawn from the evidence that Watson shot at Wilburn who was standing next to Walter, such conflicts were for the jury to resolve.

[3] Defendant complains that the deputy district attorney was guilty of prejudicial misconduct but we fail to find prejudicial error. On cross-examination of Atkinson he was asked if he did not fire a shot (as he had testified), how it happened that there were five discharged cartridges in his gun, to which he replied that he did not know—did not know what happened after Watson's .45 caliber bullet struck him, to which the deputy district attorney replied "I feel sorry for you and your .45 slug, but I feel sorrier for the man that was killed.

"Now, will you answer my question?" Atkinson's counsel objected that the deputy was quarrelling with the witness to which the court replied, "[Y]ou are getting argumentative." No request was made for the court to instruct the jury to disregard the deputy's remarks. It was nothing more than the give and take found in a trial and we find no prejudicial error.

Atkinson contends that he cannot be guilty because he was unconscious after he was shot by Watson. Assuming that would be a defense in a felony-murder situation such as we have here, there is ample evidence that Atkinson was not unconscious. Atkinson fled from the scene of the crime, jumped a fence and hid. Later he walked 15 or 20 blocks, spoke to several people and got a ride for some distance and paid the owner of the car who furnished him the ride.

[4] Defendant claims that sufficient consideration was not given to his motion for a new trial. When sentence was to be pronounced, defendant's counsel said that defendant Atkinson felt he had not been adequately represented and wanted the public defender, but that he felt that he had adequately represented Atkinson. The court agreed that Atkinson had adequate and competent representation and the rec-

ord clearly bears this out. The court denied the motion to substitute the public defender and Atkinson's counsel moved for a new trial. It was not argued as no argument was offered by Atkinson's counsel, and the motion was denied. We cannot say that the court failed to give adequate consideration to the motion for a new trial. The presumption is to the contrary (Code Civ.Proc., § 1963(15)).

[5] Since there is sufficient evidence to show that Atkinson's shot, rather than Watson's, killed Walter, it is unnecessary to consider the question of whether Atkinson could be guilty of first degree murder under the felony-murder rule if the fatal shot was fired from Watson's gun. The judgment and order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



49 Cal.2d 690

Harry S. GORDON and David J. Williams, copartners doing business under the fictitious firm name and style of Independent Home Supply Co., Plaintiffs and Appellants,

v.

Irving LANDAU, Defendant and Respondent.

L. A. 24273.

Supreme Court of California,
In Bank.

Feb. 14, 1958.

Action by employers against former employee for breach of contract of employment. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered judgment for employee and employers appealed. The Supreme Court, McComb, J.,

held that employment contract, wherein salesman, who was engaged to sell merchandise to employers' customers and collect therefor, agreed not to solicit such customers for one year after termination of employment, did not prevent salesman after termination of employment from carrying on a weekly credit business or any other business, but merely prevented use of employers' confidential lists to solicit customers and did not restrain salesman from engaging in a lawful profession, trade or business, and was valid and enforceable.

Reversed with directions.

Opinion 314 P.2d 757, vacated.

1. Contracts ⇨65(2)

Employment contract wherein salesman, who was engaged to sell merchandise to employers' customers and collect therefor, agreed not to solicit such customers for one year after termination of employment, was not unenforceable by employers on ground that there was no consideration for it, where employers agreed to and did employ salesman in consideration of his executing the contract.

2. Contracts ⇨9(1)

Employment contract wherein salesman, who was engaged to sell merchandise to employers' customers and collect therefor, agreed not to solicit such customers for one year after termination of employment, was not too vague and uncertain to be enforceable.

3. Contracts ⇨117(1)

Employment contract, wherein salesman, who was engaged to sell merchandise to employers' customers and collect therefor, agreed not to solicit such customers for one year after termination of employment, did not prevent salesman after termination of employment from carrying on a weekly credit business or any other business, but merely prevented use of employers' confidential lists to solicit customers and did not restrain salesman from engaging in a lawful profession, trade

or business, and was valid and enforceable. West's Ann.Bus. & Prof.Code, § 16600.

4. Contracts — 326

Where, under employment contract, salesman, who was engaged to sell merchandise to employers' customers and collect therefor, agreed not to solicit such customers for one year after termination of employment, but salesman, within one year after termination of employment, sold goods to at least 117 of employers' preferred customers and in so doing used employers' lists entrusted to him while he was in their employ, employers were entitled to recover for all damages proximately caused by salesman's wrong.

Joseph Stell and Herbert Murez, Los Angeles, for appellants.

Harry A. Franklin, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant, after trial before the court without a jury, in an action seeking (a) damages and (b) an injunction restraining defendant from soliciting plaintiffs' customers, plaintiffs appeal.

Facts: Plaintiffs are, and for about eight and one-half years have been, engaged in the house-to-house installment sales business. Their business is conducted by selling merchandise, generally to housewives in the low-income bracket at their homes, with either a down payment of \$1.00 or \$2.00, or with no down payment at all. Weekly installments of \$1.00 to \$2.00 are thereafter collected by plaintiffs through their collector-salesmen.

The collector-salesman has a dual task. He calls at the house of the customer each week on a scheduled day and collects the small installment payment due. At the same time he makes what, in the trade, are called "add-on sales," that is, sales of additional merchandise, the cost of which is added to the customer's account. The cus-

tomers thus comes to rely on the plaintiffs, through the medium of their collector-salesman, as her supplier of the type of goods which plaintiffs handle.

Plaintiffs carry a line of general merchandise, such as clothing, household goods and appliances. Their customers are unique in that they are mostly persons in the low-income brackets, many of whom cannot afford to patronize more than one house-to-house credit installment supplier.

Plaintiffs have about 9000 accounts in Los Angeles County. Their customers are obtained by (1) reference from old customers, (2) canvassing of the various homes by plaintiffs' employees for the sole purpose of attempting to make initial sales, and (3) plaintiffs' purchasing accounts from companies whose business it is to canvass homes and make opening sales on an installment basis.

Many customers make a single purchase and thereafter pay off the account. Some continue to buy, and these form the hard core of steady customers who have bought merchandise from plaintiffs for many years.

There is considerable turnover in the new accounts, but plaintiffs' regular customers can be counted on to buy month after month and year after year.

For the past several years, plaintiffs' cost of merchandise, plus cost of sales and collections, has been about 70% of the gross sales price. After computing overhead, plaintiffs have made a net profit of approximately 10%. A few hundred customers one way or the other would not materially raise or lower the overhead.

Defendant was employed by plaintiffs as a collector-salesman in November 1946 and was shortly thereafter assigned to a route. On each working day he was given a set of cards, on each of which appeared the name of a customer of plaintiffs on the particular route, the customer's address, a list of the merchandise previously bought by her from plaintiffs, and the amounts of payments for the period during which she had been a customer of plaintiffs. The card also showed the money balance due on the

account and the name of the person who obtained or referred the customer in the first instance.

When the card indicated that the balance of the account and the credit rating of the customer warranted, defendant would attempt to sell additional merchandise to the customer.

Customers relied on defendant's being at their houses one week from the day of his last call.

On March 4, 1952, plaintiffs and defendant executed a contract, which read in part:

"8. Collector-Salesman further agrees that during the period of one (1) year immediately after the termination of his employment with the Employer he will not, either directly or indirectly, make known or divulge the names or addresses of any of the customers or patrons of Employer at the time he entered the employ of Employer or with whom he became acquainted after entering the employ of Employer, to any person, firm or corporation, and that he will not, directly or indirectly, either for himself or for any other person, firm, company or corporation, call upon, solicit, divert, or take away, or attempt to solicit, divert or take away any of the customers, business or patrons, of the Employer upon whom he called or whom he solicited or to whom he catered or with whom he became acquainted, or upon whom he called or to whom he catered after his employment with said Employer.

"9. Collector-Salesman hereby consents and agrees that for any violation of any of the provisions of this agreement, a restraining Order and/or an injunction may issue against him in addition to any other rights the Employer may have.

"10. In the event that the Employer is successful in any suit or proceeding brought or instituted by the Employer to enforce any of the provisions of the within agreement or on account of any

damages sustained by the Employer by reason of the violation by the Collector-Salesman of any of the terms and/or provisions of this Agreement to be performed by the Collector-Salesman, Collector-Salesman agrees to pay to the Employer reasonable attorneys' fees to be fixed by the Court."

Defendant terminated his employment with the plaintiffs on July 25, 1954. Shortly thereafter he started operating the same type of business for himself, selling the same kind of merchandise. He went along his old route and methodically visited the customers of plaintiffs whose names, identities and locations he had learned and whose acquaintances he had made during and by reason of his former employment with plaintiffs.

With a few exceptions, he visited these customers without any prior invitation or request on their part to do so. He advised them that he was then engaged in the same business for himself and solicited their trade.

With the knowledge which he had acquired from plaintiffs' customer cards, he asked, suggested and urged customers to buy merchandise from him on the same installment basis. After he had made sales, he would call on the customers regularly each week, collecting the weekly installments and making substantial add-on sales. His ability to make such sales was greatly facilitated by his having sold the customers merchandise during his employment with plaintiffs. He sold goods to 117 former customers of plaintiffs in the amount of \$6,752.89.

The trial court found in favor of defendant, holding that the contract which the parties had entered into was invalid.

This is the single question necessary for us to determine: Was the contract entered into between plaintiffs and defendant, invalid for the reason, as contended by defendant, that (i) there was no consideration for it; (ii) it was too vague and uncertain to be enforceable;

(iii) there were no wages or conditions of employment specified in it; or (iv) it had an unlawful object and was therefore void under the provisions of section 16600 of the Business and Professions Code?*

[1, 2] This question must be answered in the negative for these reasons:

(i) There was consideration for the contract, in that plaintiffs agreed to and did employ defendant in consideration of his executing the contract, a portion of which is set forth above.

(ii) A reading of the contract discloses that it is neither vague nor uncertain.

(iii) The contract specifically provided for the payment of a weekly salary and commissions by plaintiffs to defendant.

(iv) The contract did not restrain defendant from engaging in a lawful profession, trade or business within the meaning of section 16600 of the Business and Professions Code.

[3] It clearly appears from the terms of the contract that it did not prevent defendant from carrying on a weekly credit business or any other business. He merely agreed not to use plaintiffs' confidential lists to solicit customers for himself for a period of one year following termination of his employment. Such an agreement is valid and enforceable. (*Gordon v. Wasserman*, 153 Cal.App.2d 328, 314 P.2d 759 [hearing denied by the Supreme Court]; *Handyspot Co. of Northern California v. Buegeleisen*, 128 Cal.App.2d 191, 195 [6], 274 P.2d 938; *King v. Gerold*, 109 Cal.App.2d 316, 318 [2], 240 P.2d 710.)

[4] The uncontradicted evidence shows that defendant sold goods to at least 117 of plaintiffs' preferred customers and in doing so used plaintiffs' lists entrusted to him while he was in their employ. Plaintiffs' preferred customers are a real asset to their business and the foundation upon which its success, and indeed its survival, rests. It thus logically follows that a list of such customers is a valuable trade secret and that plaintiffs were damaged by defendant's unlawful use thereof. (*California Intelligence Bureau v. Cunningham*, 83 Cal.App.2d 197, 203 [4], 188 P.2d 303; cf. *Aetna Bldg. Maintenance Co. v. West*, 39 Cal.2d 198, 204 [8], 246 P.2d 11.) Plaintiffs were therefore entitled to have damages found and assessed in their favor. They may recover for *all* damages proximately caused by defendant's wrong. (*Gordon v. Schwartz*, 147 Cal.App.2d 213, 216 [1], 305 P.2d 117.)

In view of the fact that more than a year has passed since defendant left plaintiffs' employ, by the very terms of the contract the time has elapsed during which plaintiffs would be entitled to obtain an injunction against defendant restraining him from using the lists of their customers.

The judgment is reversed with directions to the trial court to take evidence and make a finding as to the amount of damages suffered by plaintiffs and to enter judgment accordingly.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

* Section 16600 of the Business and Professions Code reads: "Except as provided in this chapter, every contract by

which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

49 Cal.2d 706

ARGONAUT INSURANCE EXCHANGE,
 Petitioner,
 v.

INDUSTRIAL ACCIDENT COMMISSION
OF STATE OF CALIFORNIA, M. Frances
Bellinger, and Barbara A. Bellinger, Doro-
thy M. Bellinger, Robert W. Bellinger,
Laurence G. Bellinger, Thomas M. Bel-
linger, Mary C. Bellinger, and Jo Ann M.
Bellinger, minors, by their Guardian ad
litem and Trustee, M. Frances Bellinger,
Respondents.

S. F. 19812.

Supreme Court of California.
 In Bank.
 Feb. 14, 1958.

Employer brought proceeding in Supreme Court to review a decision of the Industrial Accident Commission on reconsideration of decision of referee approving agreement between employer and claimants for compromise of claim for benefits for death of employee, and to annul an award of death benefits, and for annulment of order denying employer's application for reconsideration. The Supreme Court, Spence, J., held that fact that referee found agreement of compromise "outstandingly fair to all concerned" did not preclude Industrial Accident Commission from exercising its power to reconsider the referee's order of approval.

Award and order affirmed.

1. Workmen's Compensation ☞1144

The Industrial Accident Commission has jurisdiction to annul order of referee approving agreement for compromise of compensation claim and release. West's Ann.Labor Code, §§ 115, 5001, 5900-5911, 5900(b).

2. Workmen's Compensation ☞1145

Right of Industrial Accident Commission to annul referee's order approving agreement for compromise of compensation claim and release is not limited to a situation where some meritorious reason exists for reconsideration, as distinguished from

a situation where commission may have a different view of the same evidence than referee. West's Ann.Labor Code, §§ 115, 5001, 5803, 5804, 5900-5911, 5900(b).

3. Compromise and Settlement ☞15(1)

Generally, merits of original controversy are no longer in issue when compromise settlement is made in good faith and without fraud, duress, or undue influence.

4. Compromise and Settlement ☞15(1)

Ordinarily, a compromise agreement is binding on the parties and becomes the measure of their rights.

5. Workmen's Compensation ☞1125

Fact that referee found executed agreement between claimants and employer for compromise of claim for benefits for death of employee "outstandingly fair to all concerned" did not preclude Industrial Accident Commission from exercising its power to reconsider the referee's order of approval of the agreement. West's Ann. Labor Code, §§ 115, 5001, 5803, 5804, 5900-5911, 5900(b), 5903.

6. Workmen's Compensation ☞1125

Reconsideration by Industrial Accident Commission of determination of referee approving agreement between employer and claimants for compromise of claim for death benefits for death of employee was not limited, though decision of Industrial Accident Commission to reconsider case was apparently prompted by referee's determination to increase fee of attorney of claimant. West's Ann.Labor Code, §§ 115, 5001, 5803, 5804, 5900-5911, 5900(b), 5903.

7. Workmen's Compensation ☞1125

Industrial Accident Commission, in reconsidering decision of referee approving agreement between employer and claimants for compromise of claim for benefits for death of employee, was not required to take further evidence, but could re-determine the case on the existing record pursuant to its statutory powers. West's Ann.Labor Code, §§ 115, 5001, 5803, 5804, 5900-5911, 5900(b), 5903, 5906, 5907.

8. Workmen's Compensation $\Rightarrow$ 1125

Industrial Accident Commission, in reconsidering decision of referee approving agreement between employer and claimants for compromise of claim for benefits for death of employee, was required only to make findings on ultimate facts. West's Ann.Labor Code, § 5313.

9. Workmen's Compensation $\Rightarrow$ 1125

On reconsideration by the Industrial Accident Commission of decision of referee approving agreement between employer and claimants for compromise of claim for benefits for death of employee, evidence supported finding that death of employee from acute coronary occlusion was caused by his work. West's Ann.Labor Code, §§ 115, 5001, 5803, 5804, 5900-5911, 5900(b), 5903, 5906, 5907.

10. Workmen's Compensation $\Rightarrow$ 1125

On reconsideration by Industrial Accident Commission of decision of referee approving agreement between employer and claimants for compromise of claim for benefits for death of deceased employee, finding of Industrial Accident Commission that deceased employee, while employed as general manager subsequent to certain date at certain place by employer, sustained injury arising out of and occurring in course of employment, and that such injury proximately caused his death on subsequent date, sufficiently complied with statutory requirement that Industrial Accident Commission make findings on all facts involved in the controversy. West's Ann.Labor Code, § 5313.

11. Workmen's Compensation $\Rightarrow$ 1939

On review by Supreme Court of decision of Industrial Accident Commission on reconsideration of decision of referee approving agreement between employer and claimants for compromise of claim for benefits for death of employee, the substantial evidence rule was applicable, and Supreme Court had no power to substitute its judgment for that of Industrial Accident Commission as to effect or weight of evidence. West's Ann.Labor Code, § 5952.

Leonard, Hanna & Brophy and Ivan A. Schwab, San Francisco, for appellant.

Everett A. Corten and Daniel C. Murphy, San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks the annulment of an award of death benefits made to a surviving widow and children by a panel of respondent commission, and of an order of the panel denying petitioner's application for reconsideration. The panel made the challenged award following its reconsideration of a referee's order approving a compromise and release. Petitioner contends that the commission through its panel lacked jurisdiction to substitute its decision for that of the referee. Petitioner also contends that the panel's findings were insufficient, and it questions whether there was substantial evidence "based upon the entire record" to support the panel's award. Upon a review of the record and the applicable statutory provisions, we have concluded that petitioner's contentions cannot be sustained.

Decedent died on August 27, 1955, from an acute coronary occlusion. He had a pre-existing heart condition. His widow and minor children claimed that the fatal heart attack resulted from exceptional stress and strain incident to the deceased's occupational activities. After several protracted hearings before a referee, the parties on October 15, 1956, filed a compromise and release for \$5,000. This agreement contained a request that the attorney for the applicants be allowed a fee of \$750. On October 23, the referee approved the agreement but increased the attorney's fee to \$1,000. On October 31, a panel of the commission, on its own motion, granted reconsideration "pursuant to Labor Code, Section 5900(b)." Its initial report stated that the review had been primarily directed toward the adequacy of the attorney's fee allowed but that a review of the evidence indicated that the applicants had made out a sufficiently strong case to warrant re-determination of the adequacy of the consideration for the compromise and release. On

December 20, 1956, the panel issued its decision after reconsideration. It concluded therein, after study of the record as a whole, that further proceedings were not essential for disposition of the claim. The panel set aside the referee's approval of the compromise and release agreement and substituted its own findings and award. It awarded a death benefit in the sum of \$8,750, plus \$400 burial expense, and determined that the applicants' attorney was entitled to a fee of \$750, with the right of a lien for that amount against the unpaid compensation. Petitioner's application for reconsideration was denied.

Petitioner first challenges the jurisdiction of respondent commission to annul the referee's order approving the parties' compromise and release agreement. In 1951, the Legislature amended section 115 of the Labor Code so as to grant referees authority to issue original decisions. It was further provided that "every [such] * * * order, decision, or award * * * is the * * * order, decision, or award of the commission unless reconsideration is had in accordance with the provisions of Article 1, Chapter 7, Part 4, Division 4 of this code [sections 5900-5911]." Stats. 1951, ch. 778, p. 2266, § 1. However, no authority was given to referees to render an original decision approving a compromise or release agreement. Under section 5001 of the Labor Code as it then read, "no release of liability or compromise agreement" was "valid unless * * * approved by the commission as a whole or a panel thereof." Stats. 1951, ch. 778, p. 2267, § 2. In 1955, section 5001 was amended so that the required approval might be given "by the commission, a panel, commissioner, or referee." Stats. 1955, ch. 1822, p. 3365, § 4; emphasis added. Petitioner argues that these successive changes indicate a legislative intent that approval by a referee of a compromise and release agreement should have the same force and effect as an approval by the commission as a whole; and that once the referee has determined that the compromise should be approved, the commission cannot substitute

its contrary determination for that of the referee. As above stated, no additional evidence was taken by the commission upon reconsideration of the case. Neither of the parties had sought to be released from the agreement nor claimed that the agreement was unfair or the consideration inadequate.

[1] However, as respondent commission maintains, the authority granted to a referee by the 1955 amendment to section 5001 of the Labor Code must be construed in the light of the 1951 amendment to section 115 thereof, making "every * * * order, decision, or award * * * by any commissioner or referee" subject to reconsideration under Labor Code sections 5900-5911. (Emphasis added.) Section 5900 of said code, by subdivision (b) added in 1951, provides: "At any time within 60 days after the filing of an order, decision, or award made by a commissioner or a referee * * * the commission may, on its own motion, grant reconsideration." Stats. 1951, ch. 778, p. 2268, § 13. Section 5911 of said code, also added in 1951, provides: "Nothing contained in this article shall be construed to prevent the commission, on petition of an aggrieved party or on its own motion, from granting reconsideration of an original order, decision, or award made and filed by the commission or a panel thereof, within the same time specified for reconsideration of an original order, decision, or award made and filed by a commissioner or a referee." Stats. 1951, ch. 778, pp. 2270-2271, § 27. Since the commission could reconsider its own orders and decisions, it would seem logical that it was similarly intended to have authority to reconsider the orders and decisions of one of its referees. To hold otherwise would give the 1955 amendment an effect inconsistent with the power of reconsideration vested in the commission under the cited statutes theretofore existing.

[2] Petitioner contends that it was intended that the authority given by section 5900(b) of the Labor Code should be exercised only where some meritorious reason

exists for reconsideration, and not merely where the commission may have a different view of the same evidence. To this point, petitioner cites *Silva v. Industrial Accident Commission*, 68 Cal.App. 510, 229 P. 870, which held that the commission could "reopen and reconsider an award where the equities of the case demanded it." 68 Cal. App. 515, 229 P. 871. In that case a party, dissatisfied with a compromise of a claim approved some two years earlier, sought to have it set aside but made no showing of "mistake, duress, fraud, or undue influence" or of any excuse for his failure to have "acted promptly in making his application for relief." 68 Cal.App. 515-516, 229 P. 872. The "petition to reopen" was made in pursuance of the continuing jurisdiction of the commission over its orders, decisions and awards and its authority to "rescind, alter, or amend" them upon "good cause appearing therefor." Lab.Code, § 5803; formerly Workmen's Comp. & Safety Act, Stats.1917, ch. 586, p. 850, § 20d. Such power exists in the commission for "five years from the date of the injury" (Lab. Code, § 5804) and its exercise requires a showing of good cause commensurate with such extended power. (See 1 Hanna, *The Law of Employee Injuries and Workmen's Compensation*, pp. 157-158.) But an entirely different situation is presented when the commission exercises, on its own motion, its right to reconsider a commissioner's or referee's order within 60 days after its filing. In such case the applicable statute makes no comparable reference to a showing of "good cause" as the basis for reconsideration. Lab.Code, § 5900(b).

[3-7] It is true, as petitioner maintains, that the agreement purported to compromise a bona fide dispute between the parties. It is generally the rule that the merits of the original controversy are no longer in issue where a compromise agreement is made in good faith and without fraud, duress or undue influence. Ordinarily, such a compromise agreement is binding upon the parties and becomes the measure of their rights. See *Stub v. Belmont*, 20 Cal.2d 208,

217, 124 P.2d 826; *Bennett v. Bennett*, 219 Cal. 153, 159, 25 P.2d 426; 11 Cal.Jur.2d § 5, pp. 8-9. But here the legislative intent must prevail. The statute required approval (Lab.Code, § 5001), which was given by the referee. At the same time the referee increased the allowance of the fee for the applicants' attorney. While admittedly the referee found the executed agreement "outstandingly fair to all concerned," that finding did not preclude the commission's exercise of its power to reconsider his order of approval. Lab.Code, § 115. Although the commission's decision to reconsider the case was apparently prompted by the referee's determination to increase the attorney's fee, such reconsideration, once granted, was in nowise limited. The commission was not required to take further evidence (Lab.Code, §§ 5905, 5907) and it could redetermine the case upon the existing record pursuant to its statutory powers. Lab.Code, §§ 5900(a), 5903.

Petitioner argues that unless the referee's order of approval is final, the payment of the agreed amount will be delayed for the statutory 60-day period during which reconsideration may be granted, thus preventing prompt consummation of the agreed compromise. This same argument could be made whether the original order approving the compromise was signed by a referee or the commission itself, a panel thereof or a commissioner. Lab.Code, § 5001. It thus appears that any such argument should be presented to the Legislature rather than to the courts. Under the circumstances here outlined and the statutory authority now conferred, respondent commission acted within its jurisdiction in granting reconsideration and thereafter making its own determination based upon its own review of the evidence. Lab.Code, § 5900(b).

[8-10] Petitioner next urges that respondent commission failed to make "findings upon all facts involved in the controversy," as required by section 5313 of the Labor Code. Its objection is directed to the only finding made pertinent to the cause of death: that decedent "while employed as

a general manager subsequent to October 1, 1954, at San Jose, California, by [the employer], sustained an injury arising out of and occurring in the course of his employment. Said injury proximately caused his death on August 27, 1955." Petitioner contends that this finding is inadequate as being no more than a conclusion of law. Several portions of the record are cited to show that various mental tensions arising from decedent's employment occurred some three months prior to the fatal attack, and it maintains there was no evidence that decedent sustained an injury at the time of his death. From this premise it argues that the commission should have made specific findings on each of these incidents of alleged tension in demonstration of their "truth or falsity" as a causative factor of decedent's death. *Pierson v. Industrial Accident Commission*, 98 Cal.App.2d 598, 601, 220 P.2d 794, 797. In the *Pierson* case the commission's failure to find on the material issue of employment caused the award to be annulled. In this case, however, there was no such omission. Findings on ultimate facts only are required. *Lumbermen's Mutual Casualty Co. v. Industrial Accident Commission*, 29 Cal.2d 492, 499, 175 P.2d 823, and cases cited. Here the finding was directed to the ultimate issue as to whether the death was caused by the work. There is ample evidence to support such finding. The applicants' medical expert established decedent's medical history of hypertension, outlined the progressive nature of his advanced coronary arteriosclerosis, and concluded that decedent's work, with its exceptional mental stress and responsibility, might "be considered the precipitating factor in hastening his exodus." In addition, petitioner's own medical expert, upon cross-examination, recognized that a person with decedent's advanced pathological involvement should not be subjected to nervous tension and strain in working conditions because "he might get an elevation of blood pressure that might literally blow out the wall of one of his coronary or cerebral vessels and cause death."

[11] Likewise there is no merit to petitioner's attack upon the settled rule governing the scope of judicial review of the commission's award. Petitioner relies on the 1951 amendment to section 5952 of the Labor Code, calling for the court to determine "based upon the entire record" whether the commission's award is supported by substantial evidence. Stats.1951, ch. 606, p. 1769, § 8. It argues that the quoted phrase requires the court to re-examine the whole record rather than to ascertain merely if there was substantial evidence therein to support the ruling in question. See *California Shipbuilding Corp. v. Industrial Accident Commission*, 27 Cal.2d 536, 541-542, 165 P.2d 669; *Nielsen v. Industrial Accident Commission*, 220 Cal. 118, 122, 29 P.2d 852. But the 1951 amendment would appear to be only a restatement of the existing law, manifesting the Legislature's acceptance of the substantial evidence rule in these cases. As was said on this precise point in *Columbia-Geneva Steel Division, etc. v. Industrial Accident Commission*, 115 Cal.App.2d 862, at pages 863-864, 253 P.2d 45, at page 46: "This [1951] amendment was not intended to give the courts the power to substitute their judgment for that of the Commission as to the effect or weight of the evidence. Section 9 of the statute embodying this amendment specifically provides that it does not 'permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.' Stats.1951, p. 1769. Since we cannot exercise our independent judgment on the evidence our inquiry ends when we find substantial evidence to support the panel's finding." See Stats.1953, ch. 94, pp. 815-816, §§ 1-2; also *Industrial Indemnity Co. v. Industrial Accident Commission*, 115, Cal.App.2d 684, 692, 252 P.2d 649. The record here contains substantial evidence to support the challenged finding that decedent "sustained * * * injury arising out of and occurring in the course of his employment [which] proximately caused his death," and therefore the award will not be disturbed. *Douglas Aircraft Co.*

v. Industrial Accident Commission, 47 Cal. 2d 903, 905, 306 P.2d 425.

The award and order are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and McCOMB, JJ., concur.



157 Cal.App.2d 638

Lillian J. JORGENSEN and Hans C. Jorgensen, Plaintiffs and Appellants,

v.

William BURROWS, Hilda Randall and Joseph A. Brown, Defendants and Respondents.

No. 17370.

District Court of Appeal, First District, Division 1, California.

Feb. 18, 1958.

Rehearing Denied March 20, 1958.

Hearing Denied April 16, 1958.

Proceedings to set aside a default judgment which abrogated plaintiffs' contract to sell an apartment business to defendants and awarded defendants a monetary recovery on theory that plaintiffs' attorney, who had agreed that plaintiffs should retain other counsel because attorney represented other parties who had interests potentially adverse to plaintiffs, had obtained indefinite extension of time to plead. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., granted motion for judgment on opening statement for defendants and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that issues of fact as to whether plaintiffs honestly believed they had indefinite extension of time and felt they could wait until further notice to do something with respect

to action against them were presented and trial court improperly granted defendants' motion for judgment on plaintiffs' opening statement.

Reversed.

Trial $\Rightarrow$ 109

In action to set aside a default judgment which abrogated plaintiffs' contract to sell an apartment business to defendants on theory that plaintiffs' attorney, who had agreed that plaintiffs should retain other counsel because attorney represented other parties who had interests potentially adverse to plaintiffs, had obtained indefinite extension of time to plead, issues of fact were presented as to whether plaintiffs honestly believed they had indefinite extension of time and felt they could wait until further notice to do something with respect to action against them, and trial court improperly granted defendants' motion for judgment on plaintiffs' opening statement.

Sugarman, Bernhelm & Gilbert, Irving C. Sugarman, San Francisco, for appellants.

Miguel A. Leite, San Francisco, for respondent Brown.

Joseph A. Brown, San Francisco, for respondents Burrows and Randall.

FRED B. WOOD, Justice.

Plaintiffs seek to set aside a default judgment which abrogated their contract to sell an apartment business to the defendants herein and awarded the latter monetary recovery in the amount of \$8,705 as actual and \$20,000 as punitive damages.

Defendants' general and special demurrers to the complaint herein were overruled. They filed their answer and the cause came on for trial. Defendants moved and the trial court granted a motion for judgment on the opening statement of plaintiffs.¹

1. Defendants argue that judgment was rendered after a trial on the merits, despite the fact that their counsel when making the motion said it was being made "on the opening statement and remarks

of counsel" for plaintiffs and the official minute entry reads: "* * * counsel for defendant interposed a motion for judgment on the opening statement of plaintiff. Whereupon the Court ordered

Our examination of the record convinces us that the opening statement presented questions of fact concerning which plaintiffs are entitled to present evidence.

From the opening statement and the complaint (which was made a part of the opening statement) it appears: plaintiffs herein were served with summons in the other action. They went to an attorney who obtained from the attorney for defendants herein (plaintiffs in the other action) an indefinite extension of time to plead. Shortly thereafter plaintiffs and their attorney mutually agreed they should retain other counsel because he represented other parties who had interests potentially adverse to plaintiff. On November 17, 1954, their attorney mailed plaintiffs a letter (also made a part of the opening statement) in which he said: "This is to confirm my telephone conversation with Mrs. Jorgensen on Monday in which it was understood that you people are going to employ another firm of attorneys to represent you in connection with the above matter, and that our charge for services to-date would be \$25. In that conversation I pointed out to Mrs. Jorgensen it was imperative that an answer or other pleading be filed in response to the plaintiff's complaint and that she would make arrangements to call upon me or Mr. Lerer to pick up the papers which you gave us. We have been keeping the time to plead open but cannot keep the case in suspense indefinitely. I discussed our telephone conversation with Mr. Lerer and he will be happy to see either of you when you come in. I wish to stress the fact it is important that you procure legal representation at once so your rights are not prejudiced. I suggest you make an appointment with either Mr. Lerer or myself as soon as possible."

said motion granted." The minute entry does not indicate that a more formal order was to be made.

Our examination of the record convinces us that court and counsel regarded it simply as a motion upon plaintiffs' opening statement; an understanding not altered by the introduction of some documentary evidence after the court had orally announced the granting of the mo-

December 22, 1954, plaintiffs' former attorney filed an answer on behalf of the other defendants in the other action.

January 26, 1955, plaintiffs' default was entered.

July 27, 1955, judgment was taken against them.

Upon receipt from the clerk of the court of a postcard notice of the judgment, they sought and retained their present counsel who on August 17, 1955, filed the complaint herein.

It does not appear that they did anything after receipt of the letter from their former attorney until receipt of the clerk's notice of judgment. By way of explanation, the complaint alleges that the plaintiffs "believed * * * they would be notified * * * when and if an appearance would be required from them." Counsel in his opening statement said: "My understanding of the facts is that they waited for somebody to let them know if they had to do something, which I must say is negligence, but I have to disagree with counsel's statement that merely because they were negligent that they lost their rights. In negligence, and I have some cases in my points and authorities * * * It has got to be negligence, plus prejudice."

This statement, say the defendants, was an admission that plaintiffs were "negligent" and thereby lost any right they otherwise may have had to challenge the judgment in question. We do not think that could be said as a matter of law. "Negligence" was perhaps an unfortunate word to use. It has potentially broad connotations. But when in the same breath counsel said it takes negligence "plus prejudice," he is not necessarily unsaying what he had just been saying: that his clients honestly be-

tion. Indeed, in reference to such evidence, plaintiffs' counsel upon that occasion said: "Also, your Honor, *may it be deemed that the complaint on file herein to which I referred may be deemed a part of the opening statement?*" In response thereto, counsel for defendant said, "The whole record can be deemed a part of it." (Emphasis added.)

lieved they had an indefinite extension of time and felt they could wait until further notice. The latter concept presents questions of fact, among them these: Did plaintiffs really so believe? Did the circumstances of the case furnish a basis for such a belief and reliance upon their part? The fact that they had been engaged in the apartment house business for some time did not, as defendants would have us conclude, token (as a matter of law) the possession by plaintiffs of such knowledge and sophistication as might render the deal inexcusable even if upon the trial the circumstances prove to be such that an attorney-defendant would have no possible excuse.

The order is reversed.

PETERS, P. J., and BRAY, J., concur.



157 Cal.App.2d 624

**Buster MASON, Plaintiff, Cross-Defendant
and Respondent,**

v.

**Joseph R. OCHINERO et al., Defendants,
Cross-Complainants and Appellants.**

Civ. 5611.

**District Court of Appeal, Fourth District,
California.**

Feb. 17, 1958.

Action by pickup truck driver against driver of another pickup and its owner for personal injury and property damage resulting from intersectional collision between the two trucks wherein defendants cross-complained for personal injuries and damages. The Superior Court, Fresno County, Edward L. Kellas, J., rendered judgment for plaintiff and defendants appealed on ground of insufficient evidence and alleged plaintiff was contributorily negligent. The District Court of Appeal, Griffin, J., held that evidence, though con-

flicting, was sufficient to submit questions of defendants' negligence and plaintiff's contributory negligence to jury.

Affirmed.

1. Automobiles $\Rightarrow$ 245(14, 80)

In action by pickup truck driver against driver of another pickup and its owner for injuries and damages sustained when plaintiff's truck was struck on right side by defendants' truck after plaintiff had allegedly crossed center line of intersection, wherein defendants cross-complained for injuries and damages and alleged contributory negligence, evidence was sufficient to submit questions of defendants' negligence and plaintiff's alleged contributory negligence to jury.

2. Appeal and Error $\Rightarrow$ 931(1), 1010(1)

An appellate court, on appeal from judgment on verdict, will review evidence in the light most favorable to respondent, will not weigh the evidence, will indulge all intendments and reasonable inferences which favor sustaining the finding of trier of facts, and will not disturb the trier's finding if there is substantial evidence in the record to support it.

3. Appeal and Error $\Rightarrow$ 1011(1)

It is not reviewing court's province to analyze conflicts in the evidence.



Hays & Hays, James N. Hays, Fresno, for appellants.

Hansen, McCormick, Barstow & Shepard and William B. Boone, Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent driver sought damages against defendants and appellants for personal injury and property damage resulting from a collision between two pickup trucks. Defendant and appellant driver Mijach was driving one owned by defendant and appellant Ochinerio. Defendants denied any negligence and alleged plaintiff was guilty of contributory negligence.

They also filed a cross-complaint against plaintiff for personal injury and damages. A jury verdict resulted in a judgment for plaintiff in the sum of \$7,000, which also found against defendants on their cross-complaint. On this appeal defendants contend that there was not sufficient evidence of their negligence to support the verdict and judgment, and that plaintiff was guilty of contributory negligence as a matter of law.

The accident occurred on January 27, 1955, about 12:30 p.m. where Mountain View (running east and west) and Walnut Avenue (running north and south) intersect in Fresno County. At this intersection there is a "jog" in Walnut Avenue to the extent the westerly edge of Walnut, north of Mountain View, is virtually in line with the easterly edge of Walnut, south of the intersection. There were no traffic signs or signals and the view of the intersection was unobstructed except for grape vines near the northeast corner. Plaintiff was proceeding south on Walnut. Defendant was traveling east on Mountain View. According to plaintiff, he approached the intersection at about 20 to 25 miles per hour, reduced his speed to 15 miles as he reached it, and while crossing through the intersection. There was some corroboration of this testimony by one other witness. Plaintiff stated he looked in both directions on Mountain View, saw defendants' car to his right (west) about 250 feet away and then started to cross the intersection; that as he crossed the center line he saw defendants' vehicle "right on him"; that it struck his truck on its right side after plaintiff's truck was south of the center line of Mountain View; that he (plaintiff) was "coming over onto" his right side of the road all of the time and did not get over to the left side until the defendants' truck hit him. There were some discrepancies between plaintiff's testimony and other statements made in his deposition and to the officers.

Defendant Mijach testified he was traveling about 50 miles per hour while approaching the intersection (others placed it at 55 miles per hour); that he had slowed to 40

miles per hour at the time of the impact; and that it appeared to him plaintiff was going to stop to let him go by but instead plaintiff speeded up again and attempted to go in front of him. Broken skid marks showed for approximately 94 feet up to the point of impact. Likewise, there was testimony that the point of impact was about 10 feet south of the center line of Mountain View and six feet east of the center line of Walnut Avenue, that plaintiff did not give a signal of any intended turn, and that plaintiff's truck had been traveling in the easterly one-half of Walnut Avenue. The "jog" in the street and other factors may account for part of this testimony. The evidence that plaintiff intended to make a left-hand turn at the intersection was not very conclusive. Defendant Mijach said although he saw plaintiff's truck when it was about 100 feet from the intersection he could not estimate plaintiff's speed at any time. He also gave different versions of the accident on different occasions.

It is argued by defendants that from this evidence it conclusively shows plaintiff's testimony to be of no value since it was impeached by other testimony, and that although it may appear that plaintiff's truck entered the intersection first, plaintiff did so blindly and did not use due care for his own safety. They rely on such authority as *Huetter v. Andrews*, 91 Cal.App.2d 142, 145, 204 P.2d 655; *Isaacs v. City and County of San Francisco*, 73 Cal.App.2d 621, 628, 167 P.2d 221, and sections 540, subdivision (b), 544, and 551 of the Vehicle Code.

[1] It appears to us that there was sufficient evidence, though conflicting, to submit the question of defendants' negligence and the question of plaintiff's alleged contributory negligence to the jury. Its determination was reexamined by the trial court on a motion for a new trial. The evidence does not show contributory negligence of the plaintiff as a matter of law. *Fresno City Lines, Inc. v. Herman*, 97 Cal.App.2d 366, 368, 217 P.2d 987; *Gilkey v. Crow-Harr Lumber Co.*, 103 Cal.App.2d 150, 152, 229

P.2d 3; Bramble v. McEwan, 40 Cal.App. 2d 400, 104 P.2d 1054.

[2, 3] An appellate court will review the evidence in the light most favorable to the respondent, will not weigh the evidence, will indulge all intendments and reasonable inferences which favor the sustaining of the trier of the facts, and will not disturb its finding if there is substantial evidence in the record to support it. It is not the province of the reviewing court to analyze conflicts in the evidence. Peneski v. Ledford, 112 Cal.App.2d 371, 372, 246 P.2d 109. The evidence produced by plaintiff, if believed by the jury, was sufficient to show negligence on the part of defendants.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



157 Cal.App.2d 649

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Thomas B. DAILY and Jean K. Poltevent,
Defendants and Appellants.

Cr. 3325.

District Court of Appeal, First District,
Division 1, California.

Feb. 18, 1958.

Rehearing Denied March 20, 1958.

Prosecution for committing an abortion and conspiring to commit an abortion. From adverse judgment of the Superior Court, San Mateo County, Edmund Scott, J., and from an order denying defendants' motions for new trial, the defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that the corroborating evidence was sufficient to sustain the conviction.

Judgment and orders affirmed.

1. Arrest ☞71

Where police officers, who had reasonable cause to believe that defendant had committed a felony, arrested him without a warrant, search of his automobile, which was parked in street, 50 to 60 feet distant, was reasonably incident to the arrest and was legal.

2. Searches and Seizures ☞3(5)

Search warrant was not defective for failure of magistrate to insert a direction in warrant as to whether it was to be served, in the daytime or at any time of day or night, when warrant was in fact served in daytime. West's Ann.Pen.Code, § 1533.

3. Searches and Seizures ☞3(9)

Although copy of return, unsigned, indicated that return was intended for execution by San Mateo County officer and copy of return named a San Mateo officer as officer by whom search warrant was executed search of a place in San Francisco by a San Francisco police officer, who received warrant and was accompanied by two San Mateo officers during search, was legal.

4. Criminal Law ☞395

Searches and Seizures ☞3(8)

Where search warrant authorized search of apartment for "certain surgical instruments and medication consisting in part of" followed by specification of a number of such objects, items not specifically enumerated but which answered such designation were subject of search and objects falling within that category were admissible in evidence in prosecution for abortion.

5. Searches and Seizures ☞3(9)

In conducting a search under search warrant for certain surgical instruments and medication, some of which were specified, officers need not blind themselves to other things they see, such as objects used or usable in performing an abortion or objects indicative of commission of other crimes.

6. Criminal Law *§* 386

In prosecution for committing an abortion and conspiring to commit abortion, testimony by a friend of prosecutrix concerning a telephone conversation with one of defendants was not inadmissible for lack of a proper foundation because prosecutrix' friend could not recognize voice of such defendant.

7. Criminal Law *§* 511(7)

Corroboration may consist of testimony of a defendant and inferences therefrom.

8. Abortion *§* 11

In prosecution for committing an abortion and conspiring to commit an abortion, corroborating evidence as to both defendants was sufficient to sustain conviction. West's Ann.Pen.Code, *§§* 182, 274.

9. Jury *§* 131(6)

In prosecution for committing abortion and conspiring to commit an abortion, wherein one juror was asked whether she belonged to any religious groups, to which she answered "yes", defendants were not improperly curtailed in their interrogation of prospective jurors by court's statement that juror need not tell what church she went to.

10. Criminal Law *§* 1171(1)

In prosecution for committing an abortion and conspiring to commit an abortion, wherein prosecution showed an officer two catheters and started to ask a question concerning them when court ruled it out and instructed jury to disregard exhibit, district attorney did not commit prejudicial misconduct in introducing catheters when both search warrant and affidavit upon which it was based mentioned "catheters". West's Ann.Pen.Code, *§§* 182, 274.

11. Criminal Law *§* 1171(1)

In prosecution for committing abortion and conspiring to commit abortion, prosecutor did not commit prejudicial misconduct in referring to medical books found in one of defendant's apartments during course of search. West's Ann.Pen.Code, *§§* 182, 274.

Dennis L. Woodman, Redwood City, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Lynn, Asst. Atty. Gen., Marvin J. Christiansen, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of abortion and of conspiring to commit abortion (Pen.Code, *§§* 274 and 182), defendants appeal from the judgment and from the denial of their motions for new trial.

The testimony of the prosecuting witness, if sufficiently corroborated, furnishes adequate support for each verdict. There was medical evidence that an abortion had been performed.

Finding herself pregnant she requested her doctor for an abortion but he refused, deeming it unnecessary for the preservation of her life. Later, through a friend, she contacted defendant Poitevent who put her in touch with defendant Daily. He performed a packing operation and gave her some post-operative care, all at her home. Miscarriage occurred on the ninth day. Daily gave her shots the next day and again about three weeks later. Then she had a hemorrhage and went to a hospital. There the police contacted her and told her to let them know if Daily called again. Daily phoned later and by appointment came to see her at her home, where the police arrested him.

(1) *Daily questions the legality of the seizure of certain instruments, medicines and materials used or useful in performing abortions.*

[1] Some of these objects were in a bag which the officers found in the trunk of Daily's car. They had just arrested him, without a warrant, at the home of the prosecuting witness; legally so, because the information she gave them furnished reasonable cause to believe that he had committed a felony. See Pen.Code, *§* 836. Searching him they found a key to his car which he told them was parked in the street, 50 to 60 feet distant. The search of

the car was legal as reasonably incident to the arrest. A man's automobile, unlike his house, is a mobile object and the need for immediate search is deemed that much the greater. See *Carroll v. United States*, 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543; *United States v. Cefaratti*, 91 U.S. App.D.C. 297, 202 F.2d 13.

[2] The other similar objects seized were found in Daily's apartment while the officers were engaged in executing a search warrant. Daily claims the warrant defective for failure of the magistrate to "insert a direction in the warrant" as to when it must be served, in the daytime or at any time of day or night (Pen.Code, § 1533). We do not deem the omission of such a direction fatal when, as in this case, the warrant is served in the daytime. See *Johnson v. United States*, 6 Cir., 46 F.2d 7; *Yeargain v. State*, 69 Okl.Cr. 98, 101 P.2d 273; *Farmer v. Sellers*, 89 S.C. 492, 72 S.E. 224.

[3] The place searched was in San Francisco and the warrant was directed to "any police officer in * * * San Francisco." A copy of the return, unsigned, indicated that the return was intended for execution by a San Mateo County officer. However, a San Francisco police inspector testified that he received the warrant, asked two San Mateo officers to accompany him because they were more familiar with the case than he; he opened the door to the place searched; and he and the other officers were together throughout the search and until the objects seized were delivered to the San Francisco district attorney's office. This evidence warrants the trial court's determination that the search was legally conducted. See *Rose v. United States*, 6 Cir., 274 F. 245, 251. The fact that the copy of the return in evidence names a San Mateo officer as "the officer by whom this warrant was executed" does not negate the fact that the San Francisco officer participated.

[4] Daily complains that some objects seized at the apartment were not specifically mentioned in the warrant which authorized a search for "certain surgical in-

struments and medication consisting in part of," followed by the specification of a number of such objects. (Emphasis added.) Such an enumeration we deem illustrative, not restrictive, of the designation "surgical instruments and medication." Accordingly, items not specifically enumerated but which answered this designation as thus illustrated were the subject of search pursuant to this warrant. It would appear that some of the objects seized and allowed in evidence are in this category. There was no error in that.

[5] Moreover, when conducting such a search officers need not blind themselves to other things they see, such as objects used or usable in performing an abortion or objects indicative of the commission of other crimes. *People v. Roberts*, 47 Cal.2d 374, 379, 303 P.2d 721; *People v. Acosta*, 142 Cal.App.2d 59, 64-65, 298 P.2d 29.

Furthermore, any error in respect to such objects would not have been prejudicial. They were not numerous or especially impressive. They were merely cumulative in character. The really significant evidence consisted of various surgical instruments that were specified in the warrant.

We conclude that the corroborative evidence as to Daily is sufficient. His challenge of the legality of the search of his car and of his apartment marks the extent of his questioning of the sufficiency of corroboration as to him.

(2) *Was there sufficient corroboration as to defendant Poitevent?*

[6] Mrs. Mullins, a friend of the prosecutrix, concerned over the latter's condition on the day after the operation for abortion, testified that she phoned Merle's Reducing Studio (operated by a partnership of which Mrs. Poitevent was a member), asked for "Kay" (a name by which Mrs. Poitevent was known) and "asked Kay what the supposed qualifications of the gentleman involved, insofar as the abortion, his qualifications were, and Kay told [Mullins] * * * that he was a doctor, a member

of the medical profession, a physician who had his practice in Los Angeles. * * *

Defendant assigns error in the admission of this testimony, for lack of a proper foundation, because Mrs. Mullins said she could not recognize Mrs. Poitevent's voice. This point is not well taken. In *People v. Herman*, 49 Cal.App. 592, 193 P. 868, a telephone conversation was held admissible when the witness testified that she had a conversation with a man who said he was "Herman" (defendant's last name) of the "American Junk Company" (the defendant's company). See also *Union Const. Co. v. Western Union Tel. Co.*, 163 Cal. 298, 304-308, 125 P. 242.

[7] Defendant is mistaken also in her assertion that Mrs. Mullins' testimony was the sole bit of corroboration as to Poitevent, who by her own testimony corroborated the prosecutrix. Corroboration may consist of the testimony of the defendant and inferences therefrom. *People v. Wilson*, 25 Cal.2d 341, 347, 153 P.2d 720; *People v. Wayne*, 41 Cal.2d 814, 822, 264 P.2d 547.

[8] Mrs. Poitevent testified that she talked to Mrs. Bradley (mother of Mrs. Mullins) in the reducing salon, who told her of Mrs. Beale's pregnancy. Mrs. Poitevent told her she had a former boy friend who was a doctor "who might help." Mrs. Beale, the prosecutrix, called Mrs. Poitevent. They met and Mrs. Beale discussed her situation. Mrs. Poitevent met a friend in the city whose sister had had an abortion and who offered to try to get in touch with her sister's abortionist. Mrs. Poitevent told her friend to call Mrs. Mullins or Mrs. Bradley. Mrs. Poitevent then received a telephone call from someone named Don who was coming to talk to her about Mrs. Beale. Don came down to Mrs. Poitevent's shop, and explained that Mrs. Beale did not want to meet him at her home because of her family. Mrs. Poitevent talked to him in the parking lot, and Don stated that "he knew someone who might be able to help her" and that he would get in touch with her. Mrs. Beale then came and told her that she had not been able to get

all the money. Don then telephoned and said his friend would be free that evening. The same evening, a man came to the door and said he had an appointment with Mrs. Beale. Mrs. Beale came in and she and the man talked in a room of the salon. Mrs. Poitevent said she could not identify the man.

This testimony coincided with that of the prosecutrix at several significant points sufficiently to serve as corroboration, the principal difference being that Poitevent denied receiving the money from the prosecutrix and denied that Daily was the abortionist.

[9] (3) *Did the court err in disallowing interrogation of the jurors as to their religious affiliations?*

One juror was asked whether she belonged to any religious groups, to which she answered "yes." The court stated that the juror need not tell what church she went to. This juror was peremptorily challenged by the defense. It does not appear, nor did defendants suggest, that any religious organization countenances abortions, other than therapeutic abortions which this one was not. Accordingly, the particular religious group to which the juror belonged was of no particular significance. Moreover, the defendants did not use all of the peremptory challenges which the law allows.

Questions as to whether a prospective juror belonged to any sect whose teachings might interfere with the consideration of the case and whether the juror had any inherent belief based upon any church's teaching that might interfere with a fair consideration of the case were allowed.

We conclude that the defendants were not improperly curtailed in their interrogation of prospective jurors.

[10] (4) *Did the district attorney commit prejudicial misconduct? No.*

The prosecution showed an officer witness two catheters and started to ask a question concerning them. The court ruled it out and instructed the jury to disregard the exhibit. The prosecutor did not argue

the matter and went on to other topics. The court's reason appears to have been that "catheters" were not specifically mentioned in the search warrant. It happens that both the warrant and the affidavit upon which it was based mentioned "catheter." So, there was no error and certainly no misconduct in seeking to identify the catheters as objects seized under authority of the warrant.

[11] The other incident related to some medical books that were found in Daily's apartment. The court did not permit the prosecution to go into this subject, no books having been specifically mentioned in the search warrant. The prosecutor immediately responded with this statement: "May the record show that the books have not been shown. I misunderstood Your Honor [referring to a conference between court and counsel on the admissibility of various objects seized.] I have not shown them, the backs nor the fronts, to the jury." The books may not have been subject to seizure and for that reason not admissible in evidence but we see no lack of good faith upon the part of the prosecutor, nor any prejudice to the defendants. It does not appear to us that it would be improper to elicit by oral testimony the fact that the officers observed that Daily had a collection of medical books, particularly if any of them contained information important or significant to an abortionist, testimony that was later allowed, upon rebuttal. The extent of Daily's medical knowledge, self-taught or not, was relevant to the inquiry.

(5) *Did certain remarks of the court constitute prejudicial misconduct?* No.

Defendants direct attention to various observations made by the judge during the course of the trial, asserting that thereby the court unintentionally cast reflections upon the defense and its conduct and that no cautionary instruction, even if requested and given, could have erased the harm done.

We are not so impressed. Read in their context, we do not believe those remarks had the connotations now ascribed them.

Some of them, indeed, had reference to the prosecution's case. Most of them, it would seem, reflect a desire of the court to keep the trial moving and to avoid unnecessary delay.

Such incidents, few in number, gleaned from 970 pages of transcript, coupled with a number of similar admonitions to counsel for the prosecution, do not indicate that defendants' right to a fair trial was at all impaired. Apparently they thought at the time there was no such impairment, for they interposed no objections and assigned no misconduct.

The judgment and the orders denying a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.



157 Cal.App.2d 642

C. E. SCHMITT and C. E. Schmitt, Executor of the Last Will and Testament of Edith M. Schmitt, deceased, Plaintiff and Respondent,

v.

Edward I. FELIX, Defendant,
Maurice C. Cohn, Sam C. Zipkin, Defendants and Appellants.

No. 17579.

District Court of Appeal, First District,
Division 1, California.

Feb. 18, 1958.

Landlord's action against tenants. The Superior Court, San Francisco County, Theresa Meikle, J., rendered judgment for plaintiff, and two of defendants appealed. The District Court of Appeal, Bray, J., held that colessees out of possession are bound by action of tenant in exercising option to renew.

Reversed in part and in part affirmed.

1. Landlord and Tenant ⇨86(1)

Written exercise of lease option to renew is not necessary, and payment by tenant of rental provided in lease and its acceptance by landlord constitutes exercise of option.

2. Landlord and Tenant ⇨86(1)

Exercise of lease option to renew merely continues tenancy under original lease, and does not make new agreement.

3. Tenancy In Common ⇨3

A colessee of real property is tenant in common of leasehold interest.

4. Tenancy In Common ⇨13

Possession of one cotenant is possession for all.

5. Landlord and Tenant ⇨85½

Option to renew may be exercised by a tenant remaining in possession and paying rent, and his colessee out of possession is bound by such action.

6. Landlord and Tenant ⇨90(3), 115(3)

Holding over at end of term of lease does not create new agreement but merely an extension of original term, and colessees out of possession are bound to month to month tenancy when lessee in possession holds over.

7. Landlord and Tenant ⇨183

Liability for rent arises either from a contractual agreement with property owner or by actual occupancy of premises with owner's consent; privity of contract existing in the first situation and privity of estate existing in the second.

8. Landlord and Tenant ⇨1

Possession is essential to relationship of landlord and tenant.

9. Landlord and Tenant ⇨90(1)

Where lease has hold-over provision, continued occupancy of the premises after termination of term of lease changes relationship of parties from lessor-lessee to landlord-tenant, and occupancy is then regulated by the hold-over provision.

10. Partnership ⇨292

Notice by one tenant that he was no longer connected with firm occupying prem-

ises put landlord on notice that at expiration of term such tenant would not be holding over and that it would be incumbent on landlord to decide whether he would be satisfied to permit other tenants to hold over.

11. Landlord and Tenant ⇨116(4)

Tenant's surrender of possession would not be prerequisite to co-tenant's termination of month to month tenancy.

12. Landlord and Tenant ⇨116(5)

Once a tenant in month to month tenancy gives notice to landlord of his termination of his tenancy, he cannot be held liable for his cotenant's remaining in possession; and upon receipt of such notice landlord is put to choice of either accepting cotenant as his tenant alone or terminating tenancy. West's Ann.Civ.Code, § 1946.

13. Landlord and Tenant ⇨194(1)

Tenant who had notified landlord that he would quit and deliver up possession of premises, which he had never occupied, on specified date did all he could to (1) comply with landlord's notice to quit and (2) terminate his tenancy, and he could not be held liable for rental subsequent to date specified. West's Ann.Civ.Code, § 1946.

Charles M. Stark, Paul W. McComish, San Francisco, for appellant Cohn.

Rhein, Dienstag & Levin, Jay Jackson, San Francisco, for appellant Zipkin.

Samuel M. Samter, Bertrand A. Bley, San Francisco, for respondents.

BRAY, Justice.

Plaintiff recovered judgment of \$4,208.27 against all defendants. Defendants Cohn and Zipkin appeal.

Questions Presented.

1. Does holding over by one lessee bind other lessees not in possession (a) as to an extended term of the lease, and (b) as to a month to month tenancy thereafter.

2. Effect of notices of termination of tenancy.

Stipulated Facts.

Plaintiff C. E. Schmitt and his wife, Edith M. Schmitt, entered into a lease with the three defendants for a period of one year ending March 31, 1953, rental \$475 per month. The lease granted lessees an option for an additional year after March 31, 1953, on the same terms and conditions. Defendant Felix remained in actual physical possession and occupied the premises through January 19, 1955. Defendant Cohn at no time was in physical possession or occupied the premises. Defendant Zipkin was not in physical possession or occupancy of the premises after September, 1953. The rent was paid to May 1, 1954. The unpaid rent was \$4,208.27, the amount of the judgment.

No notice of exercise of the option was given. However, defendants Felix and Zipkin remained in possession at the end of the original term, Felix for the entire term provided by the option, Zipkin for the first six months thereof. The rental paid was \$475 per month during the extended period and \$500 thereafter as provided in the holding over provision hereafter quoted.

1. (a) The Extended Term.

Although the rental was paid in full for the extended term, it nevertheless becomes necessary to consider defendant Cohn's contention that because at no time and particularly at the end of the original term was he physically in possession of the leased premises, his liability terminated at the end of the year and he is not bound by the fact that his colessees continued in possession.

[1,2] The lease provided: "The Lessees are granted an option for an additional term of one (1) year after March 31st 1953 on the same terms and conditions herein set forth." A written exercise of an option of this kind is not necessary. Payment by the tenant of the rental provided in the lease and its acceptance by the landlord constitutes an exercise of the option. *Cafe Apollo Co. v. Anselm*, 47 Cal.App.2d 151, 155, 117 P.2d 691. Whether a colessee out of possession is bound by the

action of his colessees in exercising such an option has not clearly been decided in this state. There are authorities elsewhere holding that the colessee is not bound. See *Foster v. Stewart*, 1921, 196 App.Div. 814, 188 N.Y.S. 151 which expressly refused to follow *Fronty v. Wood*, 2 Hill, S.C., 367, which held to the contrary; *Tweedie v. P. E. Olson Hardware & Furniture Co.*, 1905, 96 Minn. 238, 104 N.W. 895 to that effect, and *Kleros Building Corp. v. Battaglia*, 1952, 348 Ill.App. 445, 109 N.E.2d 221 and *Howell v. Behler*, 1896, 41 W.Va. 610, 24 S.E. 646 holding that the lessor is not bound by the exercise of an option to renew by one colessee only. However, the theory of these cases seems to be that on the exercise of the option to renew a new agreement came into existence. In California, however, the exercise of the option is not considered to make a new agreement but merely the extension of the original term of the lease. " * * * where a lease gives an option to the lessee 'to renew' the lease for a specified term without requiring the execution of a new lease, the extension is a continuation of the tenancy under the original lease. [Citations.]" *Knox v. Wolfe*, 1946, 73 Cal.App. 2d 494, 502, 167 P.2d 3, 8; see also *Howell v. City of Hamburg Co.*, 1913, 165 Cal. 172, 177, 131 P. 130.

[3,4] "A colessee of real property is a tenant in common of the leasehold interest. The possession of one cotenant is possession for all. [Citations.]" *Barrow v. Simon*, 2 Cal.App.2d 500, 503, 38 P.2d 197, 198. See also *Reynolds v. McEwen*, 111 Cal.App.2d 540, 544, 244 P.2d 961, dealing with the defendant McEwen's contention that under a new lease given in cancellation of the old one, he never was in possession of all the property leased. There the court said (111 Cal.App.2d at page 545, 244 P.2d at page 965): " * * * it is immaterial whether Stover and McEwen be considered as colessees, in which case Stover's possession, whether actual or constructive, was possession for both [citations] or as partners * * *."

[5] Therefore, as an option to renew may be exercised by a tenant remaining in possession and paying the rent, as such renewal is merely an extension of the original term and is not a new agreement, and as the possession of one colessee is that of the other colessee, defendant Cohn was constructively in possession at the time of the extension of the lease and was therefore bound by his colessees' acts.

(b) Month to Month Tenancy.

[6-9] At the time of the termination of the extended term neither defendants Cohn nor Zipkin were in physical possession.

The holding over clause provides: "Any holding over after the expiration of the said term, including that covered by the option, with the consent of Lessor, shall be construed to be a tenancy from month to month, at a rental of Five Hundred (\$500.00) Dollars a month, and shall otherwise be on the terms and conditions herein specified, so far as applicable."

For the reasons above mentioned defendants Cohn and Zipkin were constructively in possession at the end of the extended term of the lease and therefore they would be liable for the rent during the month to month tenancy, unless they terminated their respective tenancies. As in the case of the exercise of the option to renew, a holding over at the end of the term of the lease as extended did not create a new agreement but merely an extension of the original term. "When a tenant under a lease remains in possession of the leased premises with the permission of the lessor from month [to month] after the term expires, a new tenancy is not created but the original tenancy is deemed to have been extended [citation] * * *." *Knox v. Wolfe*, supra, 73 Cal.App.2d at page 502, 167 P.2d at page 8.

It is true as contended by defendants that liability for rent arises in one of two ways, either from a contractual agreement with the property owner or by actual occupancy of the premises with the owner's consent, and that the first provides "privity of contract," the other provides "privity

of estate" (see *Samuels v. Ottinger*, 169 Cal. 209, 146 P. 638, 639; *Ross v. City of Long Beach*, 24 Cal.2d 258, 263, 148 P.2d 649), and that possession is essential to the relation of landlord and tenant (see *Caldwell v. Gem Packing Co.*, 52 Cal.App.2d 80, 84, 125 P.2d 901), and that where a lease has a "hold-over" provision the continued occupancy of the premises after the termination of the term of the lease changes the relationship of the parties from a lessor-lessee relationship to that of landlord and tenant, and the occupancy is then regulated by the "hold-over" provision (see *Spaulding v. Yovino-Young*, 30 Cal.2d 138, 141, 180 P.2d 691). Nevertheless, as the occupancy at the beginning of the "hold-over" term constitutes an extension of the lease term, that occupancy is the same occupancy as existed at the end of the lease term. In the absence of notice to the landlord of any change in that occupancy or of circumstances putting him on notice of that change, the original occupancy continues, even though it be a constructive occupancy.

The court allowed rental for that portion of the hold-over period running from May 1, 1954 (the date to which the rent had been paid), to January 31, 1955. This brings us to the questions of

2. The Effect of the Notices.

(a) The Zipkin Notice.

[10-12] On October 12, 1953, defendant Zipkin wrote plaintiff a letter stating that he was no longer connected with "the Felix Company, occupying your premises." The extended term of the lease did not terminate until March 31, 1954. While this notice could in nowise affect defendant Zipkin's liability under the extended term, it did at least put plaintiff on notice that at the expiration of the term defendant Zipkin would not be holding over and it would be incumbent on plaintiff to decide whether or not he would be satisfied to permit his co-tenants to hold over. Plaintiff takes the position both as to defendant Zipkin and defendant Cohn, whose situation will be discussed hereinafter, that they could not

terminate the month to month tenancy until their cotenant Felix surrendered possession. Such an interpretation of the law would place one cotenant forever at the mercy of a fellow cotenant and a landlord. There are no proceedings which a cotenant out of possession could bring against his cotenant to force the latter to surrender the premises to the landlord. Only the landlord could do that. Once a cotenant in a month to month tenancy gives notice to the landlord of his termination of the tenancy, he cannot be held liable for his cotenant's remaining in possession. Upon receipt of such notice the landlord is put to the choice of either accepting the cotenant as his tenant alone, or of terminating the tenancy. While Zipkin's notice was not as formal as the notice mentioned in section 1946, Civil Code, it did notify plaintiff long before the termination of the lease that in effect he was no longer connected with his colessees and would not remain in possession after the termination of the lease. Therefore, the judgment as to him must be reversed except as to the sum of \$181.28 excess of taxes for the year 1953-54 which the lease required the lessees to pay. The findings and judgment are amended accordingly.

(b) The Cohn Notice.

[13] Plaintiff served upon defendant Cohn, as well as on defendants Zipkin and Felix, two notices to quit, one dated June 30 and the other August 18, 1954. Thereafter defendant Cohn served upon plaintiff a 30-day notice of termination of tenancy dated August 26, 1954, and notifying plaintiff that pursuant to the notice to quit, defendant would quit and deliver up possession of the premises, which he had never occupied, on September 30, 1954. It further stated that tender of the premises was made effective at once. This notice fully complied with section 1946, Civil Code. Thus defendant Cohn did all he could do to comply with plaintiff's notice to quit and to terminate his tenancy. Therefore, he cannot be held liable for rental subsequent to September 30, 1954. The findings and judgment will have to be amended accord-

ingly. Inasmuch as this requires only a matter of computation, we deem it advisable to exercise the power given us by section 956a, Code of Civil Procedure. The period for which defendant Cohn is liable is May 1 to September 30, 1954. Five months at \$500 per month equals \$2500. To this should be added \$181.28 excess of taxes for 1953-54—total, \$2,681.28. The findings and judgment are amended accordingly.

The judgment is reversed except as follows: Judgment in favor of plaintiff and against defendants Zipkin and Cohn in the sum of \$181.28, and against defendant Cohn in the sum of \$2,500 is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



157 Cal.App.2d 617

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Don Kenneth WOODS and Bruce Thomas
Smith, Defendants,

Bruce Thomas Smith, Defendant and
Appellant.

Cr. 5919.

District Court of Appeal, Second District,
Division 3, California.

Feb. 17, 1958.

Defendant was convicted of malicious burning of personal property of value in excess of \$25. The Superior Court of Los Angeles County, LeRoy Dawson, J., entered judgment, and defendant appealed. The District Court of Appeal, Wood, J., held that where store, in regular course of its business, had printed form or tally sheet, showing printed prices of various kinds of boxes, crates and cases, and produce clerk, in regular course of his duties, stacked and

counted the boxes, crates and cases and wrote on the tally sheet the number of each kind of article and the total evaluation of articles listed, computed upon the printed prices, produce clerk was competent under the uniform business records as evidence act to testify to reasonable value of crates which he stacked, counted and entered on the form.

Affirmed.

1. Criminal Law Ⓒ460

In prosecution for malicious burning of store's vegetable crates of value in excess of \$25, where store, in regular course of its business, had printed form or tally sheet, showing printed prices of various kinds of boxes, crates and cases, and produce clerk, in regular course of his duties, stacked and counted the boxes, crates and cases and wrote on the tally sheet the number of each kind of article and total evaluation of articles listed, computed upon the printed prices, produce clerk was competent under the uniform business records as evidence act to testify to reasonable value of crates which he stacked, counted and entered on the form. West's Ann.Code Civ. Proc. § 1953f; West's Ann.Pen.Code, § 449a.

2. Criminal Law Ⓒ55

Specific intent is not necessary element of offense of malicious burning of personal property of value of \$25, and consequently, voluntary intoxication is not a defense. West's Ann.Pen.Code, § 7, subd. 4, §§ 22, 449a.

3. Arson Ⓒ37(1)

In prosecution for malicious burning of personal property of value in excess of \$25, evidence disclosed that defendant was participant in setting the fire, even though defendant did not testify and prosecution presented testimony that defendant said he did not remember anything about the fire. West's Ann.Pen.Code, § 449a.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendants Smith and Woods were convicted, in a jury trial, of the crime of malicious burning of personal property in violation of section 449a of the Penal Code in that they maliciously set fire to vegetable crates which were of a value in excess of \$25 and were the property of Safeway Stores, Inc. Smith admitted an allegation of the information that he had been convicted of robbery. Smith appeals from the judgment.

Appellant contends that there was no competent evidence of the value of the personal property burned; that the court erred in sustaining an objection to a question asked by appellant regarding intoxication of appellant; and that the evidence was insufficient to support the verdict.

On June 8, 1956, approximately 318 boxes, crates, and cases of various kinds (such as apple boxes, cantaloupe crates, and milk cases) were in an alley at the rear of a Safeway store in Lancaster, and they were stacked in rows against the rear brick wall of the store. The stack was about 25 feet long, 7 feet wide, and 7 feet high.

On said June 8, and prior thereto, there was an excavation in the alley at a place about 100 feet from the rear of the store. Flarepots, which produce light by burning oil or kerosene through a wick, had been placed around the excavation.

In the evening of June 8, the defendants Smith and Woods, and other men by the names of Bakman, Meyers, and Zink, attended a motion picture theater in Lancaster. About 11:30 p. m. they left the theater, entered Bakman's automobile and rode around for awhile in Lancaster. Then Bakman, who was driving the automobile, stopped the automobile behind the theater at a place about 300 feet from the Safeway store.

Bakman, called as a witness by the People, testified that when the automobile

Gladys Towles Root, Eugene V. McPherson, and Joseph A. Armstrong, Los Angeles, for appellant.

stopped behind the theater the defendants Smith and Woods said they were going to get out of the automobile and go to the bathroom; then Smith and Woods got out of the automobile and walked toward the Safeway store; he (witness) saw Woods pick up a lighted flarepot, which was near the excavation, and throw or drop it in the general area of the Safeway store; then Smith and Woods trotted back to the automobile; before they arrived at the automobile, he (witness) saw a fire blaze "all at once" in back of the store where the flarepot had been thrown or dropped; when they entered the automobile he (witness) drove away.

About 12:30 a. m. on June 9, firemen from the fire department in Lancaster went to the rear of the Safeway store and found that the stack of boxes behind the store was in flames. The firemen extinguished the fire, but the boxes were practically a total loss. The bricks in the rear wall of the store were so deteriorated by the fire that touching the bricks would cause the surface of the bricks to fall off. A flarepot was found in the ashes in the center of the burned area about 6 feet from the store, and another flarepot was found in the ashes about 6 feet west of the other flarepot and about 12 feet from the building. Those flarepots were similar to the flarepots which were around the excavation. The fire department captain was of the opinion that the fire was of incendiary origin.

A deputy sheriff, called as a witness by the People, testified that he was an investigating officer in this case; he had a conversation with Woods on June 10 about 1 p. m. wherein Woods said, among other things, that he had thrown a flare into the boxes. The deputy testified further that shortly after that conversation he had a conversation with Smith wherein the deputy said that he was investigating the fire that occurred at the Safeway store, and he had information that Smith had thrown a flare "with Kenny Woods"; that Smith said he had been drinking and he did not remember anything and he did not remember at all that he had thrown it; the deputy

asked Smith if he could have thrown a flare; Smith replied, "I guess I could have, but I don't remember. I don't remember a thing about that."

Defendant Woods testified that at times while he, Smith, Bakman, Meyers and Zink were in the theater, all of them except Bakman drank some whisky from a bottle; after leaving the theater, they drove around town, went to a drive-in restaurant, and later stopped in the vicinity of the Safeway store; he (Woods) walked to the excavation and picked up a burning flarepot; some coal oil dropped on his hand and burned him; then he dropped the flarepot and the fire started fast; he became scared and went back to the automobile; he did not pick up any other flarepot at that time. On cross-examination he said that the deputy sheriff told him that he (deputy) had information as to who had thrown the other flarepot; he (Woods) replied to the effect that he was not going to tell; he did not know that anyone was "out of the car" with him; he did not drop the flarepot as soon as he picked it up, but he was carrying it and trying to take it to the car when he dropped it; he carried it 30 or 40 feet, going in a direction toward the back of the store; the car was in the opposite direction; he "was just going to go around back into the car"; he did not see Smith until he (Woods) returned to the car; when he returned there he saw Smith standing outside the car near the car door.

Defendant Smith did not testify.

[1] Appellant contends that there was no competent evidence that the value of the personal property burned was in excess of \$25. Section 449a of the Penal Code provides: "Any person who wilfully and maliciously sets fire to or burns * * * or who aids * * * the burning of * * * any pile of planks, boards * * * or other lumber * * * or any other personal property not herein specifically named; (such property being of the value of twenty-five dollars and the property of another person) shall * * * be sentenced * * *." Mr. Moulds, a produce

clerk at the Safeway store in Lancaster, testified that on the night of June 8 he stacked the crates back of the store; he counted them and made an entry of the number of each kind on a tally form; there were 12 orange boxes, 52 lugs, 6 corn crates, 16 cantaloupe crates, 2 avacado flats, 30 apple boxes, 54 potato crates, 16 egg crates, and 104 milk cases. He testified that he wrote on the tally sheet or memorandum the number of each kind of article and the total evaluation of the articles; the price of each kind of article listed on the memorandum was printed thereon by the Safeway store; the memorandum was kept by the Safeway store in the course of business. When the witness was asked the reasonable value of the articles which were burned, Smith objected to the question upon the grounds that the witness was not qualified to give such opinion, and the memorandum regarding prices was hearsay. The objection was overruled. The witness answered that the value was \$326.44. Appellant asserts on appeal that the testimony as to value was incompetent for the reasons stated in his objection in the trial court, and also for the reasons that the value stated by the witness was not the "market value," that a proper foundation had not been shown, and that the witness was not a "custodian or other qualified witness" such as is referred to in section 1953f of the Code of Civil Procedure. That section provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." The trial judge determined, upon proper evidence, that the sources of information, method and time of preparation of the memorandum were such as to constitute a sufficient foundation for the evidence. The tally sheet, showing printed prices of various kinds of boxes, crates and

cases, was a printed form that was made by the Safeway store in the regular course of its business. The witness, in the regular course of his duties as produce clerk at the store, stacked and counted the boxes, crates and cases and he wrote on the tally sheet the number of each kind of article and the total evaluation of the articles listed (computed upon the printed prices). The court did not err in receiving the evidence as to value.

[2] Appellant contends that the court erred in sustaining an objection to a question regarding intoxication of appellant. During the cross-examination of Bakman, appellant asked him if he had formed any conclusion as to whether appellant was intoxicated. The deputy district attorney objected to the question on the ground that it was immaterial in that the offense charged was not one where specific intent is a necessary element. The objection was sustained. Appellant argues that specific intent is a necessary element of the alleged offense, since section 449a of the Penal Code, allegedly violated, applies to a person who "maliciously" sets fire to personal property. Section 22 of the Penal Code provides: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." In *People v. Wilkison*, 30 Cal. App. 473, 158 P. 1067, it was charged that the defendant set fire to a pile of baled hay in violation of section 600 of the Penal Code, which section provided: "Every person who wilfully and maliciously burns any * * * stack of hay * * * not the property of such person is punishable * * *." A person, who participated with the defendant in that alleged offense, testified that he and that defendant had been drinking liquor and they were intoxicated.

In that case (30 Cal. at page 478, 158 P. at page 1069) the court instructed the jury that the words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law. The definition of those words as stated in that instruction is found in section 7, subdivision 4, of the Penal Code. In that case the court said (30 Cal. at page 478, 158 P. at page 1069): "The appellant insists that the malice mentioned in section 600 of the Penal Code is a particular malice which becomes as of the intent with which the crime is committed, and is not such malice as is defined by subdivision 4 of section 7 above quoted. The Code definition of malice is applicable in all cases where the word 'malicious' is used in the Code as the part of the definition of an offense. It is only in cases where in the description of the offense some qualification is made as to the meaning of that term or as to the proof thereof that a defendant has a right to further instruction upon that subject." In *Burdick, Law of Crime*, volume 3, it is said at page 7: "The words 'wilfully and maliciously' import the state of mind which, at common law, is a necessary element of arson, but they do not import any specific intent to destroy or burn a particular building, and, at common law, no such specific intent is required, nor any grudge or personal ill will towards the owner of the property. The general criminal intent to burn some building, or general malice, regardless of any specific intent, is all that is required." Voluntary intoxication would not be a defense to the charge herein. The court did not err in sustaining the objection.

[3] Appellant also contends that the evidence was insufficient to support the judgment. His argument is that there is nothing to connect him with the crime; that there was no proof that he threw a flare, or that he encouraged or aided anyone in throwing a flare; and that since the

prosecution presented testimony that appellant said that he did not remember anything about the fire, the prosecution is bound by that statement of appellant in the absence of evidence to the contrary. There was evidence that appellant and Woods got out of Bakman's automobile and walked toward the Safeway store, that Woods picked up a lighted flarepot, carried it about 40 feet, and threw it into the stack of boxes; after Woods threw a flarepot the fire started fast and there was a blaze "all at once"; then appellant and Woods trotted back to the automobile; Woods threw only one flarepot; there were two flarepots in the ashes; and the fire was of incendiary origin. Appellant did not testify. The fact that appellant told the deputy sheriff, on the day after the fire, that appellant did not remember anything about the fire was not determinative of the question whether appellant was a participant in starting the fire. The statement by appellant that he did not remember was not determinative that he in fact did not remember, but such statement, in view of the fact it was presented by the prosecution and was uncontradicted, was a circumstance indicating that appellant was not in a position to explain or deny the evidence presented against him. Except for that statement by appellant, the circumstances were such that it could reasonably be expected that defendant would testify and explain or deny the evidence presented against him, particularly his presence at the scene of the fire at the time the fire was started, and the evidence that he hurried back to the automobile when the fire started. Irrespective of the failure of appellant to testify, the jury could reasonably infer from the circumstances that appellant was a participant in setting fire to and burning the boxes. The evidence was sufficient to support the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

157 Cal.App.2d 591

**MIRACLE ADHESIVES CORPORATION
et al., Plaintiffs and Respondents,**

v.

PENINSULA TILE CONTRACTORS' ASSOCIATION OF SAN MATEO, SANTA CLARA AND SAN BENITO COUNTIES,
a corporation, Defendant and Appellant.

Civ. 17584.

District Court of Appeal, First District,
Division 2, California.

Feb. 17, 1958.

Hearing Denied April 16, 1958.

Action by manufacturer of tile adhesive, against an association of tile contractors, to enjoin association and its members from honoring, performing or enforcing provision of contract between association and union in effect reducing use of manufacturer's adhesive. The Superior Court, Santa Clara County, Byrl R. Salsman, J., entered judgment in favor of manufacturer, and association appealed. The District Court of Appeal held that in view of fact provision in question required union, as well as association of employers to refrain from use of a particular construction method, and contract obligations of association and union in respect thereto were mutual, reciprocal and identical, and interest of union would inevitably be affected by the injunction sought, union was an indispensable party, and action could not proceed without it.

Judgment reversed with directions.

1. Parties ⇨18, 29

Persons whose interests, rights, or duties will inevitably be affected by any decree which can be rendered in an action are "indispensable parties", and an action cannot proceed without them.

See publication Words and Phrases, for other judicial constructions and definitions of "Indispensable Parties".

2. Parties ⇨18, 29

The term "indispensable parties" refers to those without whom an action cannot proceed, while "necessary parties" are those whose presence, although desirable,

may be dispensed with where equitable considerations require.

See publication Words and Phrases, for other judicial constructions and definitions of "Necessary Parties".

3. Labor Relations ⇨926

In action by manufacturer of tile adhesive, against an association of tile contractors, to enjoin association and its members from honoring, performing or enforcing provision of contract between association and union in effect reducing use of manufacturer's adhesive, in view of fact provision in question required union, as well as association of employers to refrain from use of a particular construction method, and contract obligations of association and union in respect thereto were mutual, reciprocal and identical, and interest of union would inevitably be affected by the injunction sought, union was an indispensable party, and action could not proceed without it.

4. Appeal and Error ⇨187(3)

Although it might be technically inaccurate to describe presence of an indispensable party as jurisdictional, presence of such a party is mandatory, and an objection based upon his omission may be raised by an appellate court upon its own motion.

Morgan & Beauzay, San Jose, for appellant.

Campbell, Custer, Warburton & Britton, Burnett, Burnett & Somers, John M. Burnett, San Jose, for respondents.

DRAPER, Justice.

Defendant is an association of tile contractors. On behalf of its member contractors, it entered into a collective bargaining agreement with Bricklayers, Masons and Plasterers International Union, Local No. 19. One provision of the agreement reads:

"At no time shall tile be installed in mastic or thin setting beds other than conventional methods unless all requirements and specifications contained in Handbook K-400 pertaining to types

of such installations have been complied with. The adhesive shall be used according to the manufacturers' specifications and shall bear commercial standard seal 181-152 of the Bureau of Commerce.

"Without limiting the generality of the foregoing and in order to protect the public from failures resulting from inferior installations, no tile will be applied in any shower, tub back, or other areas exposed to water unless setting beds are first installed in mortar backing by qualified tile layers in accordance with the latest accepted specifications of the Tile Handbook superseding basic specifications for tile work K-30 and Tile Handbook I of the Tile Council of America."

Plaintiffs manufacture and sell tile adhesives of the type which constitutes "mastic or thin setting beds other than conventional methods" as described in the quoted agreement. Plaintiffs' mastic is used as a substitute or alternative for mortar backing. While it can be used upon mortar, it is designed for use chiefly upon gypsum board or like surfaces which can be installed more cheaply than mortar. Since the mortar itself holds tile in place, the requirement of defendant's contract reduces the use of plaintiff's adhesives.

Upon finding these facts, the trial court concluded that the quoted contract provision was in violation of the Cartwright Act (Bus. & Prof.Code, § 16720 et seq.) and granted permanent injunction restraining defendant association and its members from "honoring, performing or enforcing" the questioned contract provision. Defendant appeals. The union with which appellant contracted is not a party to this action, and is in no way before the court.

[1,2] Persons "whose interests, rights, or duties will inevitably be affected by any decree which can be rendered in the action" are indispensable parties, and the action cannot proceed without them. The law also recognizes a class of parties who are termed "necessary," but without whom a given case may, in certain circumstances,

proceed to judgment (Bank of California, Nat. Ass'n v. Superior Court, 16 Cal.2d 516, 521, 106 P.2d 879, 883). As a matter of semantics, the distinction between "indispensable" and "necessary" is difficult to comprehend. Historically, the differentiation stems from the need to relax the early equity rule which, to avoid multiplicity of actions, required the presence of all parties who were necessary to final determination of all issues in the action. Such parties, in fact as well as in name, were "necessary" under the early rule. But cases arose in which such parties could not be joined or served. If their rights were separable, it was often more desirable to proceed without them than to delay or defeat determination of the rights of the parties who were before the court (see 29 Cal.L.Rev. 731). A happier choice of language might well have termed these parties "desirable," but this renaming did not occur. Rather, they continued to be "necessary," while those without whom the action could in no case continue were termed "indispensable." In any event, it is now clear that the term "indispensable parties" refers to those without whom the action cannot proceed, while "necessary parties" are those whose presence, although desirable, may be dispensed with where equitable considerations require (see Bank of California, Nat. Ass'n v. Superior Court, *supra*).

[3] In the case at bar, there is no room for doubt that the union is an indispensable party. The contract provision here in issue requires the union, as well as respondent employers, to refrain from use of a particular construction method. The contract obligations of respondent and the union are mutual, reciprocal and identical. To enjoin one party to the contract from "honoring, performing or enforcing" is equally to enjoin the other. In restraining the employers, the injunction necessarily deprives the employees of the benefit of their agreement, but does so without their being before the court to present their case.

The United States Supreme Court has ordered dismissal of an action for rescission of a contract because of the absence

of some of the contracting parties (*Shields v. Barrow*, 17 How. 129, 58 U.S. 129, 15 L.Ed. 158). An action to rescind a trust agreement cannot proceed without the joinder of each person who has a joint interest in the whole subject matter of the contract (*Lake v. Dowd*, 207 Cal. 290, 277 P. 1047; see also *Mitau v. Roddan*, 149 Cal. 1, 84 P. 145, 6 L.R.A.,N.S., 275; *O'Connor v. Irvine*, 74 Cal. 435, 16 P. 236). One creditor, suing for his claimed pro rata share of the sum held by an assignee for benefit of creditors, must join all creditors (*McPherson v. Parker*, 30 Cal. 455). Other cases also define the indispensable party (*McClure, on Behalf of Caruthers v. Donovan*, 33 Cal.2d 717, 205 P.2d 17; *Warner v. Pacific Telephone, etc., Co.*, 121 Cal.App.2d 497, 263 P.2d 465; *Child v. State Personnel Board*, 97 Cal.App.2d 467, 218 P.2d 52; *Ash v. Superior Court*, 33 Cal.App. 800, 166 P. 841).

Respondents argue that this case is governed by two decisions (*Ambassador Petroleum Co. v. Superior Court*, 208 Cal. 667, 284 P. 445; *Farmer v. Behmer*, 9 Cal. App. 773, 100 P. 901) holding that parties not there joined were not indispensable. But these decisions do not aid plaintiffs. Each was an action to enjoin a nuisance, and such an action is governed by a special rule. Also, in the *Ambassador Petroleum Co.* case, the state sought to enjoin defendant lessee from so operating its oil wells as to waste natural gas. It was argued that the lessors were indispensable parties. The court held that they were not, pointing out that the purpose of the action was to control the manner of operation of the wells, which was wholly within the control of defendant lessees. In *Farmer*, defendant was enjoined from leasing or permitting his premises to be used for purposes of prostitution. The argument that the lessee-operator of the house of prostitution was an indispensable party was understandably rejected. Her lease rights were affected only to the extent that they were used for the illegal purpose. Neither decision governs our case.

In the case at bar, the interests of the union are inevitably affected by the injunc-

tion sought and granted. The impropriety of proceeding without the union is even more graphically shown by consideration of the principal defense urged. Appellant employers argued and sought to show that the questioned contract provision is reasonably related to a legitimate labor objective, and therefore is excepted from the operation of the Cartwright Act (*Schweizer v. Local Joint Executive Board*, 121 Cal.App. 2d 45, 262 P.2d 568; *O'Shea v. Tile Layers Union*, 155 Cal.App.2d 373, 318 P.2d 102). This rule is based upon the theory that labor is not a commodity, and that a combination of laborers to further their interests by collective bargaining is not a combination in restraint of trade. In the instant case, with the union not a party, the burden of showing labor's interest fell upon the employer. To adopt a rule which would sanction such procedure could lead to infinite difficulty. It seems clear in this case that the interests of appellant and respondents are fully adversary. But to permit determination of the union's interest in an action between employers could well encourage collusive actions. We are satisfied that the union is an indispensable party.

[4] The record shows no objection in the trial court to the nonjoinder of the union. The question is but indirectly suggested on appeal. Respondents argue that this amounts to a waiver of the objection. But the very word "indispensable," particularly when used in an obvious effort to indicate something more than "necessary," would seem to negative this contention. It may be technically inaccurate to describe the presence of an indispensable party as jurisdictional, but the cases are clear that his presence is mandatory, and that objection based upon his omission may be raised by the appellate court upon its own motion (*Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal.2d 232, 265, 73 P.2d 1163; *Bank of California, Nat. Ass'n v. Superior Court*, supra, 16 Cal.2d 516, 522, 106 P.2d 879; *Solomon v. Redona*, 52 Cal.App. 300, 306, 198 P. 643).

The judgment is reversed, with directions to the trial court to order the union made a party and, if this not be done, to proceed

as specified in the third paragraph of Code of Civil Procedure section 389 (as amended 1957).

KAUFMAN, P. J., and DOOLING, J., concur.



157 Cal.App.2d 583

David S. GRAY, Petitioner and Respondent,
v.

Anthony BOLGER, Stephen O'Day, Clifford E. Rishell, Elvyn C. Evers, and Ted Dreyer, as and constituting the Police and Fire Retirement Board of the City of Oakland, and the City of Oakland, a municipal corporation, Respondents and Appellants.
Civ. 17472.

District Court of Appeal, First District,
Division 1, California.

Feb. 17, 1958.

Proceeding by city fireman to compel city and its police and fire retirement board to pay him a disability pension, sick leave benefits, and cancel his purported discharge. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment adverse to city and retirement board, and they appealed. The District Court of Appeal, Peters, P. J., held that under Oakland city charter, fireman, disabled in military service while on military leave, could exercise option granted him thereunder to be a member of the retirement system, and could claim and was entitled to a disability pension even though he was unable, because of his disability to return to active service in the fire department.

Judgment affirmed.

1. Municipal Corporations ⇨220(9)

Ambiguities in pension provisions in city charters should be resolved in favor of the applicant so as to carry out their beneficent policy.

2. Municipal Corporations ⇨197

Where a municipally employed fireman, pursuant to Oakland charter, was granted a leave of absence during period of his active service with the fire department to serve with the armed forces, such a leave did not create a vacancy in the position, but merely suspended occupancy of the position during period of military service, leaving fireman with certain rights which he could assert upon termination of his military service.

3. Municipal Corporations ⇨200(5)

Under Oakland city charter, fireman, disabled in military service while on military leave, could exercise option granted him thereunder to be member of the retirement system, and could claim and was entitled to a disability pension even though he was unable, because of his disability to return to active service in the fire department. West's Ann. Military and Veterans Code, § 395 et seq.

John W. Collier, City Atty., Daniel J. McNamara, Deputy City Atty., Oakland, for appellants.

Carroll, Davis & Burdick, San Francisco, for respondent.

PETERS, Presiding Justice.

David S. Gray, a fireman employed by the city of Oakland, sought to compel by mandate the city and its Police and Fire Retirement Board to pay him a disability pension, and sick leave benefits, and to cancel his purported discharge. The trial court decreed that Gray was entitled to the pension, and that the purported discharge should be set aside, and entered its judgment accordingly. The Retirement Board and the city appeal. Gray concedes that if he is entitled to his pension he is not entitled to sick leave benefits.

Respondent was employed by the city as a fireman on November 20, 1937. The city purported to discharge him from this position on December 28, 1954. During this period he was granted by the city two military leaves, the first from March 19,

1942, until March 24, 1947, and the second from October 4, 1950, to December 1, 1954. On December 1, 1954, he received a medical discharge from the Navy, and a disability rating which entitles him to a disability pension of \$265.20 per month. About December 1, 1954, he requested to be returned to active service in the Fire Department. Upon examination he was found to be physically unfit for such service, and on December 28, 1954, he was discharged for physical incompetency. But on December 10, 1954, he had filed his option to become a member of the retirement system under article XXVI of the charter, and his application for a disability pension under section 243 (b) of the charter. The application for a pension was denied by the Retirement Board upon the ground that he could not legally exercise his option to become a member of the retirement system until he first returned to "active service" in the Fire Department.

The basic question involved is whether a fireman, disabled in military service while on military leave, may exercise the option granted firemen under article XXVI of the charter to become a member of the retirement system, and then claim a disability pension, if such fireman is unable, because of his disability, to return to active service in the Fire Department. This, of course, requires an interpretation of the charter provisions.

Prior to 1951 members of the Oakland Fire Department were covered by a pension system established by article XV of the charter under which pension benefits for disability were limited to those cases in which disability was sustained in the performance of duty. In 1951 article XXVI was added to the charter, establishing a new retirement system. Section 243(b) of that article established for firemen who had completed 10 years of service a disability pension for a nonindustrial disability. Respondent was in the Navy when the section was adopted and claims under it. There is no dispute but that time served in the armed forces while on military

leave counts as time served within the meaning of pension provisions.

Appellants urge that respondent is not entitled to the benefits of section 243(b) because, so it is claimed, under section 233 of the charter persons absent on leave from duty in the armed forces must return to "active service" in the Fire Department before they become eligible to exercise their option to join the new system. Based on this premise, it is urged that since respondent is physically unfit for service, he cannot return to active service, and thus cannot elect to join the new system.

Section 233 of the charter relates to membership in the new pension system. It provides: "There is hereby added to the Charter of the City of Oakland a new Article to be known as Article XXVI for the purpose of combining into one system, hereby created and to be known as The Police and Fire Retirement System, and the separate systems heretofore created by the provisions of Articles XIV and XV of this Charter. All persons who become members of the Police or Fire Departments as defined in Articles XIV and XV of this Charter, including all persons hereafter employed to perform the duties now performed by matrons and substitute matrons of the City Prison, on or after the effective date of this Article, hereby defined as July 1, 1951, or the first of the month next following approval by the Legislature, whichever is the later, shall be members of the Retirement System established by this Article and shall be subject to the provisions hereof. All members of the Police or Fire Departments who are subject to the Relief and Pension Systems under the provisions of Articles XIV and XV of this Charter, and not permanently retired, including matrons and substitute matrons of the City Prison, shall have the option of being members of this Retirement System under the provisions of this Article, said option to be exercised in writing on a form furnished by the Retirement Board as hereinafter defined, to be filed with the Secretary of the Board not later than 90

days after the effective date of this Article: upon filing said written option, such persons shall be subject to the provisions of this Article as of its effective date, notwithstanding any other provisions of this Charter; provided that *any of such persons who are absent by reason of service in the armed forces of the United States, and any persons on disability retirement under Article XIV or XV, on the effective date of this Article, shall have the right to exercise said option within 90 days after the return of such persons to service in said departments.* Members of the Relief and Pension Systems under Articles XIV and XV of this Charter, who do not exercise the option in this section, shall remain members under the provisions of said articles and under the provisions of Section 252, and benefits being paid, on the effective date hereof, to or on account of persons who are or have been members under said articles, shall be continued at their existing rates and in accordance with the provisions of said articles, but shall be paid from the fund created under this article." (Emphasis added.)

Respondent argues and convinced the trial court that under this section he was not required to return to active service to be entitled to the nonindustrial disability benefit granted by section 243(b). He contends that section 233 is not a limitation on the right of a serviceman fireman to exercise his option to become a member of the amended pension plan, but provides for an expansion of that right, because it granted additional time to such a person to exercise his option. It is also argued that persons absent from service because of nonindustrial disabilities were entitled to exercise their option immediately upon passage of article XXVI and without return to "active" service. It is pointed out that neither section 233 nor any other relevant section of the charter uses the term "active service."

Appellants place their main reliance on the language "such persons who are absent by reason of service in the armed forces of the United States * * * shall have the right to exercise said option within

90 days after the return of such persons to service in said departments." The claim is that this provision clearly and without ambiguity requires a return to active service as a condition precedent to membership in the new system.

Respondent relies on the third sentence of section 233 which provides: "All members of the Police or Fire Departments who are subject to the Relief and Pension Systems under the provisions of Articles XIV and XV of this Charter, and not permanently retired * * * shall have the option of being members of this Retirement System under the provisions of this Article, said option to be exercised in writing on a form furnished by the Retirement Board * * * to be filed * * * not later than 90 days after the effective date of this Article." This sentence indicates, argues respondent, that all members of the former system, including those absent on military leave, except those permanently retired who are specifically exempted, could have acquired membership in the new system by filing their written option within 90 days from July 1, 1951. The provision relied upon by appellants that persons on military leave would have 90 days after return to service within which to file the option merely expanded their right to file, so that the 90-day limitation after July 1, 1951, would not work a hardship on those who, because of their military service, were not in communication with the board and who would not know that the system had been amended.

[1] While we have been referred to no case directly in point, nor have we found any such case, the law in this general field supports the contentions of respondent. It is now a well settled proposition that ambiguities in pension provisions in charters should be resolved in favor of the applicant so as to carry out their beneficent policy. *Wendland v. City of Alameda*, 46 Cal.2d 786, 298 P.2d 863; *Terry v. City of Berkeley*, 41 Cal.2d 698, 263 P.2d 833; *Gibson v. City of San Diego*, 25 Cal.2d 930, 156 P.2d 737; *City of Long Beach v. Allen*, 143 Cal.App.2d 24, 300 P.2d 349. In fact,

section 234(g) of the city charter here under consideration expressly requires that "All the provisions of this Article [Article XXVI] are to be liberally construed."

[2, 3] "In the present case we are dealing with a public employee who, pursuant to the charter, was granted a leave of absence during the period of his active service to serve with the armed forces. Such a leave does not create a vacancy in the position. It merely suspends the occupancy of the position during the period of military service, leaving the employee with certain rights which he may assert upon the termination of his military service. *McCoy v. Board of Supervisors*, 18 Cal.2d 193, 114 P.2d 569.

Gibson v. City of San Diego, 25 Cal.2d 930, 156 P.2d 737, is an interesting case, the reasoning of which is here applicable. In that case a fireman of the city was on leave to serve with the armed forces. The time fixed for his retirement expired while he was still in the armed services. He claimed that he was immediately entitled to his pension without waiting until he was released from the armed forces. The city argued, as does the city in the instant case, that under the charter provision there involved the fireman was not entitled to a pension until he was honorably discharged from the armed forces and returned to active service with the fire department. The charter provision there involved read as follows (25 Cal.2d at page 931, 156 P.2d at page 738): "In computing the time of service required for retirement the amount of time served in the United States Army, Navy, Marine Corps or any division thereof in time of war by any member of the Fire Department who shall have left said Department for the purpose of and entered such service of the United States Army, Navy, Marine Corps or any division thereof immediately thereafter, and who shall have returned to said Fire Department within three months, after having been honorably discharged from said military service, or any member having served as substitute in the San Diego Fire Department, shall have such

time counted as part of the aggregate service required for a retirement pension." (Italics added.)"

The court held that the fireman was entitled to his pension as soon as the fixed time expired and that the underlined provision, *supra*, applied only to those whose time for retirement had not yet been completed at the time of release from duty with the armed forces. In so holding the court stated (25 Cal.2d 930, at page 937, 156 P.2d 737, at page 741):

"To deny the completely earned pension benefit to those who continue on active military duty would tend to discourage rather than encourage such service—directly contrary to one of the primary purposes of the charter provision. Furthermore, to sustain the defendants in their claim of a right to postpone actual payment of the earned pension until discharge of the employe-veteran from military service and his 'return' to the fire department might well operate to deprive the employe and his family altogether of the pension benefit. If he should be kept on active military duty after his right to the pension had otherwise matured (as is the case here) and if he should die before he had been 'discharged' and had 'returned' to the fire department, the position taken by the city in its argument here, if sustained, would forever preclude such employe and his heirs from any recovery on the pension.

"There is apparent no purpose to be served by requiring any employe who has completed his period of service so as to be fully entitled to a pension to return to the fire department. The fire department has no right to his return because it has no right to further service from him. He has fully earned his pension."

The reasoning of that case is persuasive in the instant case.

It should also be mentioned that the state Attorney General has officially ruled on a problem similar to the one here presented.

His construction of several state statutes similar to the charter provisions here involved favors respondent. The question presented to him was whether a state employee who becomes incapacitated while on leave for military service must return to active service in order to be eligible for the retirement benefits conferred by the State Employees' Retirement System. The Attorney General ruled that such employee did not have to return to active service to be eligible for the pension. In so holding it was stated (13 Op. Attys. Gen. 108):

"Government Code section 20894.5, dealing with contributions by the employer under the State Employees' Retirement System, provides that the employer shall contribute for each member of the system who is absent from State service on military leave the amounts of contributions which would have been made by the employer and the employee had the employee not been absent on military leave, provided that the employee returns to State service within six months after his military discharge. The section then provides:

"For the purposes of this section, a member who is or was granted a leave of absence or placed on a state civil service reemployment list as of the same date he was reinstated from military leave shall be considered as having returned to state service within said six months, if he returns to state service at the end of such leave of absence or upon offer of employment from the reemployment list."

"An employee who has been reinstated from military service has the same status and rights of an employee and of membership in the retirement system as if he had not been absent upon military leave. (Government Code, section 20894.2; Military and Veterans Code, section 395.1.) Obviously, a State employee who is on a leave of absence retains his status as an employee and as a member of the State Employees' Retirement Sys-

tem and is eligible to be retired for disability while on a leave of absence. When found to be physically incapacitated to perform his duties, the employee must be retired 'forthwith' (Government Code section 21025) and his leave of absence is thereby automatically terminated.

"While the section here involved requires an employee reinstated from military service to return to State service at the end of his leave of absence in order that he may be eligible for the retirement benefits therein provided, this condition obviously is not applicable where there has been an intervening determination under Government Code, section 21025 that the employee is physically incapacitated to perform his duties and should be retired forthwith. Under such circumstances it was not within the contemplation of the Legislature that such a member must first return to State service before becoming eligible for retirement and for the benefits provided for State employees reinstated from military service."

Appellants correctly call attention to the fact that in the Gibson case, *supra*, and in the case discussed by the Attorney General, the employees were already members of the retirement system, and point out that in the instant case the employee was a member of the old system and had to file an election to come within the new system. Appellants urge that this distinction is vital and contend that before respondent was eligible to join the new system he had to return to active service. While this distinction exists it is not an important one. As already pointed out, respondent although a member of the old system had the legal right to exercise his option immediately upon the enactment of article XXVI. The provision relied upon by appellants—"90 days after return of such persons to service"—simply served to extend the time in which respondent might exercise his option. This was the interpretation of similar language in the charter

involved in the Gibson case, *supra*, and in the statutes involved in the case discussed by the Attorney General. In both of those cases the same ambiguity existed that exists in the present case. The ambiguities were resolved in favor of the applicants for the pension. The same ambiguity should be so resolved in the instant case. This interpretation is in accord with the statutory policy set forth in the state law applicable to state employees. See *Military and Veterans Code*, § 395 et seq.; see also *Palaske v. City of Long Beach*, 93 Cal.App.2d 120, 208 P.2d 764.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



157 Cal.App.2d 575

Application of Laurence L. DARLINGTON, father of Laurence Paul Darlington, a minor, to Compromise Disputed Claim.

Laurence Paul DARLINGTON, also known as Laurence Earle Darlington, Plaintiff and Appellant,

v.

BASALT ROCK COMPANY, Inc., a corporation, Defendant and Respondent.

Civ. 9083.

District Court of Appeal, Third District, California.

Feb. 14, 1958.

Rehearing Denied March 12, 1958.

Hearing Denied April 9, 1958.

Proceeding on motion by plaintiff, made after he reached his majority, to set aside an order approving his father's application to compromise his claim for personal injuries received while he was a minor. The Superior Court, Napa County, Mervin C. Lernhart, J., entered order denying the motion, and the plaintiff appealed. The District Court of Appeal, Peek, J., held that evidence relating to question of liability for plaintiff's personal injuries and

to fraud and to mistake as to severity of injuries disclosed no abuse of discretion in denying the motion.

Order affirmed.

1. Appeal and Error ⇨1011(1)

A ruling of trial court upon issues of fact raised by conflicting affidavits is entitled, upon appeal, to the same weight as a finding on conflicting evidence as to issues of fact.

2. Parent and Child ⇨8

Evidence relating to question of liability for plaintiff's personal injuries sustained while he was a minor and to fraud and as to mistake as to severity of plaintiff's injuries disclosed no abuse of discretion in denying plaintiff's motion made after he reached his majority, to set aside order approving his father's application to compromise his personal injury claim. *West's Ann.Prob.Code*, § 1431.

3. Constitutional Law ⇨306 Parent and Child ⇨8

The statute relating to right of father to compromise, with court approval, his minor children's disputed claim is not unconstitutional on any theory of violation of due process by depriving minor of property without notice or hearing or by denying his right to name a guardian and to disaffirm the compromise upon reaching his majority. *West's Ann.Prob.Code*, § 1431; *U.S.C.A. Const. Amend. 5*; *West's Ann.Const. art. 1, § 13*.

4. Constitutional Law ⇨48

A statute should not be declared unconstitutional unless it is clearly violative of a specific constitutional provision.

5. Constitutional Law ⇨48

Where there is reasonable doubt as to validity of statute, its constitutionality should be affirmed.

6. Infants ⇨4

Under the doctrine of *parens patriae* the state, acting through the Legislature, has the inherent power to provide protection to all persons non sui juris, and to make and enforce such rules and regulations as it

deems proper for the management and control of their property and their affairs.

Philip Steiner, San Francisco, for appellant.

Bronson, Bronson & McKinnon, San Francisco, for respondent.

PEEK, Justice.

Plaintiff appeals from a denial of his motion to set aside an order approving the compromise of a minor's claim for damages pursuant to the provisions of Probate Code, section 1431.

At a time when he was a minor of 17 years of age, plaintiff suffered serious injuries as the result of a collision between a car in which he was riding and a truck owned and operated by the defendant Basalt Rock Company and driven by one of its employees. Thereafter Mr. Ghidella of the law firm of King and Ghidella, on behalf of plaintiff's father, filed a petition for approval of the compromise previously agreed to by the father and the defendant's insurance carrier. The petition alleged in part that while plaintiff was riding as a guest in an automobile owned by R. Connors and operated by his daughter, Susan Connors, that vehicle collided with defendant's truck and plaintiff sustained injuries of a permanent nature, i. e., fracture of the right arm requiring amputation thereof, arterial anastomosis, fracture of the right foot and severe shock; that defendant offered to compromise the claim; and that petitioner was advised and considered this sum a fair and just compromise under the circumstances.

At the hearing on the proposed compromise, Mr. Ghidella was asked by the court if the compromise was in the best interest of the minor. In reply he stated that in his opinion it was; that plaintiff did not have a case against the defendant. Mr. Ghidella then requested that the father read the petition. However the court said he would explain it, stating, "If this compromise is approved * * * it is the end * * * You haven't any further rights at

all, if you accept it." The father was next asked by the court if he wanted to accept the order of compromise with the understanding that " * * * it is a fair and just compromise to the boy * * *," and he answered in the affirmative. The court observed that it appeared to be a good settlement. Mr. Ghidella further stated to the court: "Of course the award is an outright bluff. We had no case whatsoever." The court concluded the hearing with the comment: "If the liability is as questionable as Counsel represents, I have no doubt but what it is to your interests if you get anything, isn't it?" And the father replied, "Yes."

The order approving the compromise recited that it appeared to be reasonable and ordered the father to distribute specified portions of the \$4,900 received as follows: \$1,975 to himself for medical expenses incurred on plaintiff's behalf; \$877.75 to King and Ghidella for attorney fees, and the balance, \$2,047.25, to be deposited by him as trustee in a bank subject to withdrawal only upon order of the court during plaintiff's minority.

In consideration of the payment by defendant of the amount of the compromise, plaintiff's father executed a full release on plaintiff's claim for all injuries "known and unknown" attributable to the accident. The release also provided that it was executed without reliance upon any statement or representation by defendant concerning the nature or extent of injuries or legal liability therefor.

Four years later, upon reaching his majority, plaintiff who was then represented by different counsel, filed the present petition to set aside the compromise. He alleged that his father employed the law firm of King and Ghidella to prosecute an action for personal injuries; that said attorneys did not conduct an independent investigation into the facts of the case, but, on the contrary, relied solely upon the representation of defendant's agents regarding the lack of liability of defendant; that upon inquiry by said attorneys defendant false-

ly and fraudulently, and with intent to deceive, advised said attorneys that defendant was guilty of no negligence; that the attorneys believed and relied upon defendant's representation; that by wilfully concealing from and failing to advise plaintiff's father and his attorneys of the true facts, defendant induced and led said attorneys to recommend the acceptance of the offer of compromise of defendant; that defendant knew, or should have known, that plaintiff's injuries were sustained as the result of its negligence, which fact was unknown to plaintiff's father and attorneys; that the father and the attorneys were mistaken as to the extent and permanency of plaintiff's injuries; that no testimony was taken at the hearing except the father's; that no medical testimony was taken; that at no time was any mention ever made of the permanent nature of the injuries to plaintiff's right foot or to the extent of his capability to use a prosthesis; that upon the date of the compromise neither the plaintiff's father nor his attorneys knew the extent or the permanent nature of his injuries and relied solely upon the representations of defendant in reference to its liability; that consequently, the court was imposed upon in that it did not have a true representation of the facts as they actually existed or of the extent and serious nature of plaintiff's injuries, and that in reliance on said representation the court approved the compromise.

In an affidavit which was attached to plaintiff's petition, Dr. Fred D. Heegler averred that at the time of his original treatment of the plaintiff, from September 26 to November 30, 1951, his prognosis was that the plaintiff would recover from the injuries without residual effects; that when he again examined plaintiff from April 17, 1952, to the date of his affidavit he, for the first time, discovered residual effects from the injuries; that it was then and now his opinion that the disability was permanent; that the extent of plaintiff's capability to use the prosthesis had not yet been determined; that the maximum use would not exceed 20 per cent; and that he

had made no report, either oral or written, to the law firm of King and Ghidella or to the court prior to January 31, 1952.

There was also introduced at the hearing an affidavit by Mr. Ghidella wherein he set forth that he had performed substantially all of the legal work in reference to the petition for compromise; that at that time he was informed that the injury to the plaintiff's foot was an ordinary fracture; that at no time had he any medical or nonmedical information that the injury was of a permanent nature and so represented the same to the superior court.

In opposition to plaintiff's motion, defendant filed an affidavit by James E. Gallagher, an adjuster for defendant's insurance carrier, and Louie T. Cravea, an eyewitness. In the Gallagher affidavit it was alleged that prior to settlement the affiant had discussed the accident with the driver and occupants of the car in which plaintiff was riding, with the driver of the truck and with various eyewitnesses; that he also had discussed the case with plaintiff's mother but not his father; that he had discussed the case but not the details thereof with Mr. Ghidella; that he had made no representation as to either the nature or extent of plaintiff's injuries, but that he did state to Mr. Ghidella that his investigation indicated the case was not one of liability on the part of the defendant.

The Cravea affidavit corroborated in general the comments in the Gallagher affidavit concerning the facts surrounding the collision as affecting liability. Also attached to the Gallagher affidavit were two letters from Mr. Ghidella to Mr. Gallagher. The first expressed a willingness to accept a settlement of \$4,900—\$1,400 representing the medical expense and \$3,500 on account of general damages. The second letter acknowledged the acceptance of the settlement offered and advised that it would be presented to the court for approval.

[1] It must be borne in mind that in reviewing the evidence so presented to the trial court we are bound by the rule on appeal so frequently quoted from *In re Es-*

tate of Bristol, 23 Cal.2d 221, 143 P.2d 689, as to warrant no further repetition. And this is true whether the determination of the trial court was predicated on issues of fact raised by conflicting affidavits or on conflicting evidence as to issues of fact. *Rench v. Harris*, 76 Cal.App.2d 113, 118, 172 P.2d 576.

[2] From the record it appears that when plaintiff's motion to vacate the order approving the compromise was presented, the court had before it the record of the hearing at which the compromise was approved and the affidavits of the parties. Nowhere in the record was there any factual proof of the truth of the assertions of fraud and mistake as alleged in plaintiff's petition. But the record did contain the affidavits submitted by defendant wherein plaintiff's allegations were factually controverted. Additionally the record contained several statements by Mr. Ghidella in answer to particular questions by the court. Specifically he was asked concerning his recollection of the facts and circumstances leading up to the compromise, to which he replied that he talked to the officer, saw the statements made by other witnesses to the adjuster, but he did not see the statement of the truck driver, and that "* * * on the facts we gathered, there was no liability, and we thought the compromise was very reasonable * * *." Again in response to questions concerning the medical aspects of the case Mr. Ghidella stated in part:

"If Your Honor please, I would like to point out our reasoning in the matter. At that we didn't care what the report was. We didn't care whether he had four limbs removed. We had arrived at the conclusion that there was no liability whatsoever, so it was a poker game to try to determine 'how much can we get without forcing this to trial'; the result would have been the same if he was a quadruple amputee. We were not concerned with Dr. Heegler's prognosis. It just revolved on that one point: 'How

much can we get without forcing this to trial', and that is what we did."

Gauged by the rules above noted, it necessarily follows that the action of the trial court in denying plaintiff's motion to vacate the order approving the compromise finds ample factual support in the record.

Although at the hearing on the petition now before the court only two grounds were urged—(1) fraud, and (2) mistake—and although it was conceded that the original proceedings to approve the compromise were conducted properly, plaintiff's present counsel, who came into the case subsequent to the hearing on the petition to set aside the compromise, now contend that the preponderance of the evidence shows that plaintiff's interest as a minor was not protected by the court, his father, or his father's attorney; hence the order, lacking support in the evidence, amounted to nothing more than an arbitrary declaration by the judge.

We cannot agree with the assumption contained in such contention. Plaintiff's previous counsel stated at the outset of the hearing on the motion to vacate that no attack was made upon the proceeding. In view of the facts and circumstances surrounding the hearing on the compromise and the contentions then advanced by plaintiff, we take such statement to mean that although the evidence on its face was sufficient, nevertheless the court and parties had been imposed upon through the fraud of the defendant, and that all parties labored under a mutual mistake as to the permanency of plaintiff's injuries. Thus it would appear that the contentions now made by plaintiff's counsel are more in the nature of an attack upon his then counsel for failure to adequately investigate the case, and upon the court for accepting such inadequacy.

Because of the nature of the contention now made, we have summarized the evidence in detail. So summarized we cannot now say that the trial court abused its discretion in denying the motion to vacate. The evidence was all to the end that the

original attorneys had determined that because of the question of liability the case was not one to try; that it should be settled for whatever could be obtained, and hence the severity of plaintiff's injuries was not considered to the degree it would have been had the question of liability been otherwise. Such conclusion finds ample support in the record. Additionally there was the release signed by the father covering unknown and unanticipated injuries and specifically denying that it was executed in reliance upon any representation of any kind. See *Berry v. Struble*, 20 Cal.App.2d 299, 66 P.2d 746; *Kostick v. Swain*, 116 Cal.App.2d 187, 253 P.2d 531.

[3] The first portion of plaintiff's next contention is that section 1431 of the Probate Code is violative of the due process clauses of both the federal and state Constitutions, U.S.Const. Amend. 5; Const. art. 1, § 13, in that plaintiff was deprived of property without notice or hearing, and for the further reason that he was denied his right to name a guardian and to disaffirm the compromise upon reaching his majority.

[4, 5] At the outset of any discussion of the constitutionality of the section involved, it must be remembered that a statute should not be declared unconstitutional unless it is clearly violative of a specific constitutional provision. And where there is reasonable doubt as to the validity of the act, its constitutionality should be affirmed.

[6] Under the doctrine of *parens patriae* the state, acting through the Legislature, has the inherent power to provide protection to all persons *non sui juris*, and to make and enforce such rules and regulations as it deems proper for the management and control of their property and their affairs. Section 1431 is but a part of the general, comprehensive scheme for the regulation of a minor's property rights.

Plaintiff's contention regarding notice and hearing is answered by the case of *Burge v. City & County of San Francisco*, 41 Cal.2d 608, 262 P.2d 6, 10. There the mother of a 14-year-old minor filed a veri-

fied petition seeking approval of a compromise of damages for personal injuries suffered by the minor. Before reaching majority, the minor by his father as guardian ad litem, sought to recover for his injuries. The defendant, as a special defense, pleaded the previous compromise by the mother under the provisions of section 1431 of the code. The record showed that neither the plaintiff nor his mother appeared or testified when the order approving the compromise was made. The court, in denying the petition to set aside the compromise, stated that while it would have been " * * * better practice to hold a hearing and take testimony, the statute does not require it." And, in a footnote there were set forth the provisions of rule 28(c) of the Superior Court Rules wherein the attendance of the parties and the taking of evidence are said not to be mandatory. The *Burge* case cited with approval *Rico v. Nasser Bros. Realty Co.*, 58 Cal.App.2d 878, 137 P.2d 861, 863, where it was held: "This section authorizes the father to petition for the order, and does not require the appointment of a guardian, the appearance in court of the father, or the minor, or the taking of testimony relating to the extent of the injuries. If orderly procedure, or the good judgment of the superior court, should suggest that any one of these acts should have been done, the failure to do so was merely an error, or irregularity, committed within the conceded jurisdiction of the court."

The second portion of plaintiff's final contention also finds answer in what has heretofore been said concerning the inherent power of the Legislature in matters affecting minors. It necessarily follows that since the Legislature may provide for the institution of proceedings by statutory guardians, there appears to be no reason why it cannot designate the natural guardian as the person so to do.

The order is affirmed.

VAN DYKE, P. J., and WARNE, J.
pro tem., concur.

Alfred W. GOMES, Plaintiff and Appellant,
v.

**Selma F. E. BYRNE, sometimes known as
Mrs. J. D. Byrne, Defendant and
Respondent.***

Civ. 9131.

**District Court of Appeal, Third District,
California.**

Feb. 13, 1958.

Rehearing Denied March 12, 1958.

Hearing Granted April 9, 1958.

Brush salesman brought action against owner of dog under the Dog Bite Statute for injuries sustained when bitten by dog. The Superior Court, Butte County, Dudley G. McGregor, J., entered judgment in favor of the owner of the dog and an order denying the salesman's motion for new trial, and the salesman appealed. The District Court of Appeal, Warne, J. pro tem., held that where dog, which was inside fence, followed brush salesman, who was outside fence, for about 50 feet, barking continuously all the way, but salesman entered gate and was bitten by dog, salesman assumed the risk and could not recover.

Judgment affirmed and appeal from order dismissed.

1. Appeal and Error ☞110

Order denying new trial was not appealable, and purported appeal therefrom would be dismissed. West's Ann.Code Civ.Proc. § 963.

2. Animals ☞71

Where dog, which was inside fence, followed brush salesman, who was outside fence, for about 50 feet, barking continuously all the way, but salesman entered gate and was bitten by dog, salesman assumed the risk and could not recover for his injuries under the Dog Bite Statute. West's Ann.Civ.Code, § 3342.

3. Animals ☞74(5)

In action under Dog Bite Statute by brush salesman against owner of dog for injuries sustained by salesman when bitten by dog, evidence sustained finding of trial

court that salesman was not a business visitor or invitee to whom statute was applicable. West's Ann.Civ.Code, § 3342.

4. Appeal and Error ☞1010(1)

Trial court's fact determination, which finds support in record, is binding on District Court of Appeal on appeal.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, James William Morgan, Chico, for appellant.

Albert M. King, Oroville, for respondent.

WARNE, Justice pro tem.

[1] Plaintiff appeals from a judgment in favor of the defendant and from an order denying his motion for a new trial in an action wherein he sought damages alleged to have resulted when he was bitten by defendant's dog. Since the order denying a new trial is not appealable the purported appeal from said order is dismissed. Code Civ.Proc. sec. 963.

Plaintiff's cause of action is founded upon the so-called Dog Bite Statute. Civ. Code sec. 3342.

It appears from the record that at the time of the occurrence in question, plaintiff, a salesman for the Fuller Brush Company, while canvassing in the neighborhood of defendant's residence, called at defendant's home and handed her a catalogue. It was the first time he had ever called at defendant's home or on defendant. Defendant is a practical nurse and uses the premises as a private nursing home, and the house and yard are surrounded by a wire fence with a gate and path leading to the front door. As plaintiff approached the gate, the dog, a toy shepherd, followed him along the inside of the fence for about 50 feet, barking continuously all the way, and when he entered the gate the dog bit him on the right lower leg causing a puncture wound and superficial abrasions. No signs were posted on the premises indicating that

peddlers or solicitors were unwelcome, nor any sign warning of a vicious dog.

On the afternoon of the following day, plaintiff again called at defendant's home and at that time defendant bought face powder and moth preventative from him, not because she wanted the merchandise, but because she was sorry the dog had bitten him.

The trial court found "that plaintiff * * * was not a business visitor or invitee on the premises * * *; that at said time and place the business on which plaintiff was engaged was in no way connected with the business conducted by defendant on said premises," and that plaintiff was guilty of negligence and assumption of risk.

Section 3342 of the Civil Code provides: "The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, * * *. A person is lawfully upon the private property of such owner within the meaning of this section when he is on such property * * * upon the invitation, express or implied, of the owner."

Plaintiff contends that a person who calls at a residence to offer goods for sale or commences negotiations therefor is bestowing a mutual benefit upon himself and the householder and, therefore, is a business visitor and an invitee. He also contends that contributory negligence short of kicking, teasing, or otherwise provoking the dog, is not ordinarily a defense of the Dog Bite Statute, and that there is no assumption of risk as a matter of law where there is no proof that plaintiff had notice or knowledge of the dog's evil propensities. We do not believe that these contentions are sound.

In *Smythe v. Schacht*, 93 Cal.App.2d 315, 209 P.2d 114, 118, it was pointed out that the Legislature did not intend to make the liability of the owner absolute and render inoperative certain principles of law such as assumption of risk or wilfully

inviting injury, which have long been established as a part of our law. The court stated: "While the Dog Bite Statute does not found the liability on negligence, good morals and sound reasoning dictate that if a person lawfully upon the portion of another's property where the biting occurred should kick, tease, or otherwise provoke the dog, the law should and would recognize the defense that the injured person by his conduct invited injury and therefore, assumed the risk thereof."

[2] In the case at bar, the hostile conduct of the dog in pursuing and barking at the plaintiff as he walked along the outside of the fence toward the gate surely was notice to plaintiff of the dog's probable evil propensities and of the existence of a dangerous situation should one enter upon the enclosed premises. Notwithstanding, plaintiff, in the face of such an apparent danger, chose to enter upon the premises, and in so doing he voluntarily exposed himself to the hazard of being bitten by the dog. It may not be said that his entry through the gate did not provoke the dog into attacking him. Under such circumstances we conclude that the doctrine of the assumption of risk applied and the trial court properly so held.

[3,4] Whether plaintiff was a business visitor or an invitee on the premises was a question of fact which the trial court determined adversely to plaintiff's position. Such determination finds support in the record and is binding upon this court. *Butcher v. Queen City Iron & Metal Co.*, 99 Cal.App.2d 25, 221 P.2d 265. The supporting facts are: Plaintiff had never called at defendant's home or on defendant before, nor up to the time of the occurrence had he negotiated with her in any way. Plaintiff's call was merely for the purpose of handing her a catalogue with the expectation that defendant would make a purchase when he again called on her at some future date. Further, his mission was not in any way connected with defendant's personal business of running a nursing home and there was no element of any

benefit to defendant by reason of his presence on the premises.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



157 Cal.App.2d 492

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Grover Cleveland McDANIEL, Defendant
and Appellant.

Cr. 6059.

District Court of Appeal, Second District,
Division 3, California.

Feb. 6, 1958.

Hearing Denied April 2, 1958.

Prosecution for forgery of a fictitious name. After non-jury trial, the Superior Court, Los Angeles County, Thomas L. Ambrose, J., found defendant guilty, denied defendant's motion for new trial, and imposed sentence on defendant who appealed. The District Court of Appeal, Shinn, P. J., held that defendant, who testified at trial that he freely and voluntarily returned to the state with a police officer to face the charge, could not assign as error that officers who arrested him in another state acted without authority, that he was not formally extradited from such state, and that he did not waive extradition.

Affirmed.

1. Criminal Law ☞1137(1)

Defendant, who testified at his criminal prosecution that he freely and voluntarily returned to state with police officer to face the charge, could not later assign as error on appeal from conviction that officers who arrested him in another state acted without authority, that he was not formally extradited from that state and that he did not waive extradition.

2. Jury ☞29(6)

Defendant, who stated that he would accept a court trial and answered "yes" when asked by the court if defendant was satisfied to have the court determine the matter without a jury, expressed his intent to waive jury trial, and defendant's statements constituted a valid waiver of jury trial.

3. Jury ☞29(6)

The effectiveness of a jury waiver by a defendant does not depend upon use of any particular form of words; a defendant need only use language that, in its ordinary meaning, expresses an intention to submit matter to court sitting without a jury.

4. Criminal Law ☞106

Venue in criminal actions refers to the county in which a prosecution is brought for trial. West's Ann.Pen.Code, § 1033 et seq.

5. Criminal Law ☞101(2)

The superior court is a single entity and a transfer of a criminal prosecution from one department of that court to another department is not a transfer of the jurisdiction of the cause. West's Ann.Pen.Code, § 1033 et seq.

6. Criminal Law ☞254

In prosecution for forgery of a fictitious name, the clerk was not required to read the information where defendant waived jury trial, and in any event, it could not be doubted that trial judge was cognizant of charges against defendant and issues raised by his not guilty plea and his denial of prior convictions. West's Ann.Pen.Code, §§ 470, 1093, subd. 1.

7. Criminal Law 594(1)

In prosecution for forgery of a fictitious name, trial court's denial of defendant's motion for continuance upon ground that certain witnesses subpoenaed by defendant were not present in court was not an abuse of discretion where defendant did not disclose to court the names of absent witnesses who were allegedly necessary to his defense, and such denial did not deprive defendant of an opportunity to present any

evidence he deemed material to his defense in view of defendant's subsequent statement that he had presented all of the evidence that he had. West's Ann.Pen.Code, § 470.

8. Witnesses ⇨223

In prosecution for forgery of a fictitious name, trial court was not required to examine section of Unemployment Insurance Code on which witness who was official of state department of employment relied in refusing to disclose source of information as to defendant's employment where defendant stated that there was no need to go any further with the matter if the source could not be exposed and that the starting and terminating dates of defendant's employment by corporation to which such official testified was all that defendant wanted to get into evidence. West's Ann. Pen.Code, § 470.

9. Criminal Law ⇨543(2)

In prosecution for forgery of a fictitious name, trial court properly allowed testimony of witness given at preliminary hearing to be read in evidence where photostatic copies of telegrams were received in evidence showing that such witness was outside state and would be unable to appear at trial. West's Ann.Pen.Code, §§ 470, 686.

10. Criminal Law ⇨1153(6)

If upon the exercise of a reasonable discretion the court determines the fact to be that a witness is outside the state, its order allowing the testimony of such witness given at a preliminary hearing to be read in evidence in a criminal prosecution will not be disturbed on appeal. West's Ann. Pen.Code, § 686.

11. Criminal Law ⇨491(1)

In prosecution for forgery of a fictitious name, trial court's failure to require appearance of police handwriting expert who allegedly testified at preliminary hearing that handwriting on two checks was not that of defendant did not deprive defendant of right to establish that fact, if it was a fact, where police handwriting expert who did testify was a co-worker of missing handwriting expert who was on vacation, and both handwriting experts

had made a comparison of writing on checks with defendant's signature on sheet of white paper. West's Ann.Pen.Code, § 470.

12. Criminal Law ⇨1136

On appeal from conviction for forgery of a fictitious name, defendant who did not cross-examine police handwriting expert could not complain that defendant had been deprived of opportunity to establish that handwriting on checks was not his by trial court's failure to require appearance of another police handwriting expert who allegedly testified, at preliminary hearing that handwriting on checks was not that of defendant. West's Ann.Pen.Code, § 470.

13. Criminal Law ⇨661

The prosecution is not required to call any particular witness or witnesses so long as it fairly presents the material evidence relating to the charge for which the accused is on trial.

14. Criminal Law ⇨393(1)

In prosecution for forgery of a fictitious name, introduction in evidence of defendant's fingerprint impressions taken without his consent did not infringe defendant's constitutional privilege against self-incrimination. West's Ann.Pen.Code, § 470.

15. Criminal Law 393(1)

The privilege against self-incrimination relates primarily to testimonial compulsion.

16. Forgery ⇨44

Evidence sustained conviction for forgery of a fictitious name. West's Ann.Pen. Code, § 470.

17. Forgery ⇨9

In prosecution for forgery of a fictitious name, defendant who endorsed checks signed with fictitious name had same responsibility whether he uttered such checks or whether they were presented for payment at his instigation and with his knowledge. West's Ann.Pen.Code, § 470.

18. Forgery ⇨47

In prosecution for forgery of a fictitious name, question whether defendant

had an intent to defraud was question of fact to be resolved by trial court in nonjury trial from all circumstances in evidence. West's Ann.Pen.Code, § 470.

19. Criminal Law ⇐162

The so-called "prior felony conviction laws" are not unconstitutional upon ground that they place an accused person in double jeopardy for the same offense.

Grover Cleveland McDaniel, in pro. per.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Grover Cleveland McDaniel was accused by information of two offenses of forgery of a fictitious name. Pen.Code, § 470. The information alleged that he had suffered a previous felony conviction of violation of the Dyer Act, 18 U.S.C.A. § 2311 et seq., another conviction of burglary and had served terms of imprisonment therefor in a federal prison and a state prison in California. Defendant acted as his own counsel in the trial proceedings. He pleaded not guilty and denied the prior convictions. Trial was to the court, which found him guilty of both offenses of forgery and found the priors to be true. McDaniel made a motion for new trial, which was denied, and he was sentenced to state prison for the term prescribed by law. He appeals from the judgment and the order denying him a new trial.

The convictions of forgery were based upon evidence of the following facts: Harold Epstein was the President of Bookcases, Inc., a corporation engaged in the manufacture of furniture at its plant on South Hill Street in Los Angeles. Epstein testified that defendant was employed by the corporation some time in January 1957 and that the employment terminated one day in the middle of February when defendant failed to show up for work. Several weeks later, Epstein was asked by officials of the Union Bank & Trust Company to come to the bank and ex-

amine two checks drawn on the account of Bookcases, Inc. One check was in the amount of \$53.36 and was dated March 2nd; the other was in the amount of \$53.47 and was dated March 8th. Each check was signed "Harold Ayston" and was made payable to Grover McDaniel. The checks purported to be for wages earned; they bore notations in the upper left-hand corner of deductions for social security and withholding taxes. The reverse of each check bore the handwritten endorsement "Grover McDaniel 4419 S. Towne Ave."

The witness then discovered that two checks were missing from the center of the corporation's checkbook. He stated that he knew nobody by the name of Harold Ayston, that he alone had authority to sign checks on behalf of Bookcases, Inc. and that he had not given any one permission to sign company checks.

The \$53.36 check was presented for cashing on the afternoon of March 2nd to Eleanor Melendez, an employe of Handy Payments at an address on South Broadway in Los Angeles. Mrs. Melendez testified that she cashed the check and identified her initials on the face of the instrument. The check was handed to her by a colored man, but she could not identify him as defendant. The other check was approved for cashing on March 8th by Samuel Brownfield at his market on Vermont Avenue in Los Angeles. He had no recollection of the person who presented the check to him.

L. M. Deinert, a police officer for the City of Los Angeles, was one of the investigating officers in the case. While defendant was in custody, Deinert requested him to write his name on a sheet of white paper, together with other words and figures that appeared on the two checks. McDaniel complied with the officer's request; he signed his name "Grover C. McDaniel".

K. L. Woodward, an examiner of questioned documents for the Los Angeles Police Department, qualified as an expert

witness with reference to the analysis and comparison of handwriting. Woodward testified that he had made a comparison of the endorsements appearing on the reverse of the two checks with defendant's signature on the sheet of white paper. It was his opinion that the person whose signature appeared on the paper was the same person who had placed the endorsements on the checks.

The People introduced in evidence certified copies of judgments of the United States District Court for the District of New Mexico and of the Superior Court of the State of California for Los Angeles County, together with signature cards and fingerprint exemplars. Donn Kelso, a qualified fingerprint expert with the Los Angeles Police Department, testified that he had made a comparison of the exemplars with fingerprint impressions of defendant taken while McDaniel was in custody. It was his opinion that the two sets of impressions were those of the same person. Woodward also stated that he had made a comparison of the handwriting on the cards with the signature obtained from defendant. He gave his opinion that they were signed by the same person.

Officer Deinert was called as a witness by defendant. He testified that he had a conversation with McDaniel after the latter's arrest. Defendant told him that he had never seen the checks, that he did not take them, and that he did not live at 4419 South Towne Avenue but had used the number as a mailing address in the past. Fred D. Brenner, an official of the State Department of Employment, identified his signature on a letter to McDaniel stating that according to the department's records defendant worked for Bookcases, Inc. from January 21st until February 7th, 1957.

Defendant, testifying in his own behalf, denied taking the checks from the company checkbook and denied endorsing and cashing them. The endorsements on the checks were not in his handwriting. He quit work on February 7th and returned to pick up his paycheck the next

day. He left Los Angeles in the middle of February and went to Dallas, Texas, where he remained until he was taken into custody on May 31st on the forgery charges. He "freely and voluntarily returned here when the officer came, to face this charge." He never lived at 4419 South Towne Avenue but had used it as a mailing address prior to October 1956. On cross-examination, he admitted signing his name on the sheet of white paper at the officer's request. He also admitted suffering the two prior convictions and having served terms of imprisonment therefor.

Defendant has filed several briefs in support of his appeal. The briefs are adequate as a presentation of all the points that could be urged in his behalf. We have made a thorough examination of the record and have discovered no insufficiency of the evidence and no error at the trial.

Defendant argues the following points in his briefs: (1) He was not lawfully apprehended in Texas; (2) he did not waive a jury trial; (3) he was not present during "proceedings for change of venue"; (4) the court should have instructed the clerk to read the information; (5) he should have been granted a continuance in order to secure the presence of his witnesses; (6) the court should have taken a recess in order to examine the effect of certain statutes; (7) the court erred in permitting the testimony of Epstein at the preliminary hearing to be read in evidence at the trial; (8) the court erred in failing to require a handwriting expert who testified at the preliminary hearing to appear at the trial; (9) impressions of his fingerprints were taken in violation of his constitutional rights; (10) the court "injected nationality" into the record; (11) the evidence was insufficient to support the convictions of forgery; (12) the court erred in permitting proof of his prior convictions for the reason that the statutes providing for increased punishment of recidivists are unconstitutional.

[1] With respect to the first point, defendant asserts in his brief that the officers who arrested him in Dallas acted without

authority, that he was not formally extradited from Texas and that he did not waive extradition. These statements are contradicted by his testimony at the trial. McDaniel then stated that he "freely and voluntarily returned here when the officer came, to face this charge."

[2] The second point is that McDaniel did not expressly waive a jury trial. When the cause was called in Department 40 of the Superior Court, the following proceedings occurred:

"The Court: Do you want a Court or jury trial?

"The Defendant: I'll accept a Court trial.

"The Court: You're satisfied to have the Court determine this matter without a jury, are you?

"The Defendant: I will.

"The Court: And will you join in the waiver, Mr. Busch?

"Mr. Busch: Yes, your Honor, we join.

"The Court: On behalf of the People?

"Mr. Busch: Yes."

The matter was then transferred to another department for trial, whereupon after the commencement of testimony defendant asserted that "He never asked me did I waive right to a jury trial. I said Court trial would be sufficient. I never waived the right to a jury trial." and objected to being tried by the court. After hearing the shorthand reporter assigned to Department 40 read his notes of the colloquy we have just set forth, the court overruled McDaniel's objection.

[3] Defendant argues that he cannot be deemed to have consented to a court trial for the reason that he did not expressly say that he waived trial by a jury. The argument is without merit. The effectiveness of a jury waiver does not depend upon the use of any particular form of words by an accused; he need only use language that, in its ordinary meaning, expresses

an intention to submit the matter to the court sitting without a jury. *People v. Beckworth*, 151 Cal.App.2d 842, 312 P.2d 270. In our opinion, defendant's statements were clearly sufficient as an expression of such an intention and they constituted a valid waiver of a jury trial.

[4, 5] Under the third point, defendant claims that he was not present during certain "proceedings for change of venue", to wit, the transfer of his case from Department 40 of the Superior Court to Department 47 and then to Department 42. His argument rests upon a misconception of the meaning of "venue". Venue in criminal actions refers to the county in which a prosecution is brought for trial. *Pen.Code*, § 1033 et seq. A transfer to another department of the superior court is not a transfer of the jurisdiction of the cause, which remains at all times in the superior court as a single entity. *People v. Sears*, 138 Cal.App.2d 773, 794, 292 P.2d 663. Furthermore, the record discloses that defendant was personally present in court at all stages of the proceedings.

[6] There is likewise no merit to the argument that the court should have instructed the clerk to read the information, as urged under the fourth point. The requirement is applicable only to jury trials (*Pen.Code*, § 1093, subd. 1), and it cannot be doubted that the trier of fact was cognizant of the charges against defendant and the issues raised by his not guilty plea and his denial of the prior convictions.

[7] During the direct examination of Mr. Woodward, McDaniel interrupted the proceedings to make a motion for a continuance upon the ground that he had subpoenaed certain witnesses who were not present in the courtroom. The court stated that it would order the arrest of any defense witness who had failed to appear in response to a subpoena, but denied defendant's motion, taking note that upon being asked that morning in Department 40 whether he was ready for trial McDaniel replied in the affirmative.

As to the fifth point, there is no merit to the argument that denial of a continuance constituted an abuse of discretion. If defendant desired a postponement of the trial on account of the absence of witnesses necessary to his defense, it was incumbent upon him to disclose to the court the names of those witnesses, which he did not do; in the absence of such disclosure the court properly denied his motion for a continuance. *People v. Franklin*, 41 Cal.App.2d 669, 670, 107 P.2d 500. It cannot be argued that McDaniel was deprived of an opportunity to present any evidence he deemed material to his defense. After Officer Deinert and Mr. Brenner had testified in his behalf, the court asked defendant whether he wished to offer any other evidence and McDaniel replied: "That is all the evidence I have. When I was employed and when I was terminated." He then took the stand and denied his guilt of the forgeries.

[8] As we have already said, Mr. Brenner read into the record a copy of his letter to defendant, giving the dates of defendant's employment with Bookcases, Inc. Upon being asked by McDaniel whether the company was the source of that information, Brenner declined to answer the question, stating that disclosure of the records of his department would be in violation of certain sections of the Unemployment Insurance Code. The sixth point is that the court should have declared a recess for the purpose of examining those sections. A sufficient answer to this contention is furnished by the following statement of defendant at the trial: "If they can't expose it, there's no need to go any further with it. As long as the letter states when I was employed and when I was terminated. * * * That is all I wanted to get in."

[9,10] With respect to the seventh point, the court properly allowed the testimony of Mr. Epstein given at the preliminary hearing to be read in evidence at the trial. Penal Code, section 686 provides that the deposition of a witness at the pre-

liminary hearing may be read at the trial upon it being satisfactorily shown that the witness cannot with due diligence be found within the state. Two investigators for the district attorney's office testified that they made inquiries as to Epstein's whereabouts and ascertained that he was in Dallas, Texas; they sent a telegram to Epstein at an address in Dallas furnished by his family and received in reply a telegram from Epstein stating that he would be unable to appear at the trial. Photostatic copies of the telegrams were received in evidence. If upon the exercise of a reasonable discretion the court determines the fact to be that the witness is outside this state, its order allowing the testimony to be read will not be disturbed on appeal. *People v. Harris*, 87 Cal.App.2d 818, 824, 198 P.2d 60. We cannot say that as a matter of law there was an insufficient showing of Epstein's absence from the jurisdiction.

[11-13] McDaniel's eighth point is that the court erred in failing to require the appearance of a Mr. Sloane, a police handwriting expert who testified against him at the preliminary hearing. After the prosecutor had concluded his examination of Woodward, defendant was asked whether he wished to cross-examine the witness. This McDaniel declined to do, stating that he desired to examine Sloane. It appears that Sloane was then on vacation, that Woodward and Sloane were co-workers, and that both men had made a comparison of the writing on the checks with defendant's signature on the sheet of white paper.

McDaniel says in his brief that Sloane had stated his opinion at the preliminary hearing that the handwriting on the face of the two checks was not that of defendant. In this connection, he argues that the absence of Sloane at the trial deprived him of the right to bring out that fact. The argument cannot be maintained. The prosecution is not required to call any particular witness or witnesses so long as it fairly presents the material evidence relating to the charge for which the accused

is on trial. *People v. Tuthill*, 31 Cal.2d 92, 98, 187 P.2d 16. The fact, if it be a fact, that McDaniel did not execute the face of the instruments could have been developed upon the cross-examination of Woodward, and if defendant failed to avail himself of the opportunity to cross-examine the witness, he will not be heard to complain on the appeal.

[14, 15] There is likewise no merit to McDaniel's ninth point, which is that the introduction in evidence of fingerprint impressions taken without his consent was an infringement of his constitutional privilege against self-incrimination. Mr. Kelso admitted that he obtained the impressions over the objections of defendant. However, it is well settled that the privilege against self-incrimination relates primarily to testimonial compulsion, and does not extend to the taking of the fingerprints of an accused. *People v. Haeussler*, 41 Cal.2d 252, 257, 260 P.2d 8, and cases cited.

Defendant's contention that the court "injected nationality" into the record rests upon Mrs. Melendez' statement that the check she cashed was presented to her by a colored man. The point is too trivial to require discussion.

[16] The next point to be considered is the insufficiency of the evidence to support the two convictions of forgery. In this connection, defendant argues that there was no evidence that he was the person who presented the checks to be cashed and that the identification of his handwriting on the endorsements rests upon the "unscientific" opinion of Mr. Woodward. The argument is without merit.

[17, 18] The People were required to prove that defendant knowingly made, uttered, published or passed two fictitious checks for the payment of money, with an intent to defraud some other person. Pen. Code, § 470. There was evidence of all the

elements of each offense. That the checks were fictitious cannot be doubted, for they were drawn upon the account of Bookcases, Inc. and bore the signature of "Harold Ayston" whom Epstein, the president of the company, stated to be a fictitious person. There was no evidence that defendant placed the name of Ayston on the checks. However, the court could infer from Woodward's testimony that defendant endorsed the checks. The checks were payable to McDaniel. If it was a reasonable conclusion that defendant endorsed the checks, it was also a reasonable conclusion that he either uttered them or they were presented for payment at his instigation and with his knowledge. In either event, his responsibility would be the same. *People v. Johnson*, 85 Cal.App.2d 240, 244, 192 P.2d 483. Whether McDaniel had an intent to defraud was a question of fact to be resolved by the court from all the circumstances in evidence. *People v. Brown*, 137 Cal.App.2d 138, 143, 289 P.2d 880. It was a reasonable inference, and we believe a necessary one, that since McDaniel worked for Bookcases, Inc. he knew that there was no such person as Ayston and that he was acting with a fraudulent intent.

[19] The final point to be considered is the claimed unconstitutionality of the so-called "prior felony conviction laws". Defendant attacks the statutes upon the ground that they place an accused person in double jeopardy for the same offense. Suffice it to say that the enactments have previously been attacked upon the same ground and that their constitutionality has been upheld. (See, *People v. Dunlop*, 102 Cal.App.2d 314, 316-317, 227 P.2d 281 and cases cited.)

The judgment and the order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

157 Cal.App.2d 608 (1958).

C. E. BRALY, E. J. Craigo and William Crissman, co-partners, doing business under the firm name of **Marina Associates**, **Melvin A. Richley and Mary J. Richley**, Petitioners and Respondents,

v.

The BOARD OF FIRE COMMISSIONERS OF the CITY OF LOS ANGELES and G. William Shea, Roy H. Sheldon, Victor M. Carter, Robert A. Day and J. Richard Sneed, as members of **The Board of Fire Commissioners of The City of Los Angeles**, Defendants and Appellants.

Civ. 22457.

District Court of Appeal, Second District,
Division 3, California.

Feb. 17, 1958.

Rehearing Denied March 5, 1958.

Hearing Denied April 16, 1958.

Landowners and their lessees brought proceeding for writ of mandate to compel Board of Fire Commission of the City of Los Angeles and the members thereof to issue a permit for the drilling of an oil well. The Superior Court of Los Angeles County, Roger Alton Pfaff, J., entered judgment ordering issuance of the writ of mandate, and the board and members thereof appealed. The District Court of Appeal, Patrosso, J. pro tempore, held that section of Municipal Code of the City of Los Angeles providing that no oil well shall be drilled within 75 feet of any public street or highway, or within 50 feet of outer boundary of any operating unit, constitutes taking property without due process and is unconstitutional as to owners of land, which was so situated that it was impossible to drill well thereon at point distant 75 feet from any public street and also 50 feet or more from outer boundary, where wells, which were draining their land, were located on lands, separated from their own by intervening streets, so that they could not, under Municipal Code, compel owners or operators of such well to pay them their prorata share of oil recovered.

Judgment affirmed.

1. Mines and Minerals ¶92.78

Where owners of land in City of Los Angeles owned less than one acre of land excluding one-half of adjacent streets, but they also owned underlying fee to one-half of adjacent streets, and total was slightly in excess of one acre, they did not come within purview of section of Public Resources Code providing that where land aggregating less than one acre is surrounded by other lands, which other lands are subject to oil and gas lease aggregating one acre or more, owner or lessee of surrounding lands, as condition to obtaining permit to drill, must share his production with owner of isolated parcel containing less than an acre. West's Ann.Public Resources Code, § 3608.

2. Constitutional Law ¶296(1)

Section of Municipal Code of the City of Los Angeles providing that no oil well shall be drilled within 75 feet of any public street or highway, or within 50 feet of outer boundary of any operating unit, constitutes taking property without due process and is unconstitutional as to owners of land, which was so situated that it was impossible to drill well thereon at point distant 75 feet from any public street and also 50 feet or more from outer boundary, where wells, which were draining their land, were located on lands, separated from their own by intervening streets, so that they could not, under Municipal Code, compel owners or operators of such well to pay them their prorata share of oil recovered.

3. Constitutional Law ¶278(1)

Nuisance ¶3(2)

Section of Public Resources Code declaring oil or gas well located within 100 feet of outer boundary of parcel or within 100 feet of public street a public nuisance constituted the taking of property without due process and was unconstitutional as to owners of land, which contained more than one acre including streets, and on which it was impossible to drill well at point distant 75 feet from any public street and 50 feet or more from outer boundary. West's Ann. Public Resources Code, §§ 3600, 3608.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., and Claude E. Hilker, Deputy City Atty., Los Angeles, for appellants.

Kenneth A. Davis, Long Beach, for respondents.

PATROSSO, Justice pro tem.

This is an appeal from a judgment ordering the issuance of a writ of mandate directing the defendant Board of Fire Commissioners of the city of Los Angeles to issue a permit for the drilling of an oil well upon property of the petitioners.

There is no dispute as to the facts. Petitioners Richley are the owners of a parcel of real property situate in the Wilmington oil field in the city of Los Angeles subject to an oil and gas lease executed by them to their copetitioners. The subject property is bounded on the north, east and west by public streets and on the south by a parcel of property owned by the city of Los Angeles. The area of petitioners' property is 25,762.6 square feet or approximately 59/100 of an acre. In addition the Richleys also own the underlying fee to one-half of the adjacent streets totalling 17,898.6 square feet or a total, including one-half of the adjacent streets, of 43,661.2 square feet or slightly in excess of one acre. To the north, northwest and east of the petitioners' property, but separated therefrom by intervening streets, there are located five wells producing oil, gas and other hydrocarbons from the same geological oil structure as that underlying the land of the petitioners, and three of which wells are admittedly draining oil and gas and other hydrocarbons from beneath petitioners' property.

Petitioners filed with the defendant Board of Fire Commissioners an application for a permit to drill, maintain and operate an oil well upon their property at a proposed location thereon approximately 65.76 feet from the sidewalk portion of an adjacent public street, and 74 feet from the actual roadway portion thereof. This application, although otherwise in the form prescribed, was denied by the Board for

the stated reasons that (1) petitioners' land contained less than one acre of contiguous land exclusive of abutting or adjoining streets, alleys or sidewalks, and (2) the site of the proposed well was only 74 feet from an adjacent street contrary to various provisions of the Municipal Code of the city of Los Angeles. These, insofar as material, provide in part as follows:

Section 57.55(B) (1). "No oil well shall be drilled within 75 feet of any public street or highway, or within 50 feet of the outer boundary of any operating unit * * *."

Section 57.55(E). "Every operating unit shall consist of at least one net acre of contiguous land. Parcels of land interrupted by or intersected by a public street shall not be deemed to be contiguous parcels of land; * * *"

Section 57.55(O). "* * * no permit shall be issued by any board * * * authorizing the drilling * * * of any oil well * * * unless the applicant * * * has available for a drilling site at least one net acre of contiguous ground * * *."

"In computing the area of an acre drilling site, no part of the acre falling within any abutting or adjoining street, alley or sidewalk shall be included; * * *"

Section 57.55(P). "No permit authorizing the drilling for oil, or the location or construction of any derrick to be used for the purpose of drilling for oil or other hydrocarbon substances, shall be issued if the granting of such permit would cause a parcel of property of less than one (1) acre contiguous to the property involved in the application for permit to be isolated so that such isolated property could not join with other contiguous property and become part of a drilling site of at least one (1) acre of ground, except upon condition that the permittee, his successors and assigns pay in money or kind to the owner of such isolated parcel a share of that proportion of all oil, gas or other hydrocarbon substances produced and saved from the well that the area of such iso-

lated parcel bears to the whole area of the property described in the application, plus such isolated parcel; * * *

Petitioners' property is so situate that it is impossible to drill a well thereon at a point distant 75 feet from any public street and which is also 50 feet or more from its outer boundary. It is petitioners' contention, sustained by the trial court, that, under the circumstances and as applied to petitioners, the provisions of the Municipal Code hereinabove referred to, insofar as they prohibit the drilling of an oil well upon their property, are unconstitutional, and constitute the taking of property without due process. The correctness of this determination is the sole question presented upon this appeal.

A similar question was presented in *Bernstein v. Bush*, 1947, 29 Cal.2d 773, 177 P.2d 913, 916. There the Supreme Court had occasion to consider the constitutionality of section 3600 of the Public Resources Code, declaring any well to be a public nuisance thereafter drilled for oil or gas which was located within 100 feet of the outer boundary of the parcel of land (which might comprise several contiguous parcels operated as one lease) on which the well was situated, or within 100 feet of a public street or highway dedicated prior to the commencement of drilling, or within 150 feet of a well being drilled or theretofore drilled and which was producing or capable of producing oil or gas. There the petitioners owned drilling rights on six small isolated and noncontiguous parcels of land each containing less than an acre, but altogether aggregating an acre or more. Each parcel was surrounded by land owned by others and the oil beneath petitioners' land was being drained off by neighboring wells. Petitioners' application for a permit to drill was denied for the reason that, although the parcels involved in the lease comprised an acre or more, they were noncontiguous and a well drilled on any one of them would constitute a public nuisance within the meaning of section 3600. In holding that

the statute as applied to the petitioners was unconstitutional, the court said:

"Here then we are more directly concerned with the contention of the petitioners that in its application to them the statute is discriminatory and therefore unconstitutional. They assert that such discrimination results from the fact that the enforcement of the regulations permits some owners of lands overlying the oil basin to exercise and enjoy their property right to take oil from the field, while the petitioners, who are property owners overlying the same oil supply, are deprived of the use and enjoyment of their coequal right. The mere assertion of the problem suggests the answer.

"Under the law of this state the landowner has a property right in oil and gas beneath the surface, not in the nature of an absolute title to the oil and gas in place, but as an exclusive right to drill upon his property for these substances. His unqualified and absolute title attaches after the substances have been reduced to possession. *Tanner v. Title Insurance & Trust Co.*, 20 Cal.2d 814, 819, 129 P.2d 383; *Bandini Petroleum Co. v. Superior Court*, supra, 110 Cal.App. 123, 127, 293 P. 899. This is a right which is 'as much entitled to protection as the property itself, and the undue restriction of the use thereof is as much a taking "for constitutional purposes as appropriating or destroying it"' *People v. Associated Oil Co.*, supra, 211 Cal. [93], at pages 99-100, 294 P. [717], at page 721, and cases cited.)"

And after reviewing the authorities from other jurisdictions the court continued:

In the absence of statutory prohibition, the right to drill an offset well was commonly resorted to as a means of protection by an owner whose property was being drained by a well drilled on adjoining land. The wasteful use of offset wells was recognized as one of the evils sought to be minimized by the enactment of well spacing regulations. *Croxton v. State*, 186 Okl. 249, 97 P.2d 11, 19; *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 83 S.W.2d 935,

99 A.L.R. 1107; Id., 126 Tex. 296, 87 S.W. 2d 1069, 101 A.L.R. 1393. But since the mere opportunity for voluntary pooling of interests does not afford equal protection within the meaning of the federal and state Constitutions, regulatory provisions which in effect prohibit the drilling of offset wells may amount to a denial of the equal protection of the law and a taking of private property without due process of law. Equal protection is so denied where, as here, the law, in its application at least, does not afford adequate means of protection as a substitute for the right to drill an offset well."

Following this decision, and probably as a result thereof, the Legislature in 1947 added section 3608 to the Public Resources Code, which in substance provides that where land aggregating less than one acre is surrounded by other lands, which other lands are subject to an oil and gas lease aggregating one acre or more, the owner or lessee of said surrounding lands, as a condition to obtaining a permit to drill, must share his production with the owner of the isolated parcel containing less than an acre.

Subsequently in *Hunter v. Justice's Court*, 1950, 36 Cal.2d 315, 223 P.2d 465, the Supreme Court had occasion to again consider the validity of section 3600 of the Public Resources Code in the light of this amendment. There the petitioner was an owner of two town lots containing less than an acre and all of the property surrounding petitioner's lots was leased to the Shell Oil Company which was engaged in extracting oil therefrom. Before proceeding with the drilling and production of oil from this area, the company filed, pursuant to section 3608 of the Public Resources Code, with the State Oil Supervisor, a notice of intention to drill under its lease and the supervisor filed a declaration that petitioner's lots were deemed included in the company's lease. As a consequence petitioner's lands were effectively pooled with the Shell lease and he was thereby entitled to receive his pro-rata share of the production from the Shell leases. The Supreme Court con-

cluded that, in the situation there presented, section 3600 of the Public Resources Code when read in connection with section 3608 afforded petitioner an adequate substitute for his right to extract oil from his own property and upheld the constitutionality of the enactment.

In reliance upon this case, appellants contend that section 57.55(P) of the Municipal Code, hereinbefore quoted at length, affords the same protection to the respondents as did section 3608 of the Public Resources Code to the petitioner in the *Hunter* case. Whether this is so is the crucial question presented.

[1] Before turning our attention to the provisions of the Municipal Code in question, it should, however, be pointed out that section 3608 of the Public Resources Code has no application to the respondents by reason of the fact that it applies only to a parcel of land with an area of less than an acre. Unlike the Municipal Code, the statute does not exclude the area beneath streets in computing acreage requirements, and as the respondents admittedly own more than an acre, including the part subject to street easements, they do not come within the purview of section 3608.

Returning to the provisions of section 57.55(P) of the Municipal Code, we find that it differs materially in its provisions from those of section 3608 of the Public Resources Code. Unlike section 3608, it applies to all owners and lessees of a parcel of property containing less than one acre without regard to whether the surrounding lands are subject to an oil and gas lease to which he, under the State law, in effect becomes a party when an application to drill an oil well on the surrounding land is filed. Under the Municipal Code, one owning a parcel containing less than one acre may not drill a well thereon so long as the owners or lessees of land contiguous to his do not undertake to drill despite the fact that oil underlying his property is being drained by wells on other lands not contiguous to his own, which is the situation in which respondents find themselves.

The wells which are draining respondent's property are located upon lands which are separated from their own by intervening streets. As a consequence they are not "contiguous" thereto as required by section 57.55(P) because by the provisions of section 57.55(E) these streets interrupt contiguity. As a consequence the Municipal Code does not operate to compel the owners or operators of such wells to include respondents' property with theirs and pay them their pro-rata share of the oil recovered. The only property contiguous to the respondents' is that located to the south thereof which is owned by the city of Los Angeles and upon which no oil wells are located. The only possibility of respondents receiving any benefit from the oil underlying their property is that at some time in the indefinite future the city of Los Angeles may drill for oil upon its property or lease the same to others for this purpose. By that time the quantity of oil underlying respondents' property will have been greatly diminished or possibly even exhausted. Nothing in the decision in *Hunter v. Justice's Court*, supra, suggests that in such a situation it may reasonably be said that the Municipal Code affords respondents an adequate means of protection or substitute for their right to extract oil from their property. Indeed, the language of the opinion indicates the contrary for at page 321 of 36 Cal.2d, at page 470 of 223 P.2d it is said:

"Petitioner advances arguments that are not applicable to the statute *as applied to him here* such as: *That an owner of a below minimum parcel of property cannot drill until his neighbors or their lessees choose to drill, thus postponing realization by him of the oil produced from his property; that under section 3608 an owner of such property cannot receive anything from wells drilled on adjoining land unless he is 'surrounded' by land under an oil lease or leases:* * * * Those are all supposititious cases with which we are not presently concerned. Petitioner alleges that Shell Oil Company has a lease upon land 'adjacent' to or in 'proximity' with his property, and it appears from the company's return

to the petition herein that it has a 'community' lease on all the lands surrounding petitioner's property and there appears to be no dispute about it. * * * The wells drilled under the lease are producing as in *Bernstein v. Bush*, supra, and we here decide that section 3608 is not invalid as applied to petitioner *under the circumstances presented*. We said in that case 29 Cal.2d at page 777, 177 P.2d at page 916: 'The face of the legislation may appear to be valid, and insofar as it can be complied with and applied without a denial of constitutional rights it will be held to be proper and lawful legislation. But a statute, innocuous and valid on its face, may become invalid in its application, in which event it is proper for the petitioner to show the facts by which he contends that as to him the law is unreasonable, oppressive and void. In *re Smith*, 143 Cal. 368, 370, 77 P. 180. * * * In *Skalko v. City of Sunnyvale*, 14 Cal.2d 213, 216, 93 P.2d 93, this court recognized that a police regulation, valid when adopted, might become invalid in its operation in particular instances. The same principle was stated in *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 22, 52 S.Ct. 103, 108, 76 L.Ed. 136 [78 A.L.R. 826], where the Supreme Court upheld a California statute regulating the exercise of the correlative rights of surface owners with respect to a common source of supply of oil and gas as "valid upon its face, that is, considered apart from any attempted application of it in administration which might violate constitutional rights. * * *"

"Moreover, there is a valid distinction between small acreage surrounded by leased property and that which is not, for in the former there is a development of the field and the small owner may be placed under such development, * * *" [Emphasis added]

[2] From the foregoing we believe it apparent that section 57.55(P) of the Municipal Code affords the respondents no adequate means of protection or substitute for their right to extract oil from the property, and therefore section 57.55(B) (1),

which undertakes to prohibit the drilling of a well thereon falls within the condemnation of the decision in *Bernstein v. Bush*, supra.

Nor is there any merit in appellant's assertion that it was incumbent upon respondents, as a condition to receiving the relief granted them, to prove their inability to join with the contiguous land of the city of Los Angeles. Manifestly the respondents cannot compel the city to drill for oil upon its property or to lease the same for that purpose and, insofar as the Municipal Code is concerned, until the city does so, respondents must suffer the oil and gas underlying their property to continue to be drained off by wells upon other lands. Moreover if the city of Los Angeles were willing to join its property with that of respondents under an oil and gas lease, this would not dictate a different result for, as said in *Bernstein v. Bush*, supra [29 Cal.2d 773, 177 P.2d 918], "the mere opportunity for voluntary pooling of interests does not afford equal protection within the meaning of the federal and state Constitutions."

[3] Appellants further contend that in any event an oil well located as proposed by respondents would constitute a violation of section 3600 of the Public Resources Code which, as previously noted, prohibits the location of a well within 100 feet of the outer boundary of the parcel of land on which the well is situated or within 100 feet of a public street. This section however, was held to be unconstitutional in *Bernstein v. Bush* in a situation similar to that here presented absent a statutory provision affording adequate means of protection or a substitute for the right to drill an offset well. As we have seen, section 3608 later added to the Public Resources Code with the view of affording such protection, is without application to the respondents' property. Thus in these circumstances the validity of section 3600 insofar as it affects respondents, is to be determined as though section 3608 had never been enacted, and without the protection of section 3608 it must be held that, under the decision in *Bernstein v. Bush*, section 3600 is invalid.

Before concluding we feel it necessary to direct attention to the fact that neither party has undertaken to challenge the validity of the provisions of the Los Angeles Municipal Code hereinabove discussed insofar as they undertake to prescribe less restrictive or different conditions with respect to the drilling of oil wells than those prescribed by the State law and consequently we have not considered this question. Nothing herein said therefore is to be construed as implying an expression of any opinion with respect thereto.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



157 Cal.App.2d 596

Georgina Youle REDLINGER, Appellant,

v.

Ina Mae YOULE et al., Respondents.

Civ. 17692.

District Court of Appeal, First District,
Division 2, California.

Feb. 17, 1958.

Proceeding for determination of claims for death benefits payable under County Employees Retirement Law. The Superior Court, Alameda County, Marvin Sherwin, J., entered judgment adverse to former wife of decedent, and she appealed. The District Court of Appeal, Kaufman, P. J., held that evidence sustained finding that decedent, when designating a beneficiary in a form filed with Retirement Board, designated his

common law wife, rather than his former wife, notwithstanding fact such designation was ambiguous in using first name of former wife, and middle name and address of common law wife.

Judgment affirmed.

1. Counties Ⓒ69(3)

In proceeding for determination of claims for death benefits payable under County Employees Retirement Law, evidence sustained finding that decedent, when designating a beneficiary in a form filed with Retirement Board, designated his common law wife, rather than his former wife, notwithstanding fact such designation was ambiguous in using first name of former wife, and middle name and address of common law wife. West's Ann.Gov.Code, § 31782.

2. Counties Ⓒ69(3)

Where decedent made a designation of beneficiary in manner provided by County Employees Retirement Law, but designation made was ambiguous in that it could have referred to either of two persons, situation was analogous to a will containing a latent ambiguity, and therefore, court was required to look to extrinsic evidence to ascertain true intention, and court properly considered circumstances under which the ambiguous designation was made. West's Ann.Gov.Code, §§ 31450-31822; West's Ann.Prob.Code, §§ 101, 105.

3. Pleading Ⓒ236(3), 398

Question of whether an amended pleading should be allowed at time of trial as well as what matters may be raised rest in the sound discretion of the trial court, and even variances of pleading and proof are to be disregarded unless they mislead the adverse party to his prejudice. West's Ann. Code Civ.Proc. § 469.

4. Pleading Ⓒ229

A party should be allowed to correct a pleading made as the result of mistake or inadvertence.

5. Pleading Ⓒ236(6)

Where during trial for determination of claims for death benefits payable under County Employees Retirement Law, both adverse claimants were surprised by introduction of a designation of beneficiary filed with Retirement Board, trial court did not abuse its discretion in allowing one of the claimants to amend her pleading to show designation of such claimant, in view of fact her earlier pleading was the result of mistake or inadvertence. West's Ann. Code Civ.Proc. §§ 469, 473, 475.

Maurice H. Roach, James J. Kirby, Oakland, for appellant.

Willard W. Shea, Oakland, for respondent.

KAUFMAN, Presiding Justice.

This is a controversy relating to death benefits under the County Employees Retirement Law, Government Code Sections 31450-31822, between Georgina Youle, the former wife of the deceased, appellant, Adrian A. Youle, and Ina Mae Youle, also known as Ina Mae Brown, his common law wife, and Eudora M. Hutt, the Administratrix of the estate, respondents herein.

Adrian A. Youle and the appellant were married on January 11, 1941. Trouble developed in the marriage as early as 1943. In February 1945, the deceased moved to the home of his sister, Mrs. Fritz, at 3447 Louise Street in Oakland. Georgina Youle "was supposed to go there and live but did not go." She remained in her apartment at 1473-8th Street with her daughter; the deceased had a key to the apartment and occasionally spent time with her and the child. Appellant's complaint for divorce, filed in August 1946, stated that she and her husband separated in March 1946.

On March 11, 1945, about a month after the death of Mrs. Fritz, the respondent, then known as Ina Mae Brown, moved in as the decedent's housekeeper and continued to live there with him until his death of February 7, 1955. On April 4, 1946, she signed an installment note with Adrian A. Youle as "Mrs. Ina M. Youle" and on other occasions used the name on business matters.

In December 1947, a Property Settlement Agreement settling all property rights between Adrian A. Youle and Georgina Youle was prepared by her attorney, signed by both parties, and appended to the interlocutory decree of divorce which was rendered on March 15, 1948. The property agreement stated that the parties waived all rights resulting from the marriage relationship and that all property subsequently acquired was to be the separate property of the parties. The final decree was entered on April 1, 1949.

The decedent, Adrian A. Youle, was employed by Alameda County from July 16, 1946, until his death in 1955. On January 20, 1948, the decedent filed the following confidential "Beneficiary Information" with the Retirement Board:

"Name of Beneficiary: Georginia Mae Youle, Relationship of Beneficiary: Wife, Address of Beneficiary: 3447 Louise Street, Oakland, California."

No subsequent designation of beneficiary was filed with the Retirement Board.

After the death of Adrian A. Youle, the appellant filed a claim for the death benefits with the Retirement Board. Charles B. Coit, Treasurer of Alameda County filed his affidavit for interpleader stating that Ina M. Youle had given notice that she was entitled to the death benefits as the putative wife of Adrian A. Youle. An order of interpleader substituting parties defendant made and the sum of \$4,004.14 was deposited with the County Clerk of Alameda County. Thereafter, the respondent

filed her answer and cross-complaint in interpleader, alleging the divorce and property settlement agreement; that on or about September 13, 1951, the decedent had attempted to change the designated beneficiary and that the respondent was entitled to the death benefits as the putative spouse of Adrian A. Youle. Appellant filed her answer, and the case went to trial on the issues thus established.

At the trial, both sides were surprised by the "Beneficiary Information" filed with the Retirement Board, a confidential record which neither side had seen until the trial. The following took place:

"Mr. Shea: Right now I'm changing my position your Honor. My client was attempting to—Adrian A. Youle was then attempting to designate my client as a beneficiary. Her name—she had been going under the name of 'Ina Mae Youle.'

"The Court: In other words, you're relying on the similarity of the middle name?"

"Mr. Shea: Middle name and the address. She resided at '——' — whatever that address was. That was her address, and not the address of Georgina.

"The Court: All right. All right.

"Mr. Klippert: Am I excused, Judge?"

"Mr. Kirby: The designation there is 'Wife' as I understand.

"Mr. Klippert: That is right.

"The Court: All right. And the Court will have to determine from the date and all the other circumstances what was meant."

The court then permitted the respondent to amend the pleadings in the following language, to which no objection was made by the appellant:

"The Court: Well, it is my understanding that the only basis upon which there is recovery is where the joint efforts have produced some community property, joint savings and services of a

housekeeper are given a share in community property—in some cases. But I understand Mr. Shea's present position would have to be set forth in an amendment to his complaint, in which he now claims, as a result of this information obtained this morning relative to designation of beneficiary, that the decedent actually designated the plaintiff, or—no, actually designated Ina Mae Brown, or Youle, as the beneficiary; that that's what he attempted to do at the date of the designation.

"Mr. Shea: That is correct. That is correct.

"The Court: Now, that, of course, is a question of fact, and the amendment will be permitted, because I can't very well blame Mr. Shea for not having the information that the Department considered confidential until they disclosed that information this morning. So you may amend the—your pleading, and it will be deemed denied by the other parties, so that that issue of fact will be squarely presented, and the Court will have to puzzle out what the decedent was thinking at the time he was giving, admittedly—admittedly the information he gave to the party who filled out that form for him, which he signed. And I presume from the situation that that was how it was accomplished, it was not accurate, because Georgina's name was not accurately, neither was Ina Mae's name accurately given."

Respondent filed her amended answer on July 6th and on October 23, the court rendered a memorandum decision which stated as follows:

"The evidence shows that even prior to the filing of the divorce action decedent and Ina Mae Youle were living together and holding themselves out to the public as husband and wife; that they signed a promissory note as such in April, 1946; that they resided at 3447 Louise Street, an address which had never been occupied by plaintiff.

"The evidence shows that the decedent was illiterate, and in all probability

in filling out the *questionnaire* received clerical assistance from those in charge of administering the retirement plan. His employment antedated the questioned document, and the Court will infer that his employer had been previously informed of the name of his lawful wife and his new address. When he was required by his employer to designate a beneficiary he was placed in a dilemma. From the evidence of the divorce action in which he disputed the paternity of his wife's child, and their mutual releases of obligations of support, the Court will infer that he had no desire to provide financially for his wife. There is no evidence in the record to indicate an inference to the contrary. The Court will also infer that he had no desire to explain the true situation to the representative of his employer. It would appear that he made the same representation to that person that he had made to the bank and others, i. e., that Ina Mae Youle, who appeared to have customarily used that middle name as a part of her name, was his wife. The Court will also infer that the party assisting him with the record that his wife's name was "Georgina," assumed that the name "Ina" supplied by the decedent was an abbreviation of the full legal name, and wrote it in accordingly, and the decedent either failed to notice the name as written or preferred to remain silent and avoid embarrassing explanations. The name "Mae" was undoubtedly furnished by decedent, and to disregard that significant fact would be to fail to give effect to his intent.

"The court is aware of authorities which in a like situation have preferred the lawful spouse over the 'other woman,' but feels that it has no alternative except to decide the question of fact in accordance with the preponderance of evidence. While this Court ordinarily in divorce actions requires a father to maintain his minor children as beneficiaries of his insurance, and

would prefer to see such a result, it feels that under the evidence no judgment can be rendered except in favor of the defendant Ina Mae Youle, and her counsel are requested to prepare findings accordingly."

Findings of fact and conclusions of law were served on the appellant on October 30, 1956, and judgment rendered in favor of the respondent on November 19th.

This appeal is taken from that judgment, on the following grounds: (1) that there is no competent evidence that the decedent designated the respondent as the beneficiary, (2) that the trial court erred in permitting respondent to amend his pleadings to conform to the proof and thereby deny a fact admitted in the answer, (3) that the judgment is not supported by the findings and not authorized by the pleadings.

[1] As to the first issue, we think the well-reasoned memorandum decision of the trial court, a portion of which is quoted above, adequately summarizes the evidence in support of the judgment. As recently stated in *Burke v. Chrostowski*, 46 Cal.2d 444, at page 449, 296 P.2d 545, at page 548:

"* * * The choice of conflicting inferences to be drawn from the evidence was for the trial court to make, and its determination based on the inferences drawn will not be disturbed on appeal."

Appellant relies on *Nichols v. Board of Retirement*, 121 Cal.App.2d 176, 262 P.2d 862, and *Wicktor v. County of Los Angeles*, 141 Cal.App.2d 592, 297 P.2d 115, neither of which is applicable here. In the *Nichols* case, a clear and unambiguous designation of the wife as beneficiary had been filed. After the divorce, the deceased had made an invalid will, leaving all his property to his divorced wife. The court, in affirming the judgment in favor of the former wife, held that the wife had not relinquished her right as a beneficiary in the property settlement made at the time of the divorce. In the *Wicktor* case, the deceased had made a clear, unambiguous designation

of his sister as the beneficiary of his death benefits. The court admitted evidence which sought to prove that the decedent had intended to make a change of the designation in favor of his wife. In reversing the judgment in favor of the wife, the court held that the asserted declarations of the deceased were not valid substitutes for his designation of a beneficiary in the manner provided by Government Code Section 31782.

[2] In this case, the decedent made a designation of beneficiary in the manner provided by law, but the designation so made was an ambiguous one. The situation is analogous to a will containing a latent ambiguity so that a court must look to extrinsic evidence to ascertain the true intention of the testator. Probate Code Sections 101, 105; *In re Estate of Nunes*, 123 Cal.App.2d 150, 266 P.2d 574. In the instant case, the court properly considered the circumstances under which the ambiguous designation was made and reached a conclusion which cannot be disturbed without infringing on the function of the trial court.

[3-5] As to the second issue, appellant relies chiefly on the rule that the pleadings may not be amended to contradict an admission made in the original pleadings. As recently pointed out in *Meyer v. State Board of Equalization*, 42 Cal.2d 376, at pages 386 and 387, 267 P.2d 257, at page 263, the rule is not without exception. "Such an amendment may be allowed where it is clearly shown that the earlier pleading is the result of mistake or inadvertence (citing cases). * * * 'It is a well-established rule which is founded on good reason and justice that a court should exercise great liberality in permitting amendments of pleadings at any and all stages of the trial to adequately present all issues which are properly involved in the litigation.'" Code of Civil Procedure Section 473. The question of whether an amended pleading should be allowed at the time of trial as well as what matters may be raised rest in the sound discretion of the

trial court. *Simone v. McKee*, 142 Cal. App.2d 307, 298 P.2d 667. Under Code of Civil Procedure, Section 469, even variances of pleading and proof are to be disregarded unless they mislead the adverse party to his prejudice. Appellant has not shown here how she had been misled. Errors and defects in pleadings which do not affect substantial rights of the parties must be disregarded. (Code of Civil Procedure Section 475.) A party should be allowed to correct a pleading made as the result of mistake or inadvertence. *Lamoreux v. San Diego, etc., Ry. Co.*, 48 Cal.2d 617, 311 P.2d 1. The instant case falls within the exception to the rule and the amendment was properly allowed.

There is also no merit in appellant's final contentions relating to the judgment. The judgment was authorized by the pleadings as amended, and is supported by the findings.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.



157 Cal.App.2d 399

Stanley C. ELSIS et al., Plaintiffs and Respondents,

v.

**Gordon EVANS et al., Defendants,
Gordon Evans, Defendant and Appellant.
Civ. 22330.**

District Court of Appeal, Second District,
Division 1, California.

Feb. 4, 1958.

Hearing Denied April 2, 1958.

Proceedings by members of union against employer and others for injunction and damages arising out of alleged unfair labor practices on part of employer. The Superior Court of Los Angeles County, Frank G. Swain, J., granted preliminary injunction and employer appealed. The

District Court of Appeal, White, P. J., held that where it was alleged employer engaged in unfair practices as set forth in National Labor Relations Act, state court did not have jurisdiction to issue preliminary injunction.

Order granting preliminary injunction reversed.

1. Injunction ⇐135

Issuance of a preliminary injunction which is mandatory and which grants all the relief prayed for is largely committed to discretion of court; no hard or fast rule can be adopted to fit all cases, but each must be determined on its own peculiar facts.

2. Action ⇐3

When an affirmative and definite declaration of public policy is contained in a legislative enactment, and such enactment definitely prohibits conduct which would thwart declared purpose of legislation, an intention must be assumed that the rights conferred shall be enforceable by legal proceedings. West's Ann.Labor Code, §§ 921, 923.

3. Judgment ⇐204

Where question of violation of declared public policy in a statute is involved, courts of equity are invested with power to design their decrees so as to enforce rights and compel performance of the duty prescribed therein; where the right is present, the remedy exists. West's Ann.Labor Code, §§ 921, 923.

4. Labor Relations ⇐510

If conduct may be reasonably deemed to fall within provisions of Labor Management Relations Act defining unfair labor practices, a state court has no jurisdiction to grant injunctive relief under either state or federal law, even if National Labor Relations Board has declined to exercise jurisdiction over controversy. National Labor Relations Act, § 8(a, b) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. § 158(a, b).

5. Labor Relations ⇐510

Where dispute between employer and union concerning discharged employees had been submitted to National Labor Relations Board and Board refused to issue complaint, in view of scope of business operation involved, but Board did not cede jurisdiction, under provisions of National Labor Relations Act empowering Board to cede jurisdiction to State agencies, State court did not have jurisdiction to issue preliminary injunction to compel employer to reinstate discharged employees. National Labor Relations Act, §§ 8(a, b), (a) (1, 3, 5), 10(c) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 158(a, b), (a) (1, 3, 5), 160(c).

6. Labor Relations ⇐367, 374

Employer's conduct in allegedly interfering with employees' right to select bargaining agent and in discharging employees for union activity fell within provisions of National Labor Management Act prohibiting such conduct. National Labor Relations Act, §§ 8(a, b), (a) (1, 3, 5), 10(c) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 158(a, b), (a) (1, 3, 5), 160(c).

7. Labor Relations ⇐510

Any activity prohibited or protected under National Labor Relations Act may not be enforced or protected by state courts and question of amount or quantity of interstate commerce done by employer need not be considered in determining question of jurisdiction of National Labor Relations Board. National Labor Relations Act, §§ 8(a, b), (a) (1, 3, 5), 10(c) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 158(a, b), (a) (1, 3, 5), 160(c).

8. Labor Relations ⇐510

Since National Labor Relations Board has power to take affirmative action including right to order reinstatement of employees with or without back pay and to otherwise effectuate policies of National Labor Relations Act, prayer, by members of union for punitive damages under state

law with respect to labor relations for unfair labor practices would not impair exclusive jurisdiction vested in Federal Board. West's Ann.Labor Code, §§ 921, 923, 1050-1054; National Labor Relations Act, §§ 8(a)(1, 3, 5), 10(c) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 158(a)(1, 3, 5), 160(c).

9. Labor Relations ⇐54

Employees who were operators of telephone answering service, transmitting telephone messages and receiving interstate as well as intrastate communications, were engaged in a business which affected interstate commerce within meaning of National Labor Relations Act. National Labor Relations Act, §§ 8(a) (1, 3, 5), 9(c), 10(c) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 158(a) (1, 3, 5), 159(c), 160(c).

John H. Nelson, Los Angeles, Dean M. McCann, Upland, for appellant.

James M. Nicoson, Playa Del Rey, Arthur Garrett, Los Angeles, for respondents.

WHITE, Presiding Justice.

Respondent Stanley C. Elsis is business representative and a member of Office Employees International Union, Local No. 30 (hereinafter referred to as the Union). The other plaintiffs are officers and members or members of said union. They instituted this action themselves and for and in behalf of said local union and the members thereof.

Appellant Gordon Evans, under the firm name of Thrifty Telephone Answering Service, is engaged in the business of conducting a telephone answering service for his customers and clients.

By their complaint respondents alleged that on or before March 1, 1956 some of them were employed as telephone operators by appellant in the conduct of his business. That between March 1st and March 5th, 1956 certain named respondents signed written applications and became members

of the aforesaid union. That such employees requested and authorized the union and its officers and agents to represent and bargain collectively for them with respect to grievances, wages, hours of employment and conditions of work, and "to engage in other concerted activities for their mutual aid and protection".

It is then alleged that about March 5, 1956 respondent Charles Henderson as a representative of the union and in behalf of the employees above mentioned, stated to appellant Evans that a majority of the latter's employees had designated said union as their exclusive collective bargaining representative and had become members of said union. That respondent Henderson then invited appellant Evans to meet with him "for the purpose of discussing working conditions, wages, hours of employment and other matters and to negotiate a contract covering such subject and others". That appellant Evans agreed to such meeting but subsequently and before the time set therefor, advised respondent Henderson that he would not meet with him "at the meeting scheduled for the following day or at any other time, and since said date, has refused and continues to refuse to meet with plaintiff Henderson or any other representative of his employees or any agent * * *" of said union concerning the aforesaid conditions of employment.

It is then alleged that appellant and his co-defendants on or before February 14, 1956 conspired together to "interfere with, restrain and coerce the plaintiffs and others similarly situated, in the exercise of their rights to full freedom of association, self-organization, and designation of representatives of their own choosing and for other concerted activities for the purpose of collective bargaining and for other mutual aid and protection, and further, to require, as a condition of employment that plaintiffs and others similarly situated must refuse to join or remain members of a labor organization or that if said plaintiffs and others similarly situated were members of

a labor organization, that they and each of them, as a condition of continuing employment, must give up their membership in such labor organization or any other labor organization."

It is then alleged that in furtherance of and in pursuance of said alleged common plan of conspiracy, appellant and his co-defendants committed the following specific acts:

"(a) That on March 5, 1956 after receiving the aforementioned telephone call from Plaintiff Henderson, Defendant Evans (appellant) summons individually and separately into his private office", the foregoing named employees of appellant, "and questioned each of them separately as to whether or not they and each of them had designated the said Local No. 30, as their collective bargaining representative and whether or not they had become members of said Local No. 30. Each gave answers in the affirmative to both questions. Thereupon, defendant Evans told each of such employees that unions were a bunch of communists and racketeers and that they took their orders and directions from Russia and that any employee of his that had joined a union and who didn't withdraw from such membership would be summarily discharged and defendant Evans further stated that each of the employees whom he had questioned and who had given affirmative replies, as aforesaid, could not work for him until they withdrew their membership from said Local No. 30. That when plaintiff Lee Barnes (one of said employees) refused to withdraw her membership from said Local No. 30, defendant Evans summarily discharged her. Defendant Evans, during these questionings stated to plaintiffs Valerye De Armon, Ronald Ruff and Douglas Cameron, that they each should think the matter over and call him later in the day as to their decision of remaining in the union or remaining an employee of defendant Evans. Thereafter, and on the same day, plaintiffs De Armon, Ruff and Cameron, stated to defendant Evans, that they desired to remain members of said Local No. 30, whereupon de-

fendant Evans stated to them that they had made their choice, that it was either the union or Evans and since they desired to remain members of Local No. 30, their employment was terminated.

"(b) At or about the same time and in the similar and same manner, defendant Evans gave the same information to and took the same actions against Mary Norberg and Dorothy Phillips."

* * * * *

"(d) Thereafter, and on or about March 7, 1956 defendant Evans met with defendants Lauria, Papke, Hanson and other members of Telephone Answering Service of California, Inc., whose names are unknown to plaintiffs but are well known to defendants and each of them and agreed to unite and combine to blacklist and prevent any of the plaintiffs herein and other members of the said Local No. 30, obtaining employment as operators in any of the business establishments of defendants and other members of Telephone Answering Service of California, Inc." It is then alleged on information and belief that after the discharge of the above-mentioned employees, appellant Evans prepared a writing wherein he listed the names of the employees he discharged, and stating therein that said employees had been discharged because of their membership in and activities in behalf of said union. That copies of said writing were delivered to members of Telephone Answering Service of California, Inc. (a non-profit corporation composed of persons and corporations engaged in the business of telephone answering services, and which corporation was named herein as a defendant) requesting that members of Telephone Answering Service of California, Inc., should refuse to employ any of the persons mentioned in said writing, because of their membership and activities in said union.

It is then alleged that because of the foregoing conduct on the part of appellant and his co-defendants, the employee respondents aforesaid have been unable "to secure employment as operators in any

telephone answering service business in the City and County of Los Angeles".

The prayer was for injunctive relief against the alleged acts of appellant and his co-defendants including reinstatement of the allegedly discharged employees of appellant; for damages in the sum of \$200,000 and exemplary damages in the sum of \$250,00.

The instant action was filed June 13, 1956, and subsequently respondents obtained an order to show cause directing appellant and his co-defendants to show cause why a preliminary injunction should not be issued prohibiting appellant from interfering with the rights of self-organization of his employees; ordering appellant to recognize and bargain collectively with Office Employees International Union, Local No. 30; ordering him to reinstate certain named employees with back pay and requiring the corporate trade association (defendant Telephone Answering Service of California, Inc.) to instruct its members that their employees were free to join and become members of a labor organization.

In opposition to the issuance of a preliminary injunction appellant filed an affidavit controverting the allegations of the complaint and of the affidavits of respondents.

In his said affidavit, appellant denied the discharge of respondent employees with the exception of Lee Barnes, and with reference to her, he averred that she was employed as chief operator and was considered by appellant as "a supervisory or managerial operator and not a rank and file employee". That said employee had authority to discharge any switchboard operator, and "was in full charge of the establishment during the absence of affiant". That for some time prior to the date mentioned in the aforesaid complaint and respondents' affidavits, the work of said respondent Barnes in her supervisory capacity "had been increasingly unsatisfactory to affiant". Citing several instances which prompted appellant's dissatisfaction, he avers that he had determined to replace respondent

Barnes as chief operator, and "believed that it would be unwise to demote her to a non-supervisory position, even though her services as an operator would have been satisfactory". Appellant then sets forth that he commenced negotiations during the months of January and February, 1956, with representatives of two telephone answering services in an effort to procure employment for respondent Barnes. Appellant then avers that after he had informed said respondent of his intention to discontinue her services, she "conceived the plan of interesting her fellow employees in becoming members of the plaintiff union and contacted the plaintiff union for that purpose with the hope and desire that the advent of the union would confer immunity from discharge on plaintiff Lee Barnes.

"When affiant learned that Lee Barnes had in fact contacted the plaintiff union and had induced several rank and file employees of affiant to become members of said union, all in violation of her duties, responsibilities and loyalties as a supervisory employee, *affiant did in fact discharge plaintiff Lee Barnes immediately*. Affiant did not as alleged in the Complaint and as set forth in the affidavit of Lee Barnes, ask Lee Barnes to withdraw from the union as a condition of continued employment. On the contrary *affiant unequivocally discharged Lee Barnes* for her actions in soliciting union membership among the employees under her supervision contrary to the obligations and duties of her position.

"On July 9, 1956 affiant made a written unconditional offer of employment to plaintiff Lee Barnes." (Emphasis added.)

Appellant denied the statements in the affidavit of said respondent Lee Barnes that the former stated that it had been discussed and agreed among members of defendant Telephone Answering Services of California, Inc. that each owner-member would report to each other when employees quit or were discharged, and that each owner-member agreed not to employ such person unless the former employer assented thereto, or that appellant had entered into

any such agreement. He specifically denied that he entered into any agreement or conspired with any other person or association to require as a condition of employment that any prospective employee must refuse to join or remain a member of a labor organization. Appellant denied writing any letters or engaging in telephone conversations for the purpose of employing any alleged black list or to prevent the employment of respondent employees.

Appellant further set forth in his affidavit that instead of refusing to employ certain named respondents he had, on July 9, 1956, written said respondents extending to them an unconditional offer of employment.

Appellant admitted asking respondent Valerye De Armon "to drop her membership" in respondent union, but that he did not terminate her employment. That she "went on strike" in protest against the discharge of respondent Lee Barnes. That on July 9, 1956, appellant made a written unconditional offer of employment to respondent Valerye De Armon.

Admitting that he told the last-named respondent that he "was going to require all new employees to sign an agreement that they did not belong to a union", appellant averred that he "did not in fact ever require any of his employees to make such a statement". He denied stating to respondent De Armon "that he (appellant) would see that she didn't get employment with any other telephone answering service", but did tell her that he did not think that she would get a job at any other "answering service because it was common knowledge in the telephone answering service business that there was a strike at affiant's place of business and affiant believed it unlikely that the operators of other services would hire employees who were on strike against affiant".

As to respondent employees Douglas Cameron, Ronald Ruff, Mary Norberg, and Dorothy Phillips, appellant averred that the situation regarding termination of their employment was substantially the same as

in the case of respondent De Armon. That they were not discharged but "went out on strike", and that they were subsequently offered employment.

As to the claimed agreement to meet with Charles Henderson, the union representative, appellant admitted making an agreement for such a meeting but that later in the day when he received a telephone call from Mr. Henderson protesting the discharge of respondent Lee Barnes, he (appellant) cancelled his appointment for the following day with Mr. Henderson.

In reply to appellant's affidavit, respondents Barnes, De Armon, Ruff and Cameron (all employees of appellant) filed supplemental affidavits. The substance of these affidavits was that after receipt of the letter of July 9, 1956 (referred to in appellant's foregoing affidavit) wherein it was stated appellant made an unconditional offer of employment, each of said employees promptly applied for employment. That each was told that the offer was made under duress and that appellant did not want to rehire them. Each was told there was no immediate opening for employment with appellant and to at least one appellant said he had not changed his mind about unions and that he would never have a union shop. An additional affidavit was filed by Ceola Kingsbury, Secretary-Treasurer of respondent union, wherein she averred that in a conversation with appellant concerning the discharge of the aforesaid employees, and wherein appellant admitted that he was blacklisting the union employees and that he had discharged them because of their union activities and further stated he would never employ any of the persons he had discharged on account of their union activities. Respondent asserts that none of the averments contained in these supplemental affidavits were denied, but, as pointed out by appellant, the supplemental affidavits were not filed until the date of the hearing on the order to show cause, and therefore as he states in his brief, he "did not have an opportunity to deny the same in detail". However, the averments therein contained

were in substance controverted by appellant's affidavit above set forth.

The order to show cause in re preliminary injunction came on to be heard August 18, 1956 upon the foregoing affidavits, supplements thereto, and the verified complaint. When it was developed at the hearing that charges had been filed before the National Labor Relations Board, the question of jurisdiction of the state courts arose. In that regard, the record reflects that "It is stipulated that this dispute has been submitted to the National Labor Relations Board * * *, and discussed by that Board". The record contains a letter from the Regional Director of the National Labor Relations Board, under date of April 25, 1956, wherein it is stated that the complaint to said Board, "has been carefully investigated and considered. As a result of the investigation, it appears that in view of the scope of the business operation involved, it would not effectuate the purposes of the National Labor Relations Act [29 U.S.C.A. § 151 et seq.] to institute further proceedings at this time and I am, therefore, refusing to issue complaint in this matter."

Also, at the hearing in the court below, on motion of respondents, the action was dismissed as to all defendants except appellant Gordon Evans.

On August 9, 1956 the court issued its preliminary injunction prohibiting appellant from continuing certain acts and conduct toward respondents. The mandatory portions of said preliminary injunction from which appellant appeals read as follows:

"Refusing and failing to recognize and bargain collectively with Office Employees International Union, Local No. 30 as the exclusive representative of the plaintiffs herein.

"It is, hereby, further Ordered and Decreed that defendant, Gordon Evans, his agents, servants, confederates, representatives, attorneys and all persons acting in concert or participation with him reinstate and employ, if they, the following named

persons, so desire, Lee Barnes, Valerye De Armon, Ronald Ruff, Douglas Cameron, Mary Norberg and Dorothy Phillips to the same or substantially equivalent positions as held by them at the time of their respective discharges, without loss of any rights or privileges which they then enjoyed or which have since been instituted and established and to pay to each of them a sum of money equivalent to that which they would have earned had they not been discharged."

[1] As his first ground for reversal, appellant urges that the mandatory phase of the injunction is void because it grants all of the injunctive relief prayed for in the complaint. In this regard, it is contended that the general policy of the law is opposed to the granting of a preliminary injunction embodying all the relief prayed for in the complaint, before answer is filed and in advance of a trial on the merits in which witnesses can be sworn, with the right of cross-examination, so as to enable the court to see and judge what the truth may be. Illustrative of his contention, appellant cites the cases of *Griffin v. Lima*, 124 Cal.App.2d 697, 701, 269 P.2d 191; *Hagen v. Beth*, 118 Cal. 330, 331, 50 P. 425; *Gardner v. Stroeve*, 81 Cal. 148, 151, 22 P. 483, 6 L.R.A. 90; *Myers v. Louisiana A. Ry. Co., D.C.*, 7 F.Supp. 92, 96; Annotation 15 A.L.R.2d p. 247; *Bo Kay Chan v. Gerdon Land Co.*, 103 Cal.App.2d 724, 726, 727, 728, 230 P.2d 1. However, the foregoing and other cases stand for the principle that while mandatory injunctions granting all the relief prayed for, are not generally granted before the parties have full opportunity to present all the facts, nevertheless, its issuance is not condemned in extreme cases, or where proper circumstances are shown upon a proper consideration of the equities between the parties. In other words, the issuance of such a preliminary injunction is largely committed to the discretion of the court. No hard and fast rule can be adopted to fit all cases, but each must be determined upon its own peculiar facts (*Phillips v. Isham*, 111 Cal. App.2d 537, 539, 244 P.2d 716). The question then arises whether the facts of the in-

stant case justified the court in the exercise of its discretion, to require restoration of the *status quo ante* by judicial decree. We are satisfied that the answer must be in the affirmative.

We are not here concerned with litigation involving purely private rights as were the aforementioned cases relied upon by appellant, but are confronted with a situation wherein there is presented the question of whether certain respondents have been subjected to conduct on the part of appellant which it is urged is not only unfair to them, but contrary to the declared public policy of the state of California. In such a case, the courts have full power to afford necessary protection (*Williams v. International Brotherhood of Boilermakers, etc.*, 27 Cal.2d 586, 590, 165 P.2d 903).

From a mere reading of Labor Code sections 921 and 923 there can be little if any doubt that a question of public policy is primarily involved in this litigation. In *Shafer v. Registered Pharmacists*, 16 Cal. 2d 379, at page 385, 106 P.2d 403, 407, the court, after reviewing the background of the aforesaid Labor Code sections stated, "But there can be no doubt that the intended effect of this legislation was to balance the industrial equation, so far as it is possible to do so, by placing employer and employee on an equal basis. This purpose is plainly evidenced by Section 923, which commits the state, as a matter of public policy, to the principles of collective bargaining. In dealing with his employer, the individual workman is said to be unable either to bargain on equal terms or to combine with his fellow workmen in order to enhance his bargaining power; hence, it is necessary that he be free to associate, organize, and to designate representatives of his own choosing. And in order to make certain that the right to associate and organize be exercised without interference by the employer, the legislature provided that if the employer, as a condition of employment, exacts a promise to join or not to join a labor union, he shall have no right to injunctive relief or damages upon a violation of that promise." (Emphasis added.)

In *Nutter v. City of Santa Monica*, 74 Cal.App.2d 292, 298, 168 P.2d 741, 745, the court stated: "*In declaring the policy of the state as found in the Labor Code Sections (921, 923), the Legislature affirmed a natural right on the part of labor in private industry to enjoy freedom of contract and it outlawed the type of contract which deprives workmen of the right of free collective bargaining.*" (Emphasis added.)

[2,3] The case of *Texas & New Orleans Ry. Co. v. Brotherhood of Railway & S. S. Clerks*, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034, is authority for the statement that when an affirmative and definite declaration of public policy is contained in a legislative enactment, and such enactment definitely prohibits conduct which would thwart the declared purpose of the legislation, an intention must be assumed that the rights conferred shall be enforceable by legal proceedings. We therefore, conclude that where a question of the violation of a declared public policy is involved, courts of equity are invested with power to design their decrees so as to enforce rights and compel performance of the duty prescribed therein. Where the right is present, the remedy exists. And, this may be so in the absence of penalty (*Texas & New Orleans Ry. Co. v. Brotherhood of Railway & S. S. Clerks*, supra, 281 U.S. at page 567, 50 S.Ct. 427).

In the instant case, there was evidence that appellant had deprived respondent employees of the rights of collective bargaining in violation of Labor Code sections 921 and 923. While there were denials by appellant in part, as to the foregoing evidence, it was for the trial court to pass upon these conflicts, and when one reads the provisions of the Labor Code sections last above cited in the light of respondents' affidavits as contrasted with appellants' version of the attempted negotiations, we think it cannot justly be said that the conclusion arrived at by the court below is without substantial evidentiary support.

To us, it also seems questionable that the preliminary injunction affords *all* the re-

lief prayed for, as contended by appellant. The complaint herein seeks damages, which in a proper case may be trebled by the judgment (Labor Code, sections 1050-1054). No adjudication is made in the preliminary injunction upon the issue of damages, if any, that was or is being suffered by respondent union, and no mention is made as to damages suffered or to be suffered by respondent employees. As stated by respondents, "A reasonable reading of the preliminary injunction cannot support a conclusion that the court below intended the preliminary injunction to be a final adjudication of the issues involved, nor has it done so. Under circumstances such as here a decision on the application for a preliminary injunction does not amount to a decision on the ultimate rights in the controversy and hence it was proper to issue the preliminary injunction. (*Bomberger v. McKelvey*, 35 Cal.2d 607, 612 [220 P.2d 729])" Appellant insists that there were "sharp" questions of fact and "novel" questions of law. The factual question as to whether the named respondent employees "quit of their own volition or were fired by appellant", or as to "whether or not the respondent employees were all offered reinstatement", were all before the court through conflicting affidavits. The determination of the legal issues submitted were based on the law applicable thereto as succinctly set forth in *Shafer v. Registered Pharmacists*, supra; *Nutter v. City of Santa Monica*, supra; and *Texas & New Orleans Ry. v. Brotherhood of Railway & S. S. Clerks*, supra.

[4] Appellant earnestly urges that the state court was without jurisdiction to issue its injunction because the National Labor Relations Board has exclusive jurisdiction over the conduct alleged in respondents' complaint. We are satisfied this contention must be sustained. As was said by our Supreme Court in *McCarroll v. Los Angeles County, etc., Carpenters*, 49 Cal.2d 45, 315 P.2d 322, 325: "It is now well established that if conduct may be reasonably deemed to fall within the provisions of the Labor Management Relations Act defining

unfair labor practices (29 U.S.C. § 158 (a)-(b)), a state court has no jurisdiction to grant injunctive relief under either state or federal law, even if the National Labor Relations Board has declined to exercise jurisdiction over the controversy." (Citing cases.)

[5] Strikingly similar to the situation now confronting us, insofar as the jurisdictional question is concerned, is the case of *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S.Ct. 598, 1 L.Ed.2d 601. In the case just cited the United States Supreme Court said: "The question presented by this appeal * * * is whether Congress, by vesting in the National Labor Relations Board jurisdiction over labor relations matters affecting interstate commerce, has completely displaced state power to deal with such matters where the Board has declined or obviously would decline to exercise its jurisdiction but has not ceded jurisdiction pursuant to the proviso to § 10(a) of the National Labor Relations Act. (61 Stat. 146, 29 U.S.C. § 160(a) 29 U.S.C.A. § 160(a)." As to the factual background in the case just cited, it appears that appellant was doing business in Salt Lake City, Utah. He had contracts to manufacture certain equipment for the Air Force. To fulfill his government contracts he purchased materials from outside Utah in an amount "a little less than \$50,000." Finished products were shipped to Air Force bases, one within Utah and the others outside. A labor union filed with the National Labor Relations Board a petition for certification of that union as the bargaining representatives of appellant's employees. A consent election was agreed to, in which it was recited that appellant was "engaged in commerce within the meaning of Section 2(6), (7) of the National Labor Relations Act." The election was won by the union which was certified by the National Board as bargaining representative. Subsequently the union filed with the National Board charges that appellant had engaged in unfair labor practices proscribed by Sections 8(a) (1), (3) and (5) of the act:

As in the case now engaging our attention, the board's regional director declined to issue a complaint. He wrote as follows: "Further proceedings are not warranted, in as much as the operations of the Company involved *are predominantly local in character, and it does not appear that it would effectuate the policies of the Act to exercise jurisdiction*". (Emphasis added.) Note the similarity of the foregoing letter with the letter of declination filed in the instant case and hereinbefore set forth.

Thereupon, the union filed substantially the same charges with the Utah Labor Relations Board pursuant to the Labor Relations Act of that state. The state board found it had jurisdiction and granted the relief prayed for through a remedial order. On a Writ of Review, the Utah Supreme Court, *Guss v. Utah Labor R. Board*, 5 Utah 2d 68, 296 P.2d 733, affirmed the decision and order. The Supreme Court of the United States reversed the judgment, 353 U.S. 1, 77 S.Ct. 598, holding in unequivocal language that a state has no power to deal with matters within the jurisdiction of the National Labor Relations Board, where that board, although declining to exercise its jurisdiction, has not ceded jurisdiction pursuant to the proviso to Section 10(a) of the National Labor Relations Act empowering the board to cede jurisdiction to state agencies. This proviso, added to Section 10(a) of the Federal Act authorizes the National Board to allow state agencies to take final jurisdiction of cases in the borderline industries (i. e., borderline insofar as interstate commerce is concerned), provided the state statute conforms to national policy.

In the *Guss* case, *supra*, the Supreme Court of the United States was confronted with the situation prevailing in the case at bar, viz., the chaotic condition that is created when that National Board declines to assume jurisdiction and the state courts are prohibited from enforcing a legislatively declared public policy. In answer to the dilemma, the United States Supreme Court had this to say [353 U.S. 10, 11, 77 S.Ct. 603:

"We are told by appellee that to deny the State jurisdiction here will create a vast no-man's-land, subject to regulation by no agency or court. We are told by appellant that to grant jurisdiction would produce confusion and conflicts with federal policy. Unfortunately, both may be right. We believe, however, that Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land. Congress is free to change the situation at will."

The court disposes of claimed rights of state forums with this language:

"We hold that the proviso to § 10(a) is the *exclusive means* whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board. We find support for our holding in prior cases in this Court." (Emphasis added.)

That the court below relied heavily on the case of *Garmon v. San Diego Bldg. Trades Council*, 45 Cal.2d 657, 291 P.2d 1, is evidenced by the court's minute order granting the preliminary injunction here under attack, wherein it is stated: "This court has jurisdiction of the cause of action" (citing the *Garmon* case, *supra*). However, subsequent to the decision of the superior court therein, the Supreme Court of the United States ordered that the judgment of the California Supreme Court be "vacated" and the cause be remanded "for proceedings not inconsistent with this opinion (*San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26, 77 S.Ct. 607, 1 L.Ed. 2d 618, 620) and the opinions in *Guss v. Utah Labor Relations Board*, *supra*, and *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, *supra* [353 U.S. 20, 77 S.Ct. 604, 1 L.Ed.2d 613]". In the *Garmon* case, *supra* [353 U.S. 26, 77 S.Ct. 608], the United States Supreme Court said: "Recognizing that respondents' business affected interstate commerce, it (the Supreme Court of California) concluded that the Board's *declination*, in pursuance of its announced

jurisdictional policy, to handle respondents' representation petition *left the state courts free to act*". (Emphasis added.) The United States Supreme Court then went on to say: "What we have said in *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S.Ct. 598 [1 L.Ed.2d 601], and *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20, 77 S.Ct. 604 [1 L.Ed.2d 613], is applicable here, and those cases control this one in its major aspects". And, in the *Guss* case, *supra*, the United States Supreme Court definitely stated: "We hold that the proviso to § 10(a) is the *exclusive means* whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board. We find support for our holding in prior cases in this Court." (Emphasis added.)

We cannot refrain from saying that if we are to sustain our age-old boast that for every wrong the law provides a remedy, the situation now existing under federal labor law where interstate commerce is involved, is a sorry one. Conceding that the federal government has the right to preempt and occupy the field of labor relations insofar as unfair labor practices are concerned in interstate commerce, surely there exists no moral or legal reason why, in the event federal labor boards decline to accept jurisdiction in a given case, the state courts should not be permitted to enforce a legislatively declared public policy, where that policy is consistent with the federal policy in the field of labor relations. To adopt a "dog in the manger" policy in these matters that "we will do nothing and you can do nothing" is unfair to both management and labor, as well as all the citizens of the respective states who are also interested in a judicial or quasi-judicial solution of problems arising in that field, which affect the welfare of the entire state. If, as the Supreme Court of the United States said in *Guss v. Utah Labor Relations Board*, *supra*, concerning the "vast no-man's-land" now created, "Congress is free to change the situation at will", then both management and labor can perform no greater service

or higher duty than to demand that in the interests of justice and recognition of states rights, the duly constituted federal agencies shall either act, or upon their declination so to do, jurisdiction shall automatically revert to the state courts or duly constituted state labor relations boards. That Congress has placed the Federal Board on "short rations", thereby raising budgetary problems, which compel the declination of cases where the "industry" involved is "predominantly local in character" (*Guss v. Utah Labor Relations Board*, supra, 353 U.S. 1, 77 S.Ct. 602, 1 L.Ed.2d at page 606) furnishes no just, moral, or legal reason for denying relief in such cases by state courts or agencies where the state law is consistent with the national labor policy and will not be thwarted even in the predominantly local enterprises to which the proviso (Section 10(a)) applies. *Guss v. Utah Labor Relations Board*, supra, 353 U.S. 1, 77 S.Ct. 598, 1 L.Ed.2d at page 607.

The policy of the Federal Board to refuse jurisdiction in certain cases was declared by the board in its public announcement of October 6, 1950, that in order " * * * to better effectuate the purposes of the Act, and promote the prompt handling of major cases (the Board) has decided not to exercise its jurisdiction to the fullest extent possible under the Authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the interstate flow of commerce wherever federal jurisdiction exists under the state and the interstate commerce clause of the Constitution * * *." Among the enterprises excluded were those which did not have a "direct inflow of material valued at \$500,000 a year" or an "indirect inflow of material valued at \$1,000,000 a year." (26 Labor Relations Reference Manual 50.)

The declared purposes of the foregoing public announcement of the Federal Board, in our opinion, gives force to our critical language of a system that permits adjudication of "major" cases involving unfair labor practices, but denies redress or

remedy in cases where the enterprises involved do not have a "direct inflow of material valued at \$500,000 a year" or an "indirect inflow of material valued at \$1,000,000 a year". If good morals and law should be one and inseparable, how can such discrimination be justified under a legal system that boasts of "*equal justice for all*"? The evil could easily be eradicated and a forum be provided for adjudication of those cases which the Federal Board considers less than "major", by providing for concurrent jurisdiction thereof in the courts and agencies of the respective states when the declared public policy of said states in the field of labor relations is not inconsistent with and will not thwart the federal policy.

On reconsideration of the *Garmon* case, supra, the California Supreme Court decision filed January 16, 1958 (49 Cal.2d 595, 320 P.2d 473) clearly declares that in conformity with the mandate of the United States Supreme Court, one who is injured by unfair labor practices, contrary to the declared public policy of the state, may obtain judgment for sustained damages, but is without any remedy in cases affecting interstate commerce insofar as equitable injunctive relief to stop such injurious practices is concerned, unless the Federal Board cede jurisdiction to the state courts. If this amounts to equal and exact justice for all, we fail to perceive it.

However, until Congress acts in the matter, we are bound by the foregoing and other decisions of the Supreme Court of the United States.

[6] It therefore now becomes necessary to determine whether the alleged conduct of appellant may be reasonably deemed to fall within the provisions of the Labor Management Relations Act defining unfair labor practices (29 U.S.C.A. § 158(a-b)).

We entertain no doubt that the acts and conduct in which appellant is prohibited from engaging and the acts he is compelled to do by the preliminary injunction constitute acts and conduct either protected or

prohibited by the National Labor Management Relations Act, *supra*.

1. Interference with employees' right to select a bargaining agent (29 U.S.C.A. § 158(a) (1)).

2. Discharging employees because of union activities (29 U.S.C.A. § 158(a) (3)).

3. Exacting "yellow dog" contracts from employees (29 U.S.C.A. § 158(a) (3)).

4. Failing to recognize the employees' bargaining agent (29 U.S.C.A. § 158(a) (5)).

5. Reinstatement and back pay to certain employees (29 U.S.C.A. § 160(c)).

[7] Respondents argue that the amount or quality of interstate commerce done by appellant in his business should be considered in determining whether exclusive jurisdiction rests in the Federal Board. This contention would appear to have been determined adversely to respondent in the case of *National Labor Relations Board v. Fainblatt*, 306 U.S. 601, 606, 59 S.Ct. 668, 671, 83 L.Ed 1014, wherein it is stated: "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce *be it great or small*". (Emphasis added.) As was said in *National Labor Relations Board v. Mid-Co Gasoline Co.*, 5 Cir., 183 F.2d 451, 453, "As we read the decisions which have construed the Act, we are constrained to the view that they hold that in providing machinery for the adjustment of labor disputes, the Congress fixed no standard of degree by the use of which it can be said, as a matter of power rather than of wise policy, that a particular amount of probable direct interference with interstate commerce is too little to come within its cognizance. * * * *Congress, in short, in entrusting the enforcement to the wise discretion of the board, spoke not quantitatively or fractionally or in terms of degree, but qualitatively and in comprehensive terms.*" (Emphasis added.) The cases of *San Diego Bldg. Trades Council v. Garmon*, *supra*; *Guss v. Utah Labor Relations Board*, *supra*; *Amalgamated Meat Cutters & Butcher Workers v. Fairlawn*

Meats, 353 U.S. 20, 77 S.Ct. 604, 1 L.Ed.2d 613, as well as *McCarroll v. L. A. County etc. Carpenters*, *supra*, all support the conclusion that any activity prohibited or protected by the Federal Board may not be enforced or protected by the state courts.

[8] Since the Federal Board (National Labor Relations Board) has the power to take affirmative action including the right to order reinstatement of employees with or without back pay, and to otherwise effectuate the policies of the National Labor Relations Act, we are impressed that a prayer for punitive damages will not impair the exclusive jurisdiction vested in the Federal Board (*Swope v. Emerson Electric Mfg. Co.*, Mo., 303 S.W.2d 35, 40; *Born v. Laube*, 9 Cir., 213 F.2d 407, 409, rehearing denied 9 Cir., 214 F.2d 349, certiorari denied 348 U.S. 855, 75 S.Ct. 80, 99 L.Ed. 674.

[9] The final question presented is whether it may be reasonably assumed that appellant's business activities come within the realm of interstate commerce. In that regard respondents assert that the record herein is barren of any evidence that appellant's business affects commerce within the meaning of the Federal Labor Management Relations Act. With this contention, we cannot agree. In the first place, respondents themselves recognized that appellant's activities are an integral part of the communications system throughout the United States, when they filed charges with the National Labor Relations Board requesting that said board conduct an investigation and for certification of representatives under Section 9(c) of the National Labor Relations Act. The clerk's transcript shows that it was stipulated "that this dispute has been submitted to the National Labor Relations Board * * * and counsel agree to furnish this court with copies of the Board's orders of dismissal in those cases". When the court was furnished with the requested copies of the National Board's dismissal orders, the preliminary injunction was issued on the authority of the California Supreme Court decision in *Garmon v. San Diego Bldg. Trades Council*, 45 Cal. 2d 657, at page 663, 291 P.2d 1, 5, wherein it

was held that, "By giving the Board discretion to accept or refuse jurisdiction, the legislative purpose must have been to give the state courts jurisdiction when the Board specifically determines that the controversy will not affect the national economy." After issuance of the preliminary injunction herein the California Supreme Court decision was vacated, and the authority upon which the court below acted herein was set aside. The petition to the Federal Board was not dismissed for lack of jurisdiction but only because the "scope of the business operations involved, would not effectuate the purposes of the National Labor Relations Act". As heretofore pointed out, such a declination does not invest the state courts with jurisdiction if the controversy falls within the provisions of the federal act.

In *Bloemer v. Ezell*, D.C., 112 F.Supp. 814, it was held that operators of secretarial service consisting of receiving and transmitting telephone messages, some of which were in interstate commerce, were within the purview and coverage of the federal Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et. seq. Coverage under the Fair Labor Standards Act is dependent upon the enterprise affected being "engaged in commerce", which we regard as synonymous with "affect commerce", the requisite test under the National Labor Relations Act with which we are here concerned (See also *Tobin v. Lambart*, 22 C.C.H. Labor Cases, par. 67129; *Mitchell v. Bearden*, 32 C.C.H. Labor Cases, par. 70538).

We are persuaded that appellant's activities in a telephone answering service receiving interstate as well as intrastate communications must be held to affect interstate commerce. To hold otherwise would require the courts to shut their eyes and ears to everyday happenings of contemporary life. This they cannot and should not do. Such a telephone answering service as here involved manifestly must be regarded as an integral part of the communications system operating throughout the United States. In *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 3, 10, 77 S.Ct. 598, 599,

1 L.Ed.2d 603, supra, the Supreme Court said that by the use of the language "affecting commerce" in the Labor Management Relations Act, Congress meant to "reach to the full extent of its power under the Commerce Clause", and that this was so notwithstanding a "no-man's-land" is created when the National Labor Relations Board refuses to exercise jurisdiction and state courts are precluded from acting. In *National Labor Relations Board v. Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 684, 685, 71 S.Ct. 943, 95 L. Ed. 1284, it was held that if the effect on commerce is more than *de minimis*, it is covered by the federal act.

The court being without jurisdiction to grant the injunctive relief prayed for, it becomes unnecessary to discuss or decide other contentions advanced on this appeal.

For the foregoing reasons, the order granting a preliminary injunction is reversed.

FOURT, J., and DRAPEAU, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.



157 Cal.App.2d 565

Jose M. LUCIENTES, Jr., also and sometimes known as Joe Lucientes, Plaintiff and Appellant,

v.

Irving H. BLISS and Lena O. Bliss, his wife, Defendants and Respondents.

Civ. 9200.

District Court of Appeal, Third District, California.

Feb. 13, 1958.

As Modified on Denial of Rehearing
March 12, 1958.

Hearing Denied April 15, 1958.

Suit by purchaser for specific performance of contract for sale of ranch wherein only witness called by purchaser as to value of property was real estate agent who had no knowledge of quantity of

timber or character or extent, or of ranch buildings or fencing. From adverse judgment of the Superior Court, Mendocino County, Hale McCowen, J., the purchaser appealed. The District Court of Appeal, Schottky, J., held that evidence sustained finding that contract was not fair and reasonable and that consideration was not adequate, but that evidence was insufficient to support finding that failure of purchaser to pay price before a certain date was result of his negligence, willfulness, or fraudulent breach of duty and not from his inability to pay.

Judgment reversed insofar as it failed to determine issues of forfeiture, unjust enrichment and relief therefrom, with directions.

1. Specific Performance ⇨117

In action for specific performance of contract, plaintiff must not only allege but must also prove that contract sought to be specifically enforced is not only just and reasonable but that consideration is adequate. West's Ann.Civ.Code, § 3391.

2. Specific Performance ⇨121(3)

In suit by purchaser for specific performance of contract for sale of ranch wherein only witness called by purchaser as to value of property was real estate agent who had no knowledge of quantity of timber or character or extent, or of ranch buildings or fencing, evidence sustained finding that contract was not fair and reasonable and that consideration was not adequate. West's Ann.Civ.Code, § 3391.

3. Appeal and Error ⇨994(3), 1012(1) Evidence ⇨594

In an action tried to the court, court is sole judge of weight and effect of testimony and of credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for doing so.

4. Evidence ⇨594

Generally, uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by court as proof of the fact.

5. Specific Performance ⇨121(11)

In action by purchaser of ranch for specific performance of contract, and for relief of forfeiture of money paid to vendors pursuant to contract if specific performance could not be had, evidence was insufficient to support finding that failure of purchaser to pay price before a certain date was result of his negligence, willfulness or fraudulent breach of duty and not from his inability to pay. West's Ann.Civ. Code, § 3275.

6. Specific Performance ⇨128(1)

Upon determination that purchaser of ranch was not entitled to specific performance because contract was not fair and reasonable and consideration was inadequate, it was duty of court to determine if retention of money paid by purchaser to vendors pursuant to contract resulted in unjust enrichment of vendors, and if so, to give judgment for so much of amount as constituted unjust enrichment. West's Ann.Civ.Code, § 3275.

Spurr & Brunner, Ukiah, for appellant.

Hotle & McConnell, Santa Rosa, for respondents.

SCHOTTKY, Justice.

Some time prior to November, 1954, defendants Bliss listed for sale certain real property known as the Bliss Ranch, situated in Mendocino County, California, with William L. Auld, a real estate agent, for the listed price of \$38,000.

On January 21, 1955, plaintiff and defendants signed a document entitled Deposit Receipt, with Auld as the agent signing the same, whereby plaintiff paid an additional \$1,000, thereby increasing the deposits to \$1,800 on account of a purchase price of \$32,500, and agreed to pay the balance of the purchase price, or \$30,700, into the Mendocino County Title Company by March 21, 1955. This agreement also contained the following clause:

"Time is the essence of this contract, but the time for any act required

hereunder may for sufficient cause be extended not longer than thirty days by the agent signing this contract."

On April 21, 1955, the entire balance of the purchase price of \$30,700 was delivered to the Mendocino County Title Company, together with appropriate instructions to pay the sum to Bliss.

Thereafter, Bliss refused to sign the deed to the Bliss Ranch or to complete the transaction.

Plaintiff commenced this action in which he sought specific performance, and if this could not be had, then relief from forfeiture. Following a trial the court rendered judgment that plaintiff take nothing.

Appellant attacks the following findings as not being supported by the evidence and being contrary thereto: (1) The finding that the contract consideration is not adequate and the terms are not fair, just and adequate; (2) the finding that Lucientes did not offer to perform and pay the entire purchase price; (3) the finding that Bliss changed his position to his detriment in reliance on the failure of Lucientes to pay on March 21, 1955; and (4) the finding that the failure of Lucientes to pay the price before April 21, 1955, was the result of his negligence, wilfulness or fraudulent breach of duty, and not from his inability to obtain funds.

[1] It is a well recognized principle of law in this state that in an action for specific performance of a contract a plaintiff must not only allege but must also prove that the contract sought to be specifically enforced is not only just and reasonable but that the consideration is adequate. Civ. Code, sec. 3391. The burden of proving this fact is upon the person seeking the remedy. Many cases supporting this rule are cited in 23 Cal.Jur., page 438, et seq., and page 490, et seq., and in 10 California Jurisprudence, 10-Year Supplement, pages 304, 305.

[2] We shall, therefore, first consider appellant's attack upon the finding that the contract was not fair and reasonable and that the consideration was not adequate,

because if the record sustains that finding appellant could not be entitled to a decree of specific performance.

The only witness produced by appellant as to the value of the property was the real estate agent, Auld, who testified on direct examination:

"[Mr. Brunner]: Q. I will ask you, Mr. Auld, whether the price of \$30,700.00 or \$32,000.00 or \$32,500.00 is a reasonable price for the Bliss Ranch as of January 21, 1952? A. Yes.

"Q. And was it a reasonable price for that ranch on April 21, 1955? A. Yes."

On cross-examination he testified:

"[Mr. McConnell]: Now in determining the value of the property of this nature, Mr. Auld, timber figures in your calculation, does it not? A. That's right.

"Q. Well, in placing this figure of \$32,500.00, you were using timber as an undetermined quantity then, were you? A. I have been on the ranch and I never did see very much timber on there. It had been cut over. I never saw very much on there. I haven't been all over it, but—

"Q. You did see some timber on the ranch? A. That's right.

"Q. What kind of timber was it? A. Well, they have fir and redwood.

"Q. Have you ever been on the boundaries of the ranch? A. That's what I say, I have never been all over it. I have been down on the south—no, west boundary, I guess.

"Q. Then in reaching your opinion of \$32,500.00, you are valuing something that you have not completely examined, is that correct? A. Well, at that time, the timber wasn't worth much anyway.

"The Court: Answer the question. A. Yes.

* * * * *

"Mr. McConnell: Q. How many buildings are there upon the property?

A. I don't recall how many. There is a home and there is a barn and some sheds there.

"Q. How many miles of fence are there on the property? A. I wouldn't know. They are in pretty bad shape. I know they were at the time I was out there. Of course it's been fixed up since.

"Mr. McConnell: I will ask that be stricken, your Honor, because that's a conclusion of the witness that it was in pretty bad shape.

"The Court: It may go out.

"Mr. McConnell: Q. How many streams are on the property? A. I don't know.

"Q. Are there any streams on the property? A. Yes, it's the headwaters of the—I believe it's the Navarro, isn't it?

"Q. I'm sorry, I couldn't hear your answer. A. It's the headwaters of some stream. I don't recall which it is.

"Q. Well, property of that nature, when you go to determine the value, streams and waters are important, are they not? Doesn't that have a bearing on the value? A. Yes. Open land means a lot, too.

"Q. How many acres of open land are there on this property? A. I don't know for sure. I estimate about 40%.

"The Court: How many acres on the ranch? A. 2,170 acres, I believe it is."

On redirect examination Mr. Auld testified:

"[Mr. Brunner]: Q. Mr. Auld, where did the value at which these properties were set up for sale, where did that value come from? A. It came from Mr. Bliss.

"Q. That's the price he asked? A. He asked \$38,000 for it and he agreed to take \$32,000.00 cash.

"Q. \$32,000.00 on time or on payment? A. That was the listing price, \$38,000.00, but he would take \$32,000 cash."

Respondents argue that the testimony of Auld on cross-examination was such that the court was justified in disbelieving his testimony as to the value of the property. They assert that his knowledge of the property was shown to be sketchy, for while he knew there was some redwood and fir on the place, he had no knowledge of the quantity of timber or of the character or extent of the ranch buildings or fencing, or of the streams on the property. Appellant contends that nevertheless even if the court did not believe Mr. Auld's opinion of value there was still no evidence to support the court's finding because respondents produced no evidence of value whatever. Appellant contends further that since Bliss failed to testify contrary to Mr. Auld's valuation of the property, the presumption arises that Bliss's failure to so testify is an indication that he could only testify to his prejudice and hence preferred to remain silent and this presumption constitutes affirmative evidence supporting the testimony of Auld on this issue. Respondents in reply argue that it can be inferred from the following testimony of respondent Irving H. Bliss that he did not consider the price adequate by at least \$5,000:

"Q. What did Mr. Auld tell you on that occasion? A. He had an offer to increase the price \$5,000.00 if I would go ahead with the deal. I told him I wouldn't do it."

It must be said that the evidence introduced by appellant to prove that the consideration for the contract was fair and adequate was exceedingly weak and that a plaintiff having the burden of proof would not ordinarily rely upon such meager evidence to convince the trial court that the contract was fair and the consideration adequate. The trial court was not convinced for the court stated in its Order for Findings:

"The only evidence pertaining to the question of value came from the real estate agent who had assisted in negotiating the contract and who expressed the opinion that the price in question was reasonable. On cross-examination it was shown that his knowledge of the property was sketchy, for while he knew there was some redwood and fir timber on the place, he had no knowledge of the quantity of timber or of the character, or extent, of the ranch buildings or fencing. These are all important factors to be taken into consideration in determining the value of the kind of land here involved.

"It is well established that a trial court is not bound to accept evidence at face value even though it be uncontradicted. (*Norgard v. Estate of Norgard*, 54 Cal.App.2d [82] 89 [128 P.2d 566]; *Podesta v. Mehrten*, 57 Cal.App.2d [66] 72 [134 P.2d 38]; *Jones v. Independent Title Co.*, 23 Cal. 2d 859 [147 P.2d 542].) Under this rule the Court determines that this particular evidence is insufficient to establish value and declines to accept it.

"The plaintiff, having failed to prove the adequacy of the consideration, the relief sought by him is denied, * *"

[3] As this court said in *Norgard v. Estate of Norgard*, 54 Cal.App.2d 82 at page 89, 128 P.2d 566 at page 569:

"The trial court is the sole judge of the weight and effect of testimony and of the credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for doing so. *Davis v. Judson*, 159 Cal. 121, 113 P. 147. As was said by our Supreme Court in the very recent case of *Blank v. Coffin*, 20 Cal.2d 457, 126 P.2d 868, 878: 'There are many reasons why a jury may refuse to believe a witness. Section 1847 of the Code of Civil Procedure provides: "A witness is presumed to speak the truth. This pre-

sumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.'"

[4] And as was said in the leading case of *Davis v. Judson*, 159 Cal. 121 at page 130, 113 P. 147 at page 150:

"While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy."

While the evidence would appear to preponderate in favor of a finding that the contract was fair and the consideration adequate we cannot say upon the record in the instant case that the finding of the court to the contrary is without support. The trial court was not bound to believe the testimony of Auld that \$32,500 was the fair market value of the property, and we cannot say that the grounds stated by the court were not rational grounds for disbelieving the witness.

We conclude that the record supports the trial court's conclusion that appellant failed to sustain the burden of proof that section 3391 of the Civil Code imposed upon him to prove that the transaction was fair and the consideration adequate, and that therefore appellant was not entitled to specific performance of the agreement.

In addition to his prayer for specific performance appellant prayed for relief "from forfeiture of the moneys paid by him to Defendants under and pursuant to said contracts, in the amount of \$1800.00."

In *Barkis v. Scott*, 34 Cal.2d 116 at page 118, 208 P.2d 367 at page 368, the court said:

"Section 3275 provides: 'Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in a case of a grossly negligent, willful, or fraudulent breach of duty.' Although by its terms this section authorizes relief in this case, plaintiff contends that it is the settled law of this state that such relief is unavailable to a defaulting vendee under a contract where time has been made of the essence.

"The decisions that have considered section 3275, however, have been careful to point out in granting or denying relief that the party in default has or has not brought himself within the terms of the statute, and whenever its conditions have been satisfied relief has been granted whether or not time had been made of the essence by the contract involved. [Citing numerous cases.]"

The court said further, 34 Cal.2d at page 122, 208 P.2d at page 371:

"On the other hand, when the default has not been serious and the vendee is willing and able to continue with his performance of the contract, the vendor suffers no damage by allowing

the vendee to do so.' In this situation, if there has been substantial part performance or if the vendee has made substantial improvements in reliance on his contract, permitting the vendor to terminate the vendee's rights under the contract and keep the installments that have been paid can result only in the harshest sort of forfeitures. Accordingly, relief will be granted whether or not time has been made of the essence."

And as this court said in *Crofoot v. Weger*, 109 Cal.App.2d 839 at page 842, 241 P.2d 1017 at page 1019:

"* * * As said by the court in *Barkis v. Scott*, supra [34 Cal.2d 116, 208 P.2d (367) 370], 'Section 3275 presupposes that the party seeking relief is in default * * *.' Likewise the trial court could have found that the loss suffered by the appellants when the respondents terminated the contract was a forfeiture or a loss in the nature of a forfeiture, and such findings, coupled with findings that the breach was neither wilful nor the product of gross negligence would have made proper a reinstatement of the contract upon equitable conditions, if that were still possible, and if not then the recovery by the appellants of such amounts of the payments made as lay within the area of forfeiture.

"In addition to the foregoing, if the court had found that the breach was willful or grossly negligent so as to prevent equitable relief under section 3275 of the Civil Code there was still the duty of the court to go further and find whether or not the termination of the contract by the respondents for the appellants' default resulted in the unjust enrichment of the respondents. If such were the result then it would have been the duty of the court to give judgment for so much of the funds paid in as constituted unjust enrichment. *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, supra [37 Cal.2d 16, 230 P.2d

629, 31 A.L.R.2d 1]. * * * It is apparent that a situation was portrayed by the evidence which would have justified findings of unjust enrichment if relief could not be given through reinstatement of the contract, and it was therefore the duty of the court to proceed and find upon these matters and if it found unjust enrichment had resulted to give judgment for the amount thereof."

In *Baffa v. Johnson*, 35 Cal.2d 36 at page 38, 216 P.2d 13, the court said:

"It is now settled, however, that the defaulting vendee may recover part payments after further performance under the contract has terminated, if he proves facts justifying relief under Civil Code section 3275. *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367, 370."

[5] While the court in the instant case found that the failure of appellant to pay the price before April 21, 1955, was the result of his negligence, wilfulness or fraudulent breach of duty and not from his inability to pay, there is no support in the record for such a finding, and respondents do not contend that there is support for such a finding. Indeed, respondents virtually concede that the doctrine of unjust enrichment is applicable for they state in their brief:

"The second question raised in the *Crofoot* case (2) recovery of unjust enrichment if any, under the doctrine of *Freedman v. Rector*, 37 Cal.2d 16 [230 P.2d 629, 31 A.L.R.2d 1], has consistently been suggested by defendants as the proper solution for this type of case. In arguing both demurrers to the complaint, and a motion for judgment on the pleadings at the commencement of the trial, our position has been and still is that all

we want is our actual damages which for the most part consist of the amount we would be obligated to pay the real estate broker under the contract he negotiated. This we believe to be the sum of \$900.00. Plaintiff, however, persists in seeking specific performance and only specific performance. If a proper solution to this case in the eyes of the court would be finding on these issues the defendants have no objections to having the case remitted to the trial court to make findings and enter judgment on this issue or to having this court make such findings."

[6] We are convinced that the instant case is one in which appellant, although not entitled to specific performance, is entitled to relief from forfeiture under Civil Code, section 3275, and the decisions hereinbefore cited. When the trial court reached the conclusion that appellant was not entitled to specific performance because the contract was not fair and reasonable and the consideration was not adequate, it was the duty of the court to determine if the retention of the \$1,800 paid by appellant resulted in the unjust enrichment of respondents, and, if so, to give judgment for so much of the \$1,800 as constituted unjust enrichment. Our conclusion in this regard makes it unnecessary to discuss the other points raised in the briefs.

The judgment is reversed insofar as it fails to determine the issues of forfeiture, unjust enrichment and relief therefrom, if they occurred, with directions to the trial court to proceed in accordance herewith, either upon the evidence taken or such additional evidence as the parties with the permission of the court may see fit to offer. Respondents to recover their costs on appeal.

VAN DYKE, P. J., and PEEK, J., concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Robert McSHANN, Defendant and
Appellant.*

Cr. 3381.

District Court of Appeal, First District,
Division 2, California.

Feb. 13, 1958.

Hearing Granted April 9, 1958.

Prosecution for unlawful sale of heroin, and for unlawful possession of heroin. The Superior Court, Alameda County, Marvin Sherwin, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Dooling, J., held that where an informer was a participant in alleged unlawful sale of heroin, and was thus a material witness to the alleged crime, in fact being the only person other than defendant who could furnish direct evidence on subject of the sale, under such circumstances, informer was a material witness whose testimony might exonerate defendant, and privilege against disclosure had to give way to fundamental right of defendant to have the opportunity to produce such material witness.

Judgment on both counts reversed.

1. Witnesses ⇨216

Where, in prosecution for unlawful sale of heroin, informer was the participant in the sale, if one occurred, and was a material witness to the alleged crime, informer in fact being only person other than defendant who could furnish direct evidence on the sale, under such circumstances, informer was a material witness whose testimony might exonerate defendant, and privilege against disclosure had to give way to fundamental right of defendant to have opportunity to produce such material witness. West's Ann.Health & Safety Code, § 11500.

2. Witnesses ⇨216

It is reversible error to refuse disclosure of an informer's identity where the

informer is a participant in the alleged crime.

3. Criminal Law ⇨394

If an arrest made without a warrant was made without probable cause, evidence of narcotics thereafter discovered should have been excluded in prosecution for illegal possession thereof. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law ⇨1170½(1)

Witnesses ⇨216

Where, in prosecution for unlawful possession of narcotics, an informer's testimony might have been of material benefit in establishing that officers did not have reasonable grounds to justify an arrest and search of defendant without a warrant, defendant, under such circumstances, was entitled to have name of such informer disclosed as a material witness and trial court committed prejudicial error in hearing on admissibility of evidence in question, in not requiring name of informant to be disclosed. West's Ann.Health & Safety Code, § 11500.

Vaughns, Dixon & White, Clinton W. White, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Defendant appeals from the judgment of conviction upon two counts of violation of section 11500 of the Health and Safety Code. Count One charged a sale of heroin on November 26, 1956; Count Two charged possession of heroin on November 27, 1956.

The prosecution's evidence showed that on November 26, 1956, Inspector McBee of the State Division of Narcotic Enforcement and Sergeant Hilliard and Officers Leen and Goodrum of the Oakland Police Department met a confidential informant in the vicinity of Seventh and Clay in Oakland. McBee and Hilliard searched the informant and discovered no narcotics. The

* Opinion vacated 330 P.2d 33.

search was not complete, consisting of a check of his pockets and his stockings. Then the informer accompanied the officers to the Special Services Office of the Oakland Police Department where he made a telephone call. McBee dialed the number and a recording was made of the conversation. The number dialed was listed to 1910 Ashby Avenue in Berkeley, appellant's residence. McBee, Hilliard and Goodrum were present during the phone conversation and later listened to the recording. They identified the voice of the person talking to the informer as that of appellant.

The informer was given \$35 (consisting of three bills: a \$20, a \$10 and a \$5) that had been heavily dusted with fluorescent powder. The serial numbers of these bills was not noted. The informer was taken to the vicinity of Market and Grand and there was picked up by a man identified as appellant.

After the informer entered the automobile, McBee followed until he lost sight of it. Ten or fifteen minutes later the informer entered McBee's automobile where it was parked at 21st and Market. At this time the informer handed to McBee a small bundle containing a white powder later identified as heroin.

Officer Goodrum observed the informer enter the automobile identified as appellant's and he followed this automobile until the informer got out and entered McBee's car.

On November 27, 1956, the informer again made a telephone call to the same number. A recording was made of this conversation. After the conversation, McBee and the informer proceeded to the vicinity of the Ebony Plaza Bar where they were joined by Sergeant Hilliard. Hilliard, after listening to the recorded telephone conversation, obtained a warrant to search the premises at 1910 Ashby Avenue.

On November 27 Officers Reppas and Woishnis of the Berkeley Police, accompanied by Goodrum of the Oakland Police, were keeping appellant's residence (1910

Ashby Avenue) under surveillance. Pursuant to orders telephoned from Hilliard they followed appellant as he drove from his residence. At the intersection of Adeline and Market where appellant stopped for a traffic signal, they pulled their car in front of appellant's, blocking his way. Goodrum stated to appellant: "You're under arrest."

Appellant was instructed to get out of his car and place his hands on top of the car. As he started to comply, Woishnis observed a "silvery flutter" and shouted: "He dropped it." Goodrum observed something shiny "hit off of his [appellant's] shoe and land on the ground * * *" Reppas picked up four tinfoil packages and asked appellant: "What about these?" to which appellant replied "I don't know anything about it." Appellant was then searched and a smaller package wrapped in cellophane was found in his coat pocket. All five packages contained heroin.

All the officers then proceeded to 1910 Ashby Avenue, and McBee and Goodrum entered the house with a search warrant. The sum of \$1,058 was discovered in a drawer of the back bedroom and when a violet-ray or "black light" was shone on this money, \$35 of it was found to contain large amounts of fluorescent powder.

Appellant testified at the trial and denied that he was a party to the telephone calls. He denied meeting anyone on the corner of 23rd and Market on November 26. No other evidence connecting appellant with narcotics was found in his home.

During the cross-examination of Inspector McBee, he was asked the name of the confidential informant and refused to divulge the name claiming the information privileged (under section 1881, Code of Civil Procedure). His refusal was sustained by the trial court. Officer Hilliard was also asked to name the informant and his refusal was upheld by the court. In the hearing on reasonable cause for the arrest and search of November 27, held in the absence of the jury, Hilliard was again asked the name of the confidential informer

and his claim of the privilege was sustained.

Appellant's only contention on appeal is that the trial court committed error during the hearing on reasonable cause and the trial before the jury in not requiring that the name of the informant be disclosed.

[1,2] Insofar as Count One is concerned it involved an alleged sale to the unidentified informer. The informer was a participant in the sale, if one occurred, and was a material witness to the alleged crime—in fact in this particular case the informer was the only person other than the appellant who could furnish direct evidence on that subject since the proof of the alleged sale was entirely circumstantial. It is now settled that it is reversible error to refuse the disclosure of the informer's identity where the informer is a participant in the alleged crime. *People v. Castiel*, 153 Cal.App.2d 653, 315 P.2d 79; *People v. Lawrence*, 149 Cal.App.2d 435, 308 P.2d 821; *People v. Alvarez*, 154 Cal.App.2d 694, 316 P.2d 1006; *People v. Cox*, 156 Cal.App.2d 472, 319 P.2d 681. Under such circumstances the informer is a material witness whose testimony might exonerate the defendant and the privilege against disclosure must give way to the fundamental right of the defendant to have the opportunity to produce an obviously material witness.

The People argue that because the recorded telephone conversation was played before the jury and the jury had the opportunity to compare the voice on the recording with appellant's on the stand this case is distinguishable from the cases above cited. Appellant denied participation in the telephone conversation and denied that the voice on the recording was his. What we said in *Castiel*, supra, 153 Cal.App.2d at page 659, 315 P.2d at page 82, is equally applicable to this argument: "No one knows what the undisclosed informer, if produced, might testify. He might contradict or persuasively explain away the prosecution's evidence. It is the deprivation of the defendants of the opportunity of

producing evidence which *might* result in their exoneration which constitutes the error in this case, and we cannot assume because the prosecution evidence may seem strong that the undisclosed evidence might not prove sufficient to overcome it in the minds of the jurors. To do so is to reason that in no case can a defendant suffer prejudice from the suppression of evidence which may be favorable to him if the prosecution has produced what seems to be a strong eyewitness case of the defendant's guilt."

It cannot reasonably be claimed that the evidence shows that appellant knew the informer's identity since appellant denied talking to him on the telephone and meeting him in the automobile. *People v. Castiel*, supra, 153 Cal.App.2d 653, 315 P.2d 79.

[3,4] As to Count Two the question of whether reasonable grounds for appellant's arrest on November 27 existed is crucial since the arrest was without a warrant and the discovery of the narcotics followed the arrest. If the arrest was without probable cause the evidence of the narcotics thereafter discovered should have been excluded.

On the *voir dire* to determine whether the officers had reasonable grounds to believe that a felony was being committed, and hence to make an arrest without a warrant, the defendant is certainly entitled to produce evidence to rebut the showing of the officers. If the court must take the testimony of the officers as true on the question of reasonable cause the rights guaranteed by *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513, would have little practical substance. So as we pointed out in *People v. Lawrence*, supra, 149 Cal. App.2d 435, 451, 308 P.2d 821, 831:

"We believe the same principle applies to a hearing on *voir dire* held out of the presence of the jury. Although the question of the guilt of the defendant is not before the court, nevertheless, the defendant has the same right to present his defense at the hearing to determine the reasonableness of an arrest or search as he

does on the question of his guilt. The fact that the hearing is held before the court in the absence of the jury makes it no less a criminal proceeding. Due process applies and all the rights the defendant may have at the trial proper apply with equal force and dignity to the proceedings before the court sitting in the absence of a jury."

It seems obvious that the same principles of fair play which require the disclosure of the identity of the informer when his testimony might be of material benefit to the defendant in defending the case against him on the merits should be equally applicable when the informer's testimony might be of material benefit in establishing that the officers did not have reasonable grounds to justify an arrest and search without a warrant. It is just as important to a defendant to have access to material witnesses who may satisfy the court that evidence against him should be excluded because it was obtained as a result of an illegal search and seizure as it is to have access to material witnesses who may give evidence which will result in overcoming in the eyes of the jury the prosecution's evidence against him on the merits of the charge. Unless the defendant is accorded this right the doctrine of the Cahan case may be easily circumvented and become little more than a pious platitude.

Court of other jurisdictions which apply an exclusionary rule similar to that which our Supreme Court adopted in the Cahan case have seen this clearly as the following quotations attest:

"So we think, when an officer seeks to justify an arrest upon 'a charge made upon reasonable cause,' the officer should be required to reveal the identity of the person making the charge as well as the nature of the charge. The court has to pass upon the officer's justification, and that justification is open to impeachment. A defendant should not be bound by the officer's statement that a charge had been made, and, unless the source of the charge was ascertained, neither its good faith nor reality could well be challenged." *Smith v. State*, 169 Tenn. 633, 90 S.W.2d 523, 524.

"We think the defendant had a right to propound the question to the witness, and have it answered, as to where he obtained the information. * * * The immunity from unreasonable search, seizure, and arrest is one of the most valued liberties afforded and secured by our Bill of Rights under the state and federal Constitutions. * * * Where an officer acts without a warrant, he must, under the law, justify his action, and he cannot avoid doing so on the theory that to do so would violate any confidence or confidential communication. The rights of others are involved in such proceedings, and the court should obtain possession of all the information available, standing as nearly as possible in the place of the officer, and judging from the facts which the officer possessed, before it decides the sufficiency of the information to constitute probable cause." *Mapp v. State*, 148 Miss. 739, 114 So. 825, 826.

"If the information of the informer was unreliable or he was unworthy of belief, the officer did not have probable cause to make either the search or the arrest. It follows that the court must have all the facts before it can properly determine whether the officer acted on reasonable grounds. If an officer should stop a peaceful, law-abiding citizen on the highway and search his car, subjecting him to humiliation and ridicule, and the offended citizen should seek redress by a suit for damages, surely no court would say the officer would be relieved of responsibility by an answer that he was informed by a reliable person that the citizen was engaged in the illicit liquor traffic, but he could not and would not disclose the name of his informer, thus preventing a fair and impartial investigation of his conduct. * * * We cannot have one law applicable to an identical state of facts for the innocent and another for the guilty. * * *

"Every accused person has the right to cross-examine on material facts every witness who testifies against him. * * *

"When the government calls a witness whose testimony is based in part on that of an informer, it subjects the witness to cross-examination and the informer to whatever

peril may arise out of such cross-examination. It is a sound rule to keep secret information furnished to the state of violations of its laws, but this commendable public policy must yield to a higher, or at least an equal, right accorded to an accused to have a court investigate the facts material to his offense in a criminal prosecution * * *

United States v. Keown, D.C., 19 F.Supp. 639, 645-646, cited with approval in *Roviaro v. United States*, 353 U.S. 53, 61, 77 S.Ct. 623, 1 L.Ed.2d 639.

"We then come to discuss that feature of the case which involves the refusal of the officer to give the name of his informant. * * *

The only question here is as to whether or not, when the matter is presented to a court for the purpose of seeking a determination of whether, under all the circumstances, there was probable cause, this element of those circumstances may remain undisclosed. It is scarcely an answer to the proposition that an agent testifies that his informant was a reliable person, and that he believed the information so given, unless the court sitting in judgment may have the right to determine whether, under all the circumstances, such information was reliable and the agent was justified in having such belief. A belief must or should rest upon a substantial basis. It is not a question of impugning the motives or doubting the honest belief of the agent * * *

It is simply requiring the witness to sustain his motives and his beliefs by all the evidence at his command. * * *

"* * * I am of the opinion that the only safe rule to adopt will be to require officers who presume to make search and seizures * * * without warrant, to disclose every element which goes to make up their case of probable cause, and that this rule reasonably includes the source of their information, so that the court may determine whether or not under all the circumstances a case of probable cause has been established * * *

United States v. Blich, D.C., 45 F.2d 627, 629.

Our case on this point involves a somewhat different set of facts than the typical case where the officer makes an arrest in

reliance upon information narrated to the officer by an informer. Here the arrest was made in reliance upon information gained by overhearing a telephone conversation between the informer and another person said to have been the appellant. The informer was a participant in the conversation relied upon. The case in this respect approximates on the question of reasonable cause the participant-informer cases cited in the forepart of this opinion. Once granted the defendant's right to know the name of the informer on the *voir dire* to determine whether reasonable cause for an arrest and search existed, where his testimony may be of material aid to the defendant on that question, every reason that supports the rule that the informer's name must be furnished on the trial of the merits if he was a participant in the crime, supports the requirement that his name must be furnished if he was a participant in the conversation which is solely relied on by the officers to justify the arrest.

If the officers relied upon a conversation between two persons, neither of whom was an informer, to furnish reasonable cause for the arrest of one of them, who would question the right of the accused to know the name of the other with whom his conversation was alleged to have taken place? Being a party to the conversation relied upon his testimony would certainly be material and the accused would be entitled to call him as a witness. So the informant-participant in the conversation here relied on is an equally material witness and the appellant is equally entitled to call him. We need not speculate on what the informer's testimony might be and appellant is in no position to suggest its tenor because he has been deprived of the opportunity of interviewing the informer to ascertain his version of the facts. The appellant denied that he was a party to the conversation. The informer might corroborate him in this. But whatever his testimony might turn out to be, (to paraphrase the quotation above set out from *People v. Castiel*, supra, 153 Cal.App.2d 653, 659, 315 P.2d 79, 82) it is the deprival of the defendant of the oppor-

tunity of producing evidence which might result in a finding of want of reasonable cause which is the error here.

Judgment on both counts reversed.

KAUFMAN, P. J., and DRAPER, J.,
concur.



157 Cal.App.2d 627

Joseph T. MORENO, Plaintiff and Appellant,
v.

Ray C. HAWBAKER, Defendant and
Respondent,

Dorothy Helen Hawbaker, Defendant.

Civ. 17140.

District Court of Appeal, First District,
Division 1, California.

Feb. 18, 1958.

Action for injuries received when motorcycle plaintiff was riding collided with oncoming automobile at odd angle intersection where automobile driver intended to make left turn. The Superior Court, Contra Costa County, Hugh H. Donovan, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that driving motorcycle after dark, without lights, at speed of 60 miles per hour could constitute contributory negligence.

Affirmed.

1. Automobiles ⇨213

Driving motorcycle after dark, without lights, at speed of 60 miles per hour could constitute contributory negligence.

2. Trial ⇨260(1)

It was not error to refuse proposed instructions adequately covered by instructions given.

3. Trial ⇨252(7)

In absence of any showing that motor vehicle collision giving rise to action had occurred in residential district, it was not error to refuse proposed instruction on Vehicle Code subsection referring to law applicable when left turns are made in a residential district. West's Ann.Vehicle Code, § 541(b).

4. Automobiles ⇨146

Motorist is not required to anticipate that another vehicle will suddenly cross into his lane of traffic; but motorist who was not himself driving carefully is not entitled to invoke this rule.

5. Automobiles ⇨171(8)

Motorist cutting corner of intersection is guilty of negligence as a matter of law. West's Ann.Vehicle Code, §§ 540(b), 541(b).

6. Trial ⇨241

In action for injuries received when motorcycle plaintiff was riding collided with oncoming automobile at odd angle intersection where automobile driver intended to make left turn, trial court adequately located intersection and indicated points at which left turn could be made when he read to jury Vehicle Code section defining "intersection." West's Ann. Vehicle Code, § 86.

7. Witnesses ⇨309

Vehicle Code section, which (prior to its repeal) provided that no record of conviction or testimony produced at trial terminating in conviction should be admissible as evidence in civil action, precluded any inquiry, in motor vehicle collision case, concerning motorist's refusal, on grounds of possible self-incrimination, to testify at criminal trial arising out of same collision. West's Ann.Vehicle Code, §§ 86, 755.

8. Evidence ⇨220(1)

Accused does not, customarily, testify at preliminary examination, so his failure to do so is without legal significance, and evidence with regard thereto is thus inadmissible in civil action.

9. Evidence — 359(1)

In action for injuries received when motorcycle plaintiff was riding collided with oncoming automobile at odd angle intersection where automobile driver intended to make left turn, it was within discretion of trial court to exclude those photographs which did not disclose anything not already known to jurors, those which only showed bystanders, and those which were too gruesome.

10. Evidence — 121(12)

In action for injuries received when motorcycle plaintiff was riding collided with oncoming automobile at odd angle intersection where automobile driver intended to make left turn, evidence that bystander observing motorcycle passing at high rate of speed and without lights had said "Look at those fools go!" was admissible under spontaneous declaration rule.

11. Appeal and Error — 933(1)

Even though trial court, in its order denying motion to strike jurors' affidavits, stated that it believed that an improper attempt to impeach verdict was involved, it would have to be assumed that trial court had considered such affidavits in passing upon subsequent motion for new trial.

Lange & Rockwell, San Francisco, for appellant.

Berry, Davis & Channell, Oakland, for respondent.

PETERS, Presiding Justice.

Joseph T. Moreno brought an action against Ray C. Hawbaker and his wife Dorothy for injuries received when the motorcycle he was riding collided with the automobile of defendants. The action was subsequently dismissed as to Dorothy Hawbaker. The jury brought in a verdict in favor of Ray C. Hawbaker. Moreno appeals from the judgment entered on that verdict.

The accident occurred on October 31, 1954, at about 8 p.m. on the Dam Road in

the town of San Pablo, near where that road is intersected by Key Boulevard. Dam Road, at the scene of the accident, runs generally from north to south, while Key Boulevard runs generally in a northwesterly-southeasterly direction, intersecting Dam Road but not crossing it. The two streets intersect at about a 45-degree angle, so that one coming from the north and turning into Key Boulevard would only be required to make about a 45-degree turn to his left.

At the time of the accident Hawbaker, with his wife and child in the car, was proceeding southbound on Dam Road. He intended to make a left turn into Key Boulevard. Two motorcycles, one driven by Edward Hemlab and the other by Moreno, were proceeding northerly on Dam Road. Near or in the intersection a collision between the two motorcycles and the automobile occurred. Hemlab was killed and Moreno seriously injured.

Hawbaker testified that, prior to the accident, he was driving about 30 miles per hour, but that, as he approached the Key Boulevard intersection and about 150 feet therefrom, he slowed down to 10 to 15 miles per hour, because he intended to make a left turn into Key Boulevard. He was on his right side of the road. He was looking ahead but saw no headlights. He did not see Hemlab's motorcycle until he was but 5 to 10 feet from it. He saw a flash of light which he assumed was the reflection of his headlights, which were on, in the glass of the lights of Hemlab's motorcycle, which were not lit. He did not see Moreno's motorcycle at all before the impact. Hemlab's motorcycle was 3½ to 4 feet over the center white line on Dam Road on the wrong side of the road. It was respondent's story that Hemlab's motorcycle hit his automobile before he started to turn and while he was on the right side of the road for southbound traffic; that when Hemlab's motorcycle hit his car it turned the steering wheel causing the automobile to swerve to his left so that when Moreno's motorcycle came along respondent was on the wrong side of the road for southbound

traffic. The pictures and the other evidence show that all the damage to Hawbaker's car was to its right side, particularly to the right front and rear doors. The automobile was not damaged in front.

Hawbaker, as already pointed out, testified that neither motorcycle had its lights on before or after the accident. Mrs. Hawbaker testified that the accident happened before her husband started to turn to the left.

Moreno testified that prior to the accident his maximum speed was 25 miles per hour and that he was driving on his right side of the road. He claimed that his lights were on, but admitted that the headlight was on low beam because the high beam did not function without flickering off and on. Hemlab also had his lights on. Just as Hemlab entered the intersection Hawbaker turned to enter Key Boulevard. Both Moreno and Hemlab were on their right side of the road when they ran into the Hawbaker car.

The scene of the accident was described by the Chief of Police of San Pablo. He testified there was a stop sign on the northeast corner of Key Boulevard where it runs into the Dam Road, a marked crosswalk on Dam Road and a broken white line down the middle of Dam Road. Northerly of the intersection there was a street light. There were no houses near the intersection. The two streets intersect at about a 45-degree angle.

Tony Dykes, a high school student who was a neighbor of the Hawbakers, testified that with two companions he was in a lot about a half block from the intersection when he saw and heard the two motorcycles go by at between 40 and 60 miles per hour. Neither motorcycle had its lights lit. He exclaimed to his companions: "Look at those fools go," and then heard the crash but did not see it. Dykes' two companions corroborated him in all substantial details.

Subsequent to the accident Hawbaker was convicted of manslaughter, based on the death of Hemlab.

[1] Appellant does not challenge the sufficiency of the evidence to sustain the judgment. He could not properly do so. Regardless of what the record may show as to Hawbaker's negligence, there is substantial and convincing evidence that Moreno was guilty of contributory negligence. There is evidence that he was driving his motorcycle after dark, without lights, at a speed estimated up to 60 miles per hour. That, of course, could constitute contributory negligence.

Appellant's main attack is on the instructions, contending some proposed by him and refused should have been given, and that others given were either incomplete or incorrect. His first major point is that the following five instructions proposed by him should have been given by the trial court. They all relate to the law applicable to turning movements at or before reaching an intersection. The challenged five instructions are:

Proposed Instruction No. 5:

"As applicable to this case the intersection of Key Boulevard and Dam Road is the area embraced within the prolongation of the lateral boundary lines of the roadways."

Proposed Instruction No. 6:

"Section 540 of the Vehicle Code insofar as it applies to this action provides as follows:

"Required Position and Method of Turning at Intersection. The driver of a vehicle intending to turn at an intersection shall do as follows:

"(b) Approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway."

Proposed Instruction No. 7:

"Vehicle Code Section 541(b) as applicable in this case provides as follows:

"No vehicle in a residence district shall be turned left across the roadway * * *

when any other vehicle is approaching from either direction within 200 feet, except at an intersection.'

"A violation of this section constitutes negligence as a matter of law."

Proposed Instruction No. 8:

"The driver of a vehicle proceeding in the proper lane in a given direction is not required to anticipate that another vehicle would suddenly cross into his lane of traffic."

Proposed Instruction No. 10:

"If you find from the evidence that the defendant, Ray C. Hawbaker, was cutting the corner of the intersection at the time of the collision with the motorcycle of Joseph Moreno, the defendant, Ray C. Hawbaker, would be guilty of negligence as a matter of law."

There was no error in refusing to give these instructions.

No. 5 purports to define the term "intersection." The court gave the following instruction:

"Section 86 of the Vehicle Code of the State of California in effect at the time of this accident provides as follows:

"'Intersection is the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angles or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.'"

[2] This instruction adequately covered the subject matter of proposed Instruction No. 5. There was, therefore, no error in refusing the proposed instruction.

The same can be said as to proposed Instruction No. 6. That instruction is merely a reworded version of the provisions of section 540(b) of the Vehicle Code. That section, as it read at the time of the accident, was contained, verbatim, in one of the given instructions.

[3] Proposed Instruction No. 7 requested the giving of the provisions of section

541(b) of the Vehicle Code. That section expressly refers to the law applicable when left turns are made "in a residence district." The burden was on plaintiff to show that this was such a district. There was no evidence at all that the accident occurred in a residence district. Indeed, in his opening brief appellant states that at the time of the accident all of the houses on the Dam Road for one block north and south of Key Boulevard had been removed in anticipation of a highway project. (App. Op. Brief p. 5.) In the absence of any showing by appellant that the area had been designated as a residence district, the trial court properly refused to give the instruction.

Appellant cites *Ades v. Brush*, 66 Cal. App.2d 436, 152 P.2d 519, in support of his contention that proposed Instruction No. 8 should have been given. In the *Ades* case the defendant cut across from the right lane of traffic across the center lane and hit the plaintiff, who was driving carefully in the extreme left lane. As to this situation this court stated (*Ades v. Brush*, 66 Cal.App.2d 436, 443, 152 P.2d 519, 522): "Mrs. George was certainly not required to anticipate that, while she was moving along in the extreme left lane of traffic, an automobile would cross those lanes at approximately a right angle and run into the right front of her car."

[4] The rule stated in proposed Instruction No. 8 is a correct rule of law. But, as the *Ades* case clearly points out, that rule is only applicable where the driver is in his own lane, *and is driving carefully*. In the instant case there was substantial evidence that appellant was not driving carefully, that is, that he was driving very fast after dark without lights. The proposed instruction was incomplete and misleading. It would have told the jury that if appellant was in the proper lane, he did not have to anticipate that another driver would cross into that lane. The proposed instruction completely failed to state that for the proposed rule to apply the person claiming its benefit must himself be driving

carefully. The instruction was properly refused.

[5] Proposed Instruction No. 10 refers to the law applicable when a driver cuts the corner at an intersection. The proposed instruction states a correct rule of law. *Bushey v. Union Oil Co.*, 13 Cal.App. 2d 350, 56 P.2d 1272. But this subject matter was adequately covered by other instructions. Sections 86, 551(a) and 540(b) were read to the jury. The jury was adequately instructed on the effect of left turns at an intersection. Thus, the refusal to give this instruction did not prejudice appellant's rights.

[6] The second major contention of appellant is that the trial court improperly failed to indicate to the jury the location of the intersection, and particularly failed to indicate the points at which a proper left turn should have been made. In this respect he contends that section 86 of the Vehicle Code, which was read to the jury and which purports to define the term "intersection" is incomprehensible when applied to an odd angled intersection with shoulders but no curbs on the intersecting streets, and where one street curves into the other. This error was aggravated, so it is contended, when one of the jurors asked the court the following question and the following answer was given:

"A Juror: I'd like to know on the extension of the parallel lines of the edge of the highway. If the highway has a curve at the end of it, where do you continue on? You can't—

"The Court: You mean the prolongation of the highway?

"A Juror: Right.

"The Court: I don't have the map here to illustrate. But Counsel, I take it here that the prolongation is well-defined on the map, is it not?

"Mr. Lange: I would say so, Your Honor. The map is to scale.

"The Court: The map is there.

"Mr. Lange: That's correct.

"The Court: And prolongation means just extending the lines out across the other highway.

"A Juror: But you have to take the straight lines, right?

"The Court: The curved lines, you mean.

"A Juror: Yes."

As already pointed out, Key Boulevard intersects Dam Road at about a 45-degree angle and the street has no curbs. The diagrams, the pictures and the evidence show that the line of intersection is not straight but is curved, the curve on the north side being gradual, and that on the south abrupt.

Section 86 of the Vehicle Code gives the statutory definition of an intersection. It provides that it "is the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angles or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict." There were several excellent photographs of the area introduced into evidence. There were also diagrams of the area introduced into evidence. The witnesses fully described the area. These photographs, diagrams and the oral testimony adequately told the jury about the physical situation. Obviously, the two highways do not join at right angles so that the provision of section 86 that is applicable is the one reading "the area within which vehicles traveling upon different highways joining at any other angle may come in conflict." What the area of conflict is in other than right-angle intersections depends upon the physical situation presented. This the jury knew from the photographs, diagrams and oral evidence. It was a fact question. The jury knew as much about this question as did the trial judge. They could tell where the possible area of conflict was located. Thus, the reading of section 86 of the Vehicle Code to the jury was all that was required.

It is true that when inquiry was made by a juror the trial judge was not too clear in his explanation. But he did refer to the maps. In view of the physical facts as disclosed by the photographs, diagrams and oral evidence, and in view of the fact that section 86 of the Vehicle Code was read to the jury, we do not think that the jury could have been misled by the judge's explanation.

Appellant next objects to certain rulings on the evidence. The court permitted interrogation of respondent as to his declining to testify at the coroner's inquest into the death of Hemlab, but sustained objections to questions seeking to bring out that respondent had refused to testify on the grounds of possible self-incrimination at the criminal trial, and had not testified at the preliminary hearing. The record shows that outside the presence of the jury counsel agreed to withdraw these questions, and then in the presence of the jury requested, and was granted, permission to withdraw the questions.

The rulings of the trial court were clearly correct. Section 755 of the Vehicle Code as it read prior to its repeal in 1957 (Stats. of 1957, Chap. 1956, p. 3497) provided: "No record of the conviction of any person for any violation of this code, nor any testimony of or concerning or produced at the trial terminating in such conviction, shall be admissible as evidence in any court in any civil action."

[7] This section precluded any inquiry about the witness' refusal to testify at the criminal trial on the grounds of self-incrimination. It has been held that evidence that a person's refusal to testify at a coroner's inquest on the ground of self-incrimination is admissible "for impeachment purposes since the claim of privilege gives rise to an inference bearing upon the credibility of his statement of lack of negligence upon his part." *Nelson v. Southern Pacific Co.*, 8 Cal.2d 648, 654, 67 P.2d 682, 685. Such interrogation was permitted in the instant case. But sec-

tion 755 prohibited similar interrogation of the witness at the trial of the criminal case.

[8] It is equally clear that failure to testify at a preliminary examination should not be admissible for the reason that such failure cannot, logically, give rise to the adverse inference mentioned in the *Nelson* case. This is so because the accused does not, customarily, testify at the preliminary examination, so that his failure to do so is without legal significance.

In addition, as already pointed out, the record shows that the basic questions involved were voluntarily withdrawn by appellant.

The record shows that, at the coroner's inquest, the respondent's wife asked to be excused from testifying against her husband. In the present trial appellant sought to impeach her by offering into evidence a portion of the transcript at the coroner's inquest containing some highly critical remarks made by the coroner indicating that the witness was relying on self-incrimination. The trial court commented that the witness had the legal right to refuse to testify against her husband, and that the coroner's remarks about self-incrimination were incorrect and inflammatory. It sustained objections to this testimony. The ruling was obviously correct.

[9] Appellant complains that it was error to refuse to admit into evidence certain photographs of the scene of the accident. The record shows that several excellent photographs of the scene of the accident were introduced, and that they clearly depicted the area involved. Other photographs were excluded because they did not add anything not already known to the jurors, or only showed bystanders, or were too gruesome. The ruling was well within the discretion of the trial court. *Barone v. Jones*, 77 Cal.App.2d 656, 176 P.2d 392, 177 P.2d 30; *Harmon v. San Joaquin L. & P. Corp.*, 37 Cal.App.2d 169, 98 P.2d 1064; *Hayes v. Emerson*, 110 Cal.App. 470, 294 P. 765.

Appellant complains of several rulings made by the trial court during the examination of the witness Tony Dykes. First, appellant complains that he was unduly limited in his cross-examination of the witness. The record does not support this contention. It shows that appellant was given ample opportunity to question the witness and that on several occasions he acknowledged that he had no further questions. The record indicates that any difficulty that occurred in determining what questions were or were not proper was caused by appellant's counsel jumping back and forth from cross-examination to direct to cross and to re-cross examination.

[10] Appellant also complains that the statement of Dykes when he saw the two motorcycles proceeding at a high rate of speed and without lights "Look at those fools go" was hearsay and inadmissible. The statement was admitted for the limited purpose of showing a spontaneous declaration. It was admissible for that purpose. *Lane v. Pacific Greyhound Lines*, 26 Cal.2d 575, 160 P.2d 21.

[11] The last contention of appellant necessary to mention is his contention that the trial court erroneously excluded from consideration, on the motion for a new trial, the affidavit of the juror Dolin. The record shows that the verdict was 9 to 3 for the defendant, that the jury was polled, and that the juror Dolin twice answered "yes" when asked if the verdict as read was his. On the motion for a new trial he averred that at all times he had voted for plaintiff; that his "yes" when the jury was polled was made in the mistaken belief that

he was confirming the tally of the jury which he had counted. He further avers that the jury first voted on the issue of contributory negligence, that he voted for plaintiff, and that the affiant counted the ballots and they were 9 to 3 in favor of defendant. But when the jury was polled in the courtroom his "yes" vote was necessary to make the vote 9 to 3.

Defendant moved to strike this affidavit and the affidavits of several other jurors to the effect that the juror Dolin had always favored a plaintiff's verdict. The trial court, in its order denying this motion, stated that it believed that this was an improper attempt to impeach the verdict. But, nevertheless, the court *denied* the motion to strike. Subsequently, the trial court denied the motion for a new trial. The affidavits were necessarily before the court at that time. We must assume that the trial court considered them, and found that the "yes" given in the courtroom correctly represented Dolin's then views, and so denied the motion for a new trial. *Metcalf v. Pacific Electric Ry. Co.*, 63 Cal.App. 331, 218 P. 486. Thus, even if the affidavits were admissible under the exception to the impeachment rule stated in the *Metcalf* case, *supra*,¹ the most they accomplished was to create a conflict with the record of what occurred when the jury was polled. This conflict was for the trial court to resolve. In view of the record, we must assume that it did so.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

1. There is a serious question as to whether the affidavits were proper. See *Fernandez v. Consolidated Fisheries, Inc.*,

117 Cal.App.2d 254, 255 P.2d 863; *Clark v. Bradley*, 106 Cal.App.2d 537, 235 P.2d 439.

49 Cal.2d 729

PACIFIC PIPELINE CONSTRUCTION COMPANY (a Corporation), Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION of the State of California, Defendant and Appellant.

L. A. 24146.

Supreme Court of California,
In Bank.

Feb. 21, 1958.

Action by corporation against state board of equalization for refund of certain sales taxes, interest and penalties paid under protest. The Superior Court, Los Angeles County, William J. Palmer, J., entered judgment for plaintiff and defendant appealed. The Supreme Court, Traynor, J., held where corporation sold construction machinery and equipment valued at \$41,879.22 in 19 separate sales from 1947 to 1950 in addition to construction machinery and equipment valued at \$201,230.50 which corporation transferred in 1949 to another corporation pursuant to agreement for reorganization of both corporations which were engaged in pipeline construction business and for territorial division of such business, such series of sales was sufficient in number, scope and character to constitute an activity requiring the corporation selling construction machinery and equipment to hold a seller's permit, and transfer of property in 1949 was not an "occasional sale" within sales tax statutes exempting gross receipts of occasional sale from sales tax.

Reversed.

Schauer, Shenk and McComb, JJ., dissented.

Opinion, 309 P.2d 866, vacated.

I. Licenses ⇨15.1(8)

Transfer of machinery and equipment from one corporation to another pursuant to agreement for reorganization of both corporations which were engaged in pipeline construction business and for territorial division of such business was a "sale at retail" of tangible personal property within

sales tax statutes and gross receipts from such sale were subject to sales tax unless sale was an occasional sale within sales tax statutes. West's Ann.Rev. & Tax.Code, §§ 6006(a), 6006.5, 6007, 6015(a), 6051, 6367.

See publication Words and Phrases, for other judicial constructions and definitions of "Sale at Retail".

2. Licenses ⇨15.1(5)

Where corporation sold construction equipment valued at \$41,879.22 in 19 separate sales from 1947 to 1950 in addition to construction machinery and equipment valued at \$201,230.50 which corporation transferred in 1949 to another corporation pursuant to agreement for reorganization of both corporations which were engaged in pipeline construction business and for territorial division of such business, such series of sales was sufficient in number, scope and character to constitute an activity requiring the corporation selling construction machinery and equipment to hold a seller's permit, and transfer of property in 1949 was not an "occasional sale" within sales tax statutes. West's Ann.Rev. & Tax.Code, §§ 6006.5, 6367.

See publication Words and Phrases, for other judicial constructions and definitions of "Occasional Sale".

3. Licenses ⇨15.1(5)

In determining whether machinery and equipment transferred from one corporation to another pursuant to agreement for reorganization of both corporations which were engaged in pipeline construction business was sale of personal property which was subject to sales tax, it was immaterial that property transferred was used for field operations by acquiring corporation, that there had been no similar sales between the two corporations, or that transferring corporation was joint owner with third corporation of corporation which acquired such construction machinery and equipment. West's Ann.Rev. & Tax.Code, §§ 6006.5, 6367.

4. Licenses ⇨15.1(5)

Where reorganization agreement pursuant to which transfer of property took

place between two corporations was a territorial division of pipeline business in which both corporations were involved and transfer involved only part of transferring corporation's property, and acquiring corporation which had previously been owned jointly by transferring corporation and third corporation was to be owned after reorganization by two new owners, neither of whom had or would have any interest in transferring corporation after its reorganization, the real or ultimate ownership of property after transfer was not substantially similar to that which existed before such transfer and transfer was not exempt from sales tax. West's Ann.Rev. & Tax.Code, § 6006.5.

5. Appeal and Error ⇨1010(1)

A trial court's finding of fact is not binding on Supreme Court unless such finding is supported by evidence.

6. Appeal and Error ⇨842(2)

A trial court's finding which involves construction of a statute in its applicability to given situation is conclusion of law which is reviewable by Supreme Court.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman, Dan Kaufmann and James C. Maupin, Deputy Attys. Gen., for appellant.

Thomas A. Wood and Larwill & Wolfe, Los Angeles, for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment entered in favor of plaintiff in an action for

a refund of certain sales taxes, interest and penalties paid under protest, after trial before the court without a jury.

Although other issues were tried in the action, the sole question presented on this appeal is whether plaintiff is required to pay a sales tax with respect to a certain transfer to Pacific Pipeline & Engineers, Ltd., by plaintiff on March 14, 1949, of machinery and equipment valued at \$201,230.50. Defendant determined that plaintiff was required to pay a tax of \$6,491.78.

Prior to February 24, 1949, plaintiff and Engineers, Ltd., jointly owned Pacific Pipeline & Engineers, Ltd., which was engaged in the pipeline construction business. On February 24, 1949, an agreement was entered into by the three corporations and certain individuals providing for a reorganization of Pacific Pipeline & Engineers, Ltd., and plaintiff and for a territorial division of the pipeline business. On March 12, 1949, plaintiff entered into an agreement with Pacific Pipeline & Engineers, Ltd., providing for the exchange of certain properties to carry out the agreement of February 24th, and on March 14, 1949, the exchange occurred. The trial court determined that the sale was an occasional sale under sections 6367 and 6006.5 of the Revenue and Taxation Code.

[1] The transfer in question was unquestionably a sale¹ at retail² of tangible personal property. It is conceded that the gross receipts from the sale must be included in the measure of the tax imposed by section 6051³ of the Revenue and Taxation Code, unless the sale was an occasional sale

1. "Sale" means and includes: (a) Any transfer of title or possession, *exchange*, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. * * * (Italics added.) Revenue and Taxation Code, § 6006.

2. "A 'retail sale' or 'sale at retail' means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. * * * Revenue and Taxation Code, § 6007.

"Retailer" includes: (a) Every seller who makes any retail sale or sales of tangible personal property. * * * Revenue and Taxation Code, § 6015.

3. "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after

under sections 6367⁴ and 6006.5. Section 6019⁵ was enacted subsequent to the transfer here involved and is therefore not considered.

Section 6006.5 defines an occasional sale as follows: "Occasional sale" includes: (a) A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit; (b) Any transfer of all or substantially all the property held or used by a person in the course of such an activity when after such transfer the real or ultimate ownership of such property is substantially similar to that which existed before such transfer. For the purposes of this section, stockholders, bondholders, partners, or other persons holding an interest in a corporation or other entity are regarded as having the 'real or ultimate ownership' of the property of such corporation or other entity."

[2] The undisputed evidence shows that the sale was one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit and was therefore not an occasional sale under subdivision (a) of section 6006.5. Plaintiff's own evidence shows that in 19 separate sales, in addition to the sale in question, it sold at various times from 1947 through 1950, 65 items of equipment for a total of \$41,879.22. Three sales took place within six months preceding the sale in question and two in the

July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter." Revenue and Taxation Code, § 6051.

4. "There are exempted from the taxes imposed by this part the gross receipts from occasional sales of tangible personal property and the storage, use, or other consumption in this State of tangible personal property, the transfer of which to the purchaser is an occasional sale." Revenue and Taxation Code, § 6367.

month following. The items sold from 1947 to 1950 included trucks, automobiles, generators, a compressor, a steam cleaner, cranes, trailers, tar pots, and a dynamometer. The items sold in the sale in question included trucks, an automobile, generators, compressors, steam cleaners, cranes and crane attachments, trailers, and tar pots.

Although they involved sales prior to the enactment of section 6006.5 the following cases are directly in point, for they involved essentially the same question that section 6006.5 (a) presents, namely, was the sale one of a series of sales sufficient in number, scope and character to constitute an activity requiring the seller to hold a seller's permit. In fact, the words of the statute "number, scope and character" were apparently taken from this court's opinion in *Northwestern Pacific R. R. Co. v. State Board of Equalization*, 21 Cal.2d 524, 529, 133 P.2d 400. That case held that five sales of rolling stock over a three year period for about \$100,000 could not be regarded as casual or isolated sales, and that the seller was therefore a retailer and the tax applied. *Market Street Ry. Co. v. California State Board of Equalization*, 137 Cal.App.2d 87, 95, 290 P.2d 20, 25, involved about 900 sales totaling about \$100,000 during a 15 year period. Considering the "number, scope, and character of the transfers," the court held the seller to be a retailer. *Los Angeles City High School District v. State Board of Equalization*, 71 Cal.App.2d 486, 488, 489, 163 P.2d 45, held that sales of buildings, improvements, and equipment not needed by the school districts, averaging two to three sales per

5. "Every individual, firm, copartnership, joint venture, trust, business trust, syndicate, association or corporation making more than two retail sales of tangible personal property during any 12-month period, including sales made in the capacity of assignee for the benefit of creditors, or receiver or trustee in bankruptcy, shall be considered a retailer within the provisions of this part in his or its individual, firm, copartnership, joint venture, trust, business trust, syndicate, associate or corporate capacity." Revenue and Taxation Code, § 6019.

quarter over a three year period were sufficient to make the sellers retailers and subject to the tax. Moreover, *Sutter Packing Co. v. State Board of Equalization*, 139 Cal.App.2d 889, 895-896, 294 P.2d 1083, 1087, involving a sale after the enactment of section 6006.5, held that a sale consummated on June 1, 1949, was one of a series and that the gross receipts therefrom must be included in the measure of the tax although they totaled \$700,000 and the gross receipts from the largest sale since 1945 had totaled only \$12,063.69. The court there stated: "There appears to be nothing, however, inherently different in the nature of the items sold in the final sales than in the earlier sales of used equipment, although it is true that it was a much larger sale of a greater variety of items."

[3] It is immaterial whether or not the property transferred was used for field operations. Moreover, not only is there no evidence that the various sales to others were not sales of field equipment, but plaintiff's own exhibits disclose that the property transferred was the sort of property in which plaintiff dealt as a seller. Thus, plaintiff's list of items in the sale to Pacific Pipeline & Engineers, Ltd., includes 80 trucks, 1 automobile, 33 generators, 31 tar pots, 25 trailers, 3 cranes and 16 crane attachments, 3 steam cleaners, 20 compressors and 1 dynamometer and its list of retail sales to others includes 36 trucks, 13 automobiles, 4 generators, 2 tar pots, 3 trailers, 2 cranes, 1 steam cleaner, 1 compressor, and 1 dynamometer. Nor is it material that there were no similar sales between the two corporations, for in any series of sales by a retailer there is ordi-

narily a different purchaser in each sale, and the fact that the sales are not to the same purchaser serves to demonstrate "an activity requiring the holding of a seller's permit." Furthermore, the fact that three corporations were involved in the whole deal has no bearing on the question whether the sale was "one of a series," but is relevant only in determining whether it was an occasional sale under subdivision (b) of section 6006.5.

[4] Plaintiff has not met the burden of proof placed upon it by section 6091⁶ of the Revenue and Taxation Code to show that the sale was an occasional sale under subdivision (b) of section 6006.5. The reorganization pursuant to which the sale took place was not a liquidation, but a territorial division of the "pipeline business" between two corporations. There is no finding and no evidence that the sale involved all or substantially all of the property held or used by the plaintiff. Plaintiff's allegations and proof and the court's findings indicate only that the transfer was an exchange of "certain properties" and "certain equipment" and the reorganization agreement expressly excludes an undisclosed amount of plaintiff's property from the transfer. Moreover, there is no finding and no evidence that the real or ultimate ownership of the property sold was substantially similar before and after the transfer. The evidence indicates the contrary.⁷ Thus, the reorganization agreement provided that the purchaser, Pacific Pipeline & Engineers, Ltd., was to be owned and operated jointly by Roy Price and Engineers, Ltd. Although G. W. Abernathy had a substantial interest in the seller, Pacific

6. "For the purpose of the proper administration of this part and to prevent evasion of the sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale."

7. The only testimony in the record on this issue was:

"Q. Now, do you know what the nature of this transaction was, Mr. McDuffie? Will you explain to the Court just what happened in the transfer of that particular property?"

"Mr. Sumner: Now, just a moment. I think that I will object to that on the ground, No. 1, it is not the best evidence. I understand this transaction was the subject of a written contract.

Pipeline Construction Company, both before and after the reorganization, he apparently had no interest in the purchaser, Pacific Pipeline & Engineers, Ltd., after the reorganization. In the present state of the record, therefore, it cannot reasonably be held that the real or ultimate ownership of the property after the transfer was "substantially similar to that which existed before such transfer."

Since neither subdivision (a) nor subdivision (b) of section 6006.5 applies to the sale in question, and since no other provision of law exempts it from the operation of section 6051, that section controls. It follows that the gross receipts from the sale were properly included in the measure of the tax.

"Mr. Wolfe: I am going to introduce the contract, counsel. I am leading up as preliminary, and I will get into that.

"The Court: Well, if the witness knows, he may tell us as a starting point. We won't look to his testimony varying the terms of the contract. You may answer the question.

"The Witness: What was the question again?

"The Court: Will you read the question again, Mr. Reporter. (Question read.)

"The Witness: I do know the equipment was transferred. I know what equipment was involved, and I do know there was an agreement, I have seen that, but I do not know what is in the agreement.

"Q. By Mr. Wolfe: Well, do you know to whom the property was transferred? A. There were—

"Q. Do you know to whom it was transferred—the property? A. Well, yes. Pacific Pipeline Construction Company, Pacific Pipeline & Engineers, Ltd., and Engineers, Ltd., were the three corporations involved in the whole deal. It was transferred to the same people, they were all the same people.

"Q. In other words, this \$201,000 was transferred to the—what was it, the Pacific Pipeline & Engineers, Ltd.? A. That's right."

It cannot reasonably be inferred from the statement "It was transferred to the same people, they were all the same people" that the real or ultimate ownership of the property was substantially similar before and after the transfer. Immediately following this statement the

[5,6] Despite the undisputed evidence demonstrating that the sale in question was one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit, and despite the absence in the record of any evidence that the sale was a transfer of all or substantially all the property held or used by plaintiff in the course of such activity or of any evidence that after the transfer the real or ultimate ownership of the property was substantially similar to that which existed before the transfer, it is contended that the finding of the court that the sale was an occasional sale is binding on this court. The two inescapable answers to this contention are: (1) Even regarded as a finding

witness made clear what he meant, namely that the property was transferred to Pacific Pipeline & Engineers, Ltd. Neither he nor any other witness was asked who ultimately owned the purchaser, Pacific Pipeline & Engineers, Ltd., and it is apparent that counsel was simply attempting to elicit that the property was sold to this purchaser and was not inquiring as to the ultimate ownership thereof.

Moreover, the transfer was made pursuant to an agreement (plaintiff's Exhibit No. 15), which provides for a change in the ultimate ownership of both transferor and transferee. The foregoing testimony was simply preliminary to the introduction of the agreement and the witness testified that he did not know what was in the agreement. The agreement shows plainly that the ultimate ownership was not substantially the same before and after the transfer and reorganization. It provides: "It is the fundamental intent of the parties hereto that Abernathy shall acquire assets substantially equal in value to the present value of his one half ownership of Pacific. * * *" Thus before the transfer and reorganization 50% of the ultimate ownership of this equipment was held by Abernathy. After the transfer and reorganization, G. W. Abernathy had no interest in the property transferred, for the agreement provides that after the reorganization the northern business will be retained by Pacific Pipeline & Engineers Limited and that "Roy Price and Engineers, Limited will jointly own and operate" the northern business.

of fact the court's finding is without any evidence to support it, and (2) the so-called finding, involving as it does, "the construction of a statute and its applicability to a given situation" is actually a conclusion of law (In re Estate of Madison, 26 Cal.2d 453, 456, 159 P.2d 630, 632) that is patently erroneous under the express language of the statute and previous controlling decisions.

The judgment is reversed.

GIBSON, C. J., and CARTER and SPENCE, JJ., concur.

McCOMB, J., dissents.

SCHAUER, Justice (dissenting).

The trial court, from a wealth of oral and documentary evidence showing the transactions involved and the relationships of the parties, both contractual and territorial, and including stock ownership, presumptively resolved all conflicts and drew all permissible inferences in favor of plaintiff. Among other things, it expressly found that "said transfer of property [on which the disputed tax is based], as provided for in * * * [the] exchange agreement, was not a sale of property at retail such as is contemplated by and referred to in Section 6051 of the Revenue and Taxation Code, but was an occasional sale within the meaning of that term as used in Sections 6367 and 6006.5 of the Revenue and Taxation Code, and as contemplated by the pertinent law of California." Certainly, a transfer of property was involved but equally certain is the fact that it was not any ordinary retail sale. Specifically, the trial court found that the subject agreement effected "a reorganization of the Pacific Pipeline and Engineers, Ltd., and of the plaintiff and for a territorial division of 'pipeline business' between said corporations" and that the transfer involved was made to carry out such agreement. Based on all the evidence before it, including the inferences it drew, and guided by the applicable statute, the trial court reached its above quoted conclusion of mixed law and fact;

i.e., that the subject transfer "was not a sale of property at retail such as is contemplated by and referred to in Section 6051 * * * but was an occasional sale within the meaning of that term * * * as contemplated by the pertinent law of California." Overturning that finding-conclusion necessarily involves a re-weighing and *re-weighting* of the evidence, and that is not properly within the function of this court.

It is the duty of this court not only to view the evidence favorable to sustaining the findings but likewise to liberally construe the findings in favor of the judgment. (Richter v. Walker (1951), 36 Cal.2d 634, 639 [1, 3, 4], 226 P.2d 593.) Furthermore, as stated in the Richter case in 36 Cal.2d at page 640 [5], 226 P.2d at page 596, "It is * * * to be noted that while full findings are required upon all material issues a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made."

It appears to me that the majority, rather than conforming to the rules above stated, have scrutinized and construed both evidence and findings to the end of reversal rather than affirmance. For example, the majority, without relating all of the evidence pertinent to the ultimate fact, state that "The undisputed evidence shows that the sale was one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit and was therefore not an occasional sale under subdivision (a) of section 6006.5. * * *" That declaration either ignores or gives no weight to the evidence establishing the isolated and distinct character of the subject transaction.

There is substantial evidence that this was "A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit," and that "such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit"

(Rev. & Tax Code, § 6006.5, par. (a)). Plaintiff's manager and plant engineer testified as follows:

"Q. Mr. Porter, to your knowledge have there ever been any other transfers by Pacific Pipeline Construction Company as shown in Exhibit B to Exhibit 16, or as referred to in Exhibit 15? In other words, the two agreements [evidencing the subject transfer]? A. I take it that you mean transfers between the two companies that did exist at one time?

"Q. That is right. A. Not to my knowledge.

"Q. Or similar transactions between any individuals of the companies? A. No.

"Q. That was the only one instance in which you had such a transaction? A. To the best of my knowledge, that is true."

The foregoing testimony, although sufficient in itself to support the trial court's finding on the most critical issue, is only a part of the evidence tending to show that the subject transfer was an isolated and "occasional" transaction. The fact that the witness further testified that "There could be" sales of which he did not know, certainly does not make the quoted testimony incompetent; it goes merely to the weight to be accorded such testimony and, as I have emphasized, and the majority ignore, the weight of the evidence is for the trial court's resolution.

It is significant, as further supporting the trial court's finding that this sale was "occasional," that there is evidence, presumably believed by the trial court, that this was not a sale to an outside or retail customer. There is direct testimony that "Pacific Pipeline Construction Company, Pacific Pipeline & Engineers, Ltd., and Engineers, Ltd., were the three corporations involved in the whole deal. It was transferred to the same people, they were all the same people." Furthermore, the majority reweighs evidence that the property transferred was used for field opera-

tions and that it was not the sort of property in which plaintiff customarily dealt as a seller, and gives to such evidence as reweighed an effect unfavorable rather than favorable to upholding the findings and judgment.

The relationship among the three corporations (its evidential effect is also disregarded or re-weighted by the majority) was described as follows by the witness Ramey, plaintiff's office manager:

"Prior to 1946 in October, Pacific Pipeline Construction Company * * was organized for the purpose of carrying on pipeline maintenance. In other words, what we did was anything pertaining to the pipeline in the field. In other words, the installation and maintenance of oil, gas, water type of pipelines. * * * That was its primary function. * * * In October, 1946, the Pacific Pipeline Construction Company formed a partnership with Engineers, Ltd., a corporation * *, for the purposes of continuing this general field of pipeline work, and that became known as Pacific Pipeline & Engineers, Ltd. So Pacific Pipeline Construction Company ceased, doing general field operations in its own name at that time. Engineers, Ltd., of course, had their own business doing construction work on dams and large buildings, but they went into a partnership under the name of Pacific Pipeline & Engineers, Ltd., continuing the same work in the same field that had been done prior by the other corporation. In October, 1947, Pacific Pipeline & Engineers, Ltd., formed a corporation; in other words, they changed from a partnership setup to a corporate setup, continuing the same type of work.

"Approximately at that time * * a coating and reconditioning plant was laid out * * * and that would have been under the setup of Pacific Pipeline & Engineers, Ltd., inasmuch as I repeated previously Pacific Pipeline Construction Company had ceased any field operations or any functional op-

erations at that time. That operation was continued until March, 1949 [the time of the sale in controversy], at which time it was decided that the Pacific Pipeline & Engineers, Ltd., as it had conducted its business in Los Angeles and throughout the state, it was decided by the principals involved in these companies that there would be a reorganization; in other words, a change in the location of where they functioned in their work, and so up to that point that is where the change took place.

"Q. In other words, you are telling us then that at that time they broke up the former partnership which had become a corporation and went their separate ways? A. That is correct.
* * *

"Q. And at that time there was a distribution of the assets of the corporation known as Pacific Pipeline & Engineers, Ltd. To the various principals that had formerly been partners, and to some of the individuals—A. That is correct.

"Q. —in the corporation? A. That is correct.

"Q. In other words, a sort of a reorganization? A. That is true."

The mentioned distribution from Pacific Pipeline & Engineers, Ltd., to plaintiff was in exchange for the subject transfer.

Accepting the view, implicit in the majority opinion, that the "finding" that this was an occasional sale involved also (as do findings in many cases, including those in ordinary personal injury litigation) a conclusion of mixed law and fact, it is obvious that the ultimate determination by the trial court as to whether this was an occasional sale involved consideration of all the evidence which was before that court, including necessarily that which has been summarized, and resolution of the conflicts, including the varying inferences which could be drawn from any part or the whole of it. Although on the foregoing evidence reasonable minds could differ, it is manifest that

the trial court's conclusion is supportable from the evidence and the facts found. Accordingly, if we follow the rules hereinabove stated, the judgment should be affirmed.

SHENK and McCOMB, JJ., dissent.



49 Cal.2d 720

**Leona Faye DOW and Leona Faye Dow, as
Guardian ad litem of Richard Floyd Dow,
a Minor, Plaintiffs and Respondents,**

v.

**HOLLY MANUFACTURING COMPANY (a
Corporation), et al., Defendants,
George W. Bledsoe, Defendant and
Appellant.**

L. A. 24695.

Supreme Court of California,
In Bank.

Feb. 18, 1958.

Action by widow and son against general contractor for wrongful death of her husband and two children who were asphyxiated by carbon monoxide coming from a gas heater. From adverse judgment of the Superior Court, San Diego County, Arthur L. Mundo, J., the contractor appealed. The Supreme Court, Carter, J., held that whether plumbing contractor, who installed gas heater in house being built by general contractor, was an employee or independent contractor was immaterial and that general contractor was liable for death of subsequent owner of house and his children from carbon monoxide which escaped from defective heater.

Judgment affirmed.

McComb, J., dissented.

Opinion, 312 P.2d 316, vacated.

I. Master and Servant ⇄315

Whether plumbing contractor, who installed gas heater in house being built by

general contractor, was employee or independent contractor was immaterial and general contractor was liable for death of subsequent owner of house and his children from carbon monoxide which escaped from defective heater.

2. Negligence $\S$ 55

A general contractor has duty to inspect appliances installed in building constructed by him.

3. Negligence $\S$ 24, 25

One who installs a dangerous instrumentality is in such installation charged by law with knowledge of particular dangerous characteristic of instrumentality and of manner and means by which danger or dangers are likely to eventuate into actual harm, and with duty to use that degree of care which is commensurate with danger to guard or insulate against it.

4. Gas $\S$ 20(4)

In action by widow and her son against general contractor for death of her husband and two children allegedly caused by defective gas heater installed in house constructed by general contractor, whether contractor was negligent in permitting house to be occupied with defective heater which caused deaths for which recovery was sought was a question of fact for jury.

Gray, Cary, Ames & Frye and Sterling Hutcheson, San Diego, for appellants.

McInnis, Hamilton & Fitzgerald and John W. McInnis, San Diego, for respondents.

CARTER, Justice.

[1] Plaintiff Leona Faye Dow is the widow of Howard Dow and the mother of Patricia and Arthur Dow. Plaintiff, Richard Dow, is the son of Howard Dow and brother of Patricia and Arthur. Plaintiffs were awarded damages against defendant Bledsoe for the wrongful deaths of Howard, Patricia and Arthur. The case was tried before a jury and no verdict was ren-

dered with respect to defendant Holly Manufacturing Company. Defendant Bledsoe, hereinafter referred to as defendant, appeals from the judgment.

The deaths were caused by asphyxiation from carbon monoxide coming from a gas heater in the home of the Dow family. Dover, a plumbing contractor who installed the heater, was not a party to the action.

The home was built by defendant Bledsoe, as general contractor, for Mr. Muth between September, 1950 and February, 1951; defendant also prepared the plans and specifications. Mr. Muth was the then owner of the property. Muth never occupied the house. He sold it to Mr. and Mrs. Petty in April, 1951; they occupied the house until they sold it to the Dows in 1953. Plaintiff, Mrs. Dow, left her home with one son, Richard, the other plaintiff, for a visit in the middle west on January 15, 1954. They returned on January 26, at 8:00 p. m. and found the doors and windows closed, the hall gas heater on and Mr. Dow and the two children dead from asphyxiation.

The plans and specifications provided for the installation in the walls of the house of two 25,000 B.T.U. gas heaters, one in the living room, thermostatically controlled, and the other in the hall, manually controlled. Defendant contracted with Dover, a licensed plumbing contractor, to install the heaters.¹ Dover bought two heaters from the Holly Manufacturing Company and had his employees install them in the walls. He also installed, immediately above the hall heater, a "secondary heat exchanger," which was also installed in the wall above the top of the heater and below the ceiling and around the vent which extended upward to the roof, and a grill was placed in the wall just below the ceiling to admit heat into the room. Heat and the products of combustion arose through the vents from the heaters. Defendant saw the secondary heat exchanger when the wall studing was still uncovered. The heaters

1. There is a dispute as to whether Dover was an independent subcontractor, de-

fendant claiming he was as a matter of law; more will be said of that later.

themselves were installed when the house was nearly completed. The city building inspectors also saw the "secondary heat exchanger" and made no complaint to defendant. Defendant examined the heaters to see if the American Gas Association seal was on them.

It appears that above the burner there is a heat exchanger which is a metal box concealed by panels on the front of the heater. The flue to the roof (heater vent) goes from that exchanger to the roof. There is a grill at the top of the panel from which heat flows, the air being heated because the box or exchanger is heated. Dover also put a grill in the wall near the ceiling above the heater, giving access to the area around the flue which is heated by reason of the flue passing through it. That is referred to as a "secondary heat exchanger."

There is evidence that after the deaths the hall heater, including the flue, were heavily sooted, cutting down the area for the out-flow through the flue; that the flame was yellow instead of blue as it should have been, which meant an overfiring (too much gas coming into the burner) and the impairment of passage by the soot; that there was soot on the grill near the ceiling and on the wall and ceiling; that the heater had been changed to accommodate the secondary heat exchanger and had the wrong burner for it; that the orifices which admitted the gas for burning were too large, being proper for a 35,000 rather than a 25,000 B. T. U. heater; that the heater was a 25,000 B. T. U. design; that as a result of the larger orifices sooting would occur, which, over a period of time, would result in carbon monoxide entering the house from the heater; that carbon monoxide is a colorless and odorless gas, and it was coming from the heater in large quantities when tested after the deaths; that the effect of installing a secondary heat exchanger on a heater like the hall heater would be that the heater would be only partially vented, and a substantial portion of the products of combustion would spill out of the relief opening in the draft head; that one could not install a second-

ary heat exchanger on the hall heater without altering the appliance; that the use of a secondary heat exchanger with the hall heater would cause flue products to spill out of the relief opening in the draft head; that products of combustion would come into the room because of poorly constructed vent features; that because the hall heater was not adapted to a secondary heat exchanger it was not good practice to use one and would be more of a hazard if the heater were overfired. While there is some inconsistency within the testimony of some of plaintiffs' witnesses and there is otherwise a conflict in the evidence, those were matters for resolution by the finder of fact, the jury here. The evidence is thus sufficient to show the installation of a defective heater, which clearly constituted negligence. Whether that negligence was on the part of Dover or defendant is unimportant for the reasons hereinafter appearing.

It should first be observed that the owner for whom the house was built by defendant general contractor had accepted the house and it had been transferred by him, with title finally vesting in the Dows. At one time this was an obstacle to recovery from the general contractor on the theory that there was no privity of contract between the contractor and the person injured, but it is no longer the law, as obviously, the problem presented is the same as where a manufacturer negligently manufactures an article which subsequently injures someone other than the purchaser of the article. See famous case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696. Commenting on this subject a well-known text writer states: "Where the defendant has in fact misperformed his contract, and is to be charged with 'misfeasance' resulting in injury to a third person, it is to be expected that liability to third persons will be found more readily; and in general this has been true. Even here, however, the great obstacle has been the notion of the necessity of 'privity of contract' inherited from the misinterpretation of *Winterbottom v. Wright*.

* * * All this is now ancient history. The analogy of the seller has prevailed, and the late decisions are agreed that the man who negligently repairs a vehicle or any other chattel is liable to others who may be injured because of that negligence, to the same extent as if he had made and sold the chattel in the first instance." (Prosser on Torts, (2d ed.) p. 517.) And with respect to building contractors: "Until quite recent years it was the prevailing rule that the contractor would be liable for any injury resulting from his negligence before his work was completed, but that his responsibility was terminated and he was not liable to any third person once the structure was completed and accepted by the owner."

* * *

"The present state of the law is not altogether clear because of the survival of so many of these exceptions, which afford an opportunity to hold the defendant liable without stating any general rule. It appears, however, that the analogy of *MacPherson v. Buick Motor Co.* is at last being accepted. Several recent decisions have placed building contractors on the same footing as sellers of goods, and have held them to the general standard of reasonable care for the protection of anyone who may foreseeably be endangered by the negligence, even after acceptance of the work." (Prosser on Torts (2d ed.) p. 517.) See, also, *Hale v. Depaoli*, 33 Cal.2d 228, 201 P.2d 1, 13 A.L.R.2d 183; *Moran v. Pittsburg-Des Moines Steel Co.*, 3 Cir., 166 F.2d 908; *Hunter v. Quality Homes*, 6 Terry 100, 45 Del. 100, 68 A.2d 620; *Colton v. Foulkes*, 259 Wis. 142, 47 N.W.2d 901; *Colbert v. Holland Furnace Co.*, 333 Ill. 78, 164 N.E. 162, 60 A.L.R. 353; *Wright v. Holland Furnace Co.*, 186 Minn. 265, 243 N.W. 387; Rest. Torts, § 385; cases collected 42 Va.L. Rev. 403; 13 A.L.R.2d 191.

Turning to the question of whether the general contractor was liable for the negligent installation of a defective gas heater by Dover, his subcontractor, which brought death to plaintiff's husband and children, there are analogous situations pointing to liability.

It has been held that the owner of property cannot escape liability for a dangerous condition on his property by having an independent contractor assume the duty of constructing or repairing a building or chattel. *Knell v. Morris*, 39 Cal.2d 450, 247 P.2d 352; *Brown v. George Pepperdine Foundation*, 23 Cal.2d 256, 143 P.2d 929; *Snyder v. Southern Cal. Edison Co.*, 44 Cal.2d 793, 285 P.2d 912. There is no reasonable distinction between the owner's inability to escape liability and that of the contractor. The contractor, equally with the owner of the property, has supervision over the entire building and its construction, including the work performed by a subcontractor, and where he negligently creates a condition, either by himself or through a subcontractor, he is primarily responsible for that condition and the consequences that may follow from it. He is in full control of the construction and knows or should know what is being placed in the building. Indeed, what is placed there is peculiarly within his knowledge, and where, as here, it involves a defective appliance which is covered and hidden by the walls in the course of construction, the responsibility for such defect should rest upon him as well as on the subcontractor.

[2] There is also a close analogy between a supplier of chattels and a general contractor for the construction of a building. The contractor supplies all of the materials used as well as the labor either by fabricating it himself, buying it from another or having an independent subcontractor do the same thing. The owner in effect buys a properly completed building from the contractor which the contractor is bound to supply. In the case of the supplier of chattels when he supplies the goods it is immaterial to his liability that he may have had another supply the product; he is nevertheless liable because he has vouched for the chattels as his own by taking the contract. The same is true of a house where he supplies many parts, as well as labor, most of which are probably not fabricated by him but by independent contractors or sellers. In such

case the supplier is liable to third persons for negligence. See, *Slavin v. Francis H. Leggett & Co.*, 114 N.J.Law 421, 177 A. 120, affirmed 117 N.J.Law 101, 186 A. 832; *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N.E. 474; *Swift & Co. v. Hawkins*, 174 Miss. 253, 164 So. 231; *Moran v. Pittsburg-Des Moines Steel Co.*, supra, 166 F.2d 908; *Hunter v. Quality Homes*, 6 Terry 100, 45 Del. 100, 68 A.2d 620; *Colton v. Foulkes*, 259 Wis. 142, 47 N.W.2d 901; *McCloud v. Leavitt Corporation*, D.C., 79 F.Supp. 286; *Inman v. Binghamton Housing Authority*, 1 A.D.2d 559, 152 N.Y.S.2d 79; Rest.Torts, §§ 385, 400. The following comment is here pertinent: "In specifically rejecting the *Ford v. Sturgis* [56 App.D.C. 361], 14 F.2d 253 [52 A.L.R. 619] rule insofar as it is contrary to the present holding [*Hanna v. Fletcher*, [97 U.S.App.D.C. 310, 231 F.2d 469], the court has demolished one of the few remnants of the classic privity-of-contract doctrine which insulated builders and manufacturers from liability to ultimate users and consumers. Both the majority and the minority found no difficulty in applying the *McPherson* [sic] rule to building contractors, and their only disagreement seems to be on the facts of this particular case. Thus, building contractors will be treated like all other independent contractors, manufacturers, and vendors in regard to negligently manufactured products which cause injuries to persons not in privity of contract. It seems perfectly logical not to differentiate between the two classes of contractors. Historically the same rules of law have usually applied to both. The good sense of the *McPherson* [sic] liability rule has been so widely praised and is so well accepted that it has become a substitute for the 'general rule' of nonliability, rather than an exception. Regardless of the facts of the instant case, this notion is desirable from a social policy point of view and deserves the widespread application which it is receiving." (42 Va.L.Rev. 403, 405.) There is also an analogy in the rule stated in the Restatement. "One who puts out as his own product a chattel manufactured

by another is subject to the same liability as though he were its manufacturer." (Rest. Torts, § 400.) While ordinarily that may refer to goods sold under a trade name, there is no substantial difference between that situation and a contractor who puts out a completed house including gas heaters which appear as his product; moreover, the defendant here prepared the plans and specifications for the house. Surely there is no valid distinction between a general contractor constructing a building and using subcontractors to install equipment therein, and the manufacturer of an automobile buying parts not fabricated by it to install in the car, and selling the assembled car. There should be liability in both cases. Moreover, it should be observed that the general contractor had the duty to inspect appliances installed in the building and should have inspected the installation of the defective heater here. He had general control over all his subcontractors and their works. Although there is evidence that he made such an inspection, the jury could have disbelieved him or have found that it was not a sufficient inspection.

[3,4] It should be remembered that "One who * * * installs a dangerous instrumentality, of which a gas heater is an example, is in such installation charged by law (1) with knowledge of the particular dangers characteristic of the instrumentality and of the manner and means by which the danger or dangers are likely to eventuate into actual harm, and (2) with the duty to use that degree of care which is commensurate with the danger, to guard or insulate against it. Such a rule has its roots in an impelling necessity in the promotion of the safety and security of life and property—it has its foundation in the essence of the social compact." *American Heating & Plumbing Co. v. Grimes*, 192 Miss. 125, 4 So.2d 890, 891; see, *Gobrecht v. Beckwith*, 82 N.H. 415, 135 A. 20, 52 A.L.R. 858. Gas heaters have the inherent capacity for great harm unless they are properly made and installed, especially since their defects are usually

concealed from the occupant of the building and the deadly gas, carbon monoxide, gives no warning of its presence. They may be compared to the gas they burn which is inherently dangerous and the duty with respect to which cannot be delegated (see, *Ambriz v. Petrolane, Ltd.*, 49 Cal.2d 470, 319 P.2d 1) for they are the instrumentalities which use and should control and make safe the use of the gas. Since the liability of defendant Bledsoe was established by proof of the fact that a defective heater was installed in the house by Dover, which was the proximate cause of the deaths of plaintiff's husband and children, it is immaterial whether Dover was an employee of Bledsoe or an independent contractor. It was defendant's responsibility to construct a house equipped with an adequate heating system and he could not negate that responsibility by delegating to Dover, even as a subcontractor, the work of installing the necessary equipment for said heating system. It is obvious that if he had discovered the defect in the heater installed by Dover, he would have required Dover to correct the defect or replace the heater. The fact that he did not discover the defect does not relieve him of liability, as it was a question of fact for the jury as to whether he was negligent in permitting the house to be occupied with the defective heater which caused the deaths for which recovery was allowed.

Defendant complains of a jury instruction which stated that there was a presumption that Dover was an employee of defendant when he was an independent contractor as a matter of law and of the exclusion of evidence bearing on the nature of their relation to each other. In view of the result we have reached herein those matters are immaterial and defendant was not prejudiced.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

McCOMB, J., dissents.

Matter of the ESTATE of Nellie NEUBAUER, Deceased.

**HAZEL HURST FOUNDATION, Contestant and Appellant,
Florence Sweeney, Contestant and Appellant,
v.**

**Charles EAMES, Petitioner and Respondent,
Shriners Hospital for Crippled Children,
Los Angeles Orthopaedic Foundation, Crippled Childrens Society of Los Angeles,
State of California, Legatees and Respondents.**

L.A. 24410.

**Supreme Court of California,
In Bank.**

Feb. 21, 1958.

Rehearing Denied March 19, 1958.

Heirship proceedings. The Superior Court, Los Angeles County, Burdette J. Daniels, J., entered order determining heirship and excluded foundation, a legatee under original will, and a substitutional legatee from taking under will and they appealed. The Supreme Court, Carter, J., held that where testatrix made charitable bequests, including one to foundation, and provided that, in event charitable bequest was held invalid, a certain named friend was to be substituted, and, after execution of will testatrix drew line through bequest to foundation, will, as to foundation, was admitted to probate in that form, foundation, although it received notice of intention to probate will, did not appear, question of what constituted will of testatrix was res judicata and trial court, could not, in heirship proceeding, determine that bequest to foundation had been eliminated from will inasmuch as court was limited to an interpretation and construction of the terms of the will as admitted to probate.

Order determining heirship of substituted legatee affirmed; order as it related to interest of foundation reversed.

Opinion, 315 P.2d 494, vacated.

WILLS 427

Where testatrix made charitable bequest, including one to a foundation, and provided that in event charitable devise was

held invalid a certain named friend was to be substituted, and after execution of will testatrix drew line through bequest to foundation, will, as to foundation, was admitted to probate in that form, foundation, although it received notice of intention to probate will, did not appear, question of what constituted will of testatrix was res judicata and trial court could not, in heirship proceeding, determine that bequest to foundation had been eliminated from will inasmuch as court was limited to an interpretation and construction of the terms of the will as admitted to probate. West's Ann.Prob.Code, §§ 41, 220 et seq., 380; West's Ann.Code Civ.Proc. §§ 1327, 1333; West's Ann.Civ.Code, § 1292; West's Ann. Prob.Code, §§ 384, 1080.

Edward Raiden, Los Angeles, for appellant Hazel Hurst Foundation.

Harold L. Green, Los Angeles, for appellant Florence Sweeney.

Watkins & Charlton, Los Angeles, for respondents.

CARTER, Justice.

Two appeals from an order determining heirship and the judgment entered thereon are here involved and will be considered separately insofar as practicable.

There is no dispute concerning the facts. Nellie Neubauer executed a formal will on September 9, 1954. Her attorney retained the original and at her own request Mrs. Neubauer executed a duplicate which she retained in her possession. The will, which consisted of four pages, contained certain specific bequests which are not involved here. In the will Mrs. Neubauer directed her executor to pay to her husband the sum of \$250 per month during his lifetime. On pages 2 and 3 of the will Mrs. Neubauer directed that "(b) Upon the death of my said husband (or upon my death in the event my said husband does not survive me), then I direct that the rest and residue of my estate shall be distributed for general charitable purposes as follows: 40% thereof to the Los Angeles Orthopedic Foundation, Los Angeles, California; 40%

thereof to the Crippled Children's Fund, Los Angeles, California; 20% thereof to the Hazel Hurst Foundation, Azusa, California. I shall appreciate have [sic] the recipient charities commemorate my gift by placing my name on a plaque, or scroll or whatever device that organization ordinarily uses to perpetuate the memory of those who make gifts of the amount similar to my gift. With the intention of avoiding the statutory prohibition relating to charitable bequests and the invalidation thereof under Probate Code, Section 41, or any and all other similar provisions of the law, I declare that I desire to take advantage of the doctrine set forth in *Re Estate of Davis*, 74 Cal.App.2d 357, 168 P.2d 789, and *In re Estate of Haines*, 76 Cal.App.2d 673, 173 P.2d 693, as follows: In the event that any gift, legacy or devise to a charity or charitable organization, be held invalid in whole or in part, then I hereby substitute for such charity as such legatee or devisee my trusted friend, Florence Sweeney of Detroit, Michigan; or if she is deceased, the State of California."

Paragraph "Eighth" provided that "Having in mind my nieces and nephew and all other heirs and next of kin, I have intentionally omitted to give, bequeath or devise any of my property to my said heirs or next of kin, knowing that adequate provision has otherwise been made for each of them." The will also contained a no contest clause.

Mrs. Neubauer died on December 31, 1954, more than three months and less than six months after the execution of the will on September 9, 1954.

Without the knowledge of Mrs. Neubauer's attorney, Mrs. Neubauer altered the executed duplicate of the original will as follows: On page 2 of the duplicate the following bequest "(4) The sum of \$1,000, I give to Grace Ridley of Detroit, Michigan" had a single line drawn through it in ink and the following notation in testatrix' handwriting was made in the space following it: "I changed my mind about this—signed—Sept—9—54. Nellie Neubauer."

On page 3 provision (b) of the will as hereinbefore set forth had been altered as follows: The 20% bequest to the Hazel

Hurst Foundation had parentheses drawn around it and had been heavily overlined. Just above the overlining appeared the testatrix' signature. There was, however, no date appearing thereon. After the citation of the cases of Estate of Davis and Estate of Haines and following the words "as follows:" appeared these marks: "(In the event that any gift, legacy or devise to a *charity* or charitable organization, be held invalid in whole or in part, *then I hereby substitute* for such charity as such legatee or devisee my trusted friend, Florence Sweeney) * * *." It will be seen that the parentheses, and the underlining did not appear on the will as originally written.

The petition for probate recited "That on or about September 9, 1954, and after the execution of said will, said testatrix drew a line through subparagraph (d) of Paragraph Fifth of said will and inserted a paragraph that is entirely written, dated and signed by the hand of the testatrix herself." and prayed that the will be admitted to probate. In the petition for probate no mention was made of the lining over of the bequest to the Hazel Hurst Foundation. Both the altered duplicate and the original and unaltered will were attached to the petition for probate. While the record does not show which one was admitted to probate it is, apparently, admitted by the parties that it was the altered duplicate. The Hazel Hurst Foundation received a notice of intention to probate the will but did not appear on February 7, 1955, when the court heard the petition. On August 10, 1955, more than six months after the making of the above order, the executor petitioned the court for a Determination of Heirship. Notice of hearing was given the Hazel Hurst Foundation. After the hearing on the heirship proceeding, the court made findings of fact and conclusions of law wherein it was found that it was the "duplicate" altered will that had been admitted to probate and that at the time of admission the court had stated "The will is admitted in its present form; petitioner appointed; bond is

waived. The reason for that is that it bears a date and the signature and it is tantamount to an holographic codicil." It was also found that paragraph "seventh: (b) * * * '20% thereof to the Hazel Hurst Foundation, Azusa, California' have been eliminated from the will." The record does not show that any such findings were made on the probate of the will. The trial court in the heirship proceeding concluded that the testatrix died intestate as to twenty percent of the balance remaining after the termination of the trust in favor of testatrix' surviving husband "the amount to the Hazel Hurst Foundation, Azusa, California having been eliminated from the will, but said amount does not become a part of the residue to be distributed to any charity or charitable corporation under Paragraph Seventh (b). The Charitable bequest to the Hazel Hurst Foundation is not held invalid in whole or in part so as to be distributable to Florence Sweeney or the State of California, but has merely been stricken from the will as part of the holographic codicil heretofore adjudicated [the \$1,000 bequest to Grace Ridley], and is to be held in trust in the manner provided in Paragraph Seventh (a) for the benefit of James H. Neubauer for so long as he shall live, and then distributed to the persons entitled thereto under the laws of succession as set out in Chapter II, Division II of the Probate Code."

Both the Hazel Hurst Foundation and Florence Sweeney appeal from the judgment entered upon the above conclusion.

The Foundation argues that the order admitting the will to probate conclusively established that the gift in its behalf had not been revoked inasmuch as the probate of the will had not been contested, no appeal taken from the order and no contest made within the statutory period (Prob. Code, § 380). The Foundation relies on *In re Estate of Parsons*, 196 Cal. 294, 298, 299, 300, 237 P. 744, 746, where the will sought to be admitted to probate showed a number of erasures and interlineations attested by the initials of the decedent. Some of the lines and marks were not

attested or noted in any way and, according to the court, did not obliterate or render illegible or uncertain the plain provisions of the will. There was no objection or contest of any kind and the court executed the certificate required by law and annexed the original will thereto. The order admitting the will to probate was not appealed from and there was no contest thereof within the time required by law. Upon a petition for partial distribution the appellants there (those in whose favor the interlined bequests had been made) were denied distribution. This court there said: "In seeking a reversal of the order denying their petition for partial distribution, appellants invoke the application of sections 1327 and 1333 of the Code of Civil Procedure, which provide that, when a will has been admitted to probate, and no person, within one year after the probate, contests the same or the validity of the will, the probate of the instrument is conclusive (except as to those under certain disabilities). They do not question the rule that a portion of a will may be revoked by cancellation or obliteration, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction (Civ.Code, § 1292), but contend that the question of revocation by cancellation, or obliteration of the whole or of a part of a will, must be presented and decided either when the will is offered for probate, or by a proceeding or contest brought within one year after the will is admitted. The contention of the appellants must be upheld. The probate procedure of this state contemplates in the administration of the estates of deceased persons a series of different proceedings, each of which is separate as to the matters embraced within its purview. An adjudication as to each step in this series is intended to be final in its nature, and not subject to review in a subsequent stage of the administration of the estate. An order admitting a will may be appealed from, or the admission of the instrument to probate may be contested, and the validity of the will attacked within

one year after such probate, but an attack on the order, or a contest of the validity of the whole or of a part of the will, is not a direct attack merely because made or instituted in some proceeding connected with the administration of the same estate. In re Estate of Davis, 151 Cal. 318, 323, 86 P. 183, 90 P. 711, 121 Am.St.Rep. 105. The proceeding for the probate of the will is one *in rem*, instituted for the purpose of establishing the status of a written instrument. In re Estate of Baker, 170 Cal. 578, 585, 150 P. 989. The judgment admitting the instrument to probate is therefore binding upon all persons interested in the will who, being constructively notified to appear at the probate, might have come in, and who, had they come in, would have been heard for or against its validity. In re Estate of Allen, 176 Cal. 632, 633, 169 P. 364." It was held that the attack aimed at the will of the decedent Parsons by the respondent executor in response to a petition for partial distribution filed more than one year after the will was admitted to probate was "an independent and wholly distinct proceeding from that for the probate of the document. It is, therefore, a collateral and not a direct attack. In re Estate of Davis, *supra*." It was concluded that "the lower court was in error in denying the petition of the appellants for partial distribution on the ground that the provisions of the will making the bequests for them had been revoked."

It should be borne in mind that the words of the admitting court quoted by the court in the heirship proceeding could only have referred to the bequest to Grace Ridley which had been *dated* as well as signed when stricken out by the testatrix on the expressed ground that she had changed her mind "about this." The bequest of twenty per cent of her estate to the Hazel Hurst Foundation had been heavily lined over and the testatrix' signature placed above the lining over without any date. It also appears in one of the briefs that while the Grace Ridley bequest was revoked in ink, the one to the Foundation was lined over in pencil.

The Foundation also relies on the statement made in *Re Estate of Plaut*, 27 Cal. 2d 424, at page 427, 164 P.2d 765, at page 767, 162 A.L.R. 837, wherein it was said: "Upon the contest of a will, whether before or after probate, the court will ordinarily not construe the instrument. In *re Estate of Cook*, 173 Cal. 465, 468, 160 P. 553; In *re Estate of Fay*, 145 Cal. 82, 87, 78 P. 340, 104 Am.St.Rep. 17; In *re Estate of Pforr*, 144 Cal. 121, 125, 77 P. 825; In *re Estate of Murphy*, 104 Cal. 554, 566, 38 P. 543; In *re Estate of Cobb*, 49 Cal. 599, 604; see 2 Woerner, Administration, 3d Ed., 774. The only issue before the court is whether the instrument contested is or is not the will of the testator, and the power to construe will be exercised only in so far as it is necessary to the determination of that issue. See In *re Estate of Murphy*, supra, and cases cited in 2 Page on Wills, 3d ed., § 639." In *Re Estate of Brodersen*, 102 Cal. App.2d 896, 906, 229 P.2d 38, 44, the court emphasized that it is not the function of the trial court to construe a will in the proceeding brought for admission of the will for probate. The court in the *Brodersen* case discussed the *Estate of Parsons* and noted that in that case, "The question before the probate court was whether parts of the document which was presented to the court as a will had been manually deleted, so that not the whole instrument, but the parts not deleted, constituted the will of the testator. Since it was not found that portions of the will had been deleted, the will necessarily was as originally written and executed, and the order of the court to that effect was held to be *res judicata*." It was concluded that the facts of the *Brodersen* case did not bring it within the rule of In *re Estate of Parsons*. In other words, the Foundation argues in effect that it was never before the court and that no construction of the validity of the bequest to it had been made. It will be recalled that the petition for probate concerned itself only with the revoked bequest to Grace Ridley and made no mention of the fact that the bequest to the Foundation had been lined over with the testatrix' signature interlined above the lining over. From a practical point of view

under the circumstances appearing in the case at bar it appears that there was no reason for the Foundation to institute any kind of contest concerning the existence or validity of the bequest to it.

It appears that the rule set forth in *Re Estate of Parsons*, 196 Cal. 294, 237 P. 744, hereinbefore set forth, is controlling inasmuch as the will was admitted to probate "in its present form" which was as it had been executed by the testatrix with the exception of the holographic codicil revoking the \$1,000 bequest to Grace Ridley. In *Re Estate of Caruch*, 139 Cal.App.2d 178, 187, 293 P.2d 514, 520, the court, after discussing In *re Estate of Parsons*, supra, said:

"Under these cases the due execution and validity of the will are determined at the time the will is admitted to probate. If no contest is filed within the time set forth in section 384 of the Probate Code, those determinations are final and conclusive. The proceedings under section 1080 of the Probate Code are separate and distinct from those to admit the will to probate. In such a proceeding due execution and validity of the will cannot be collaterally attacked. *All that the court has power to do in such a proceeding is to interpret the will that has been admitted to probate—it cannot again pass on the questions of due execution or validity.* This was the precise holding in *Estate of Salmonski*, 38 Cal.2d 199, 207, 238 P.2d 966, 971: '[W]hat documents go to make up a will must necessarily be determined in the first instance on application for probate; and determinations so made have the effect of judgments and become conclusive in the course of time. * * *

"[I]t is clear here that in the absence of an appeal, the order admitting the two documents to probate after contest now stands as a conclusive adjudication of their status as a will and a codicil thereto; but beyond consideration for the determination of that precise issue of what documents constituted the deceased's last will, ques-

tions of construction and interpretation in measure of the effect of the two documents one on the other were "appropriate matters for consideration and determination" in the instant heirship proceeding.' See also *Estate of Sargavak*, 41 Cal.2d 314, 259 P.2d 897; *Estate of Challman*, 127 Cal.App.2d 736, 274 P.2d 439." (Emphasis added.)

As applied to the facts of the case at bar, the application of the rule of *In re Estate of Parsons*, supra, leads to this result: The will as executed was admitted to probate with the exception of the bequest to Grace Ridley which was held to have been revoked by an holographic codicil. The time for appeal and contest having elapsed the question of *what* constituted the will of Nellie Neubauer must be considered as res judicata. On a collateral attack such as the heirship proceeding here involved, the court was limited to an interpretation and construction of the *terms of the will as admitted to probate*.

Insofar as the appeal of Florence Sweeney is concerned, it will be recalled that she was the substitutional legatee in the event that the charitable bequests failed in whole or in part. Under the trial court's holding in the heirship proceeding that the share of the Hurst Foundation had "been eliminated from the will" and that it went by intestate succession rather than to Florence Sweeney as substitutional legatee, the Sweeney appeal is concerned only with that question.

In view of the conclusion which must be reached here because of the rule set forth in *Re Estate of Parsons*, supra, the order determining heirship as it affects Florence Sweeney is affirmed even though that order was based on erroneous reasoning, and the order as it relates to the interest of the Hazel Hurst Foundation is reversed.

GIBSON, C. J., SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., and DRAPER, J. pro tem., concur.

Rehearing denied; DRAPER, J., pro tem., participating in place of McCOMB, J.

49 Cal.2d 749

T. A. HALLDIN, Plaintiff and Appellant,
v.

William A. USHER et al., Defendants,
May L. Erickson, Raymond Halldin, Dexter Halldin and Ruth Halldin,
Respondents.
L. A. 24380.

Supreme Court of California,
In Bank.
Feb. 25, 1958.

Rehearing Denied March 26, 1958.

Action for declaration that a certain document was a valid contract imposing a trust. The Superior Court, Los Angeles County, A. Curtis Smith, J., rendered judgment for defendants, and the plaintiff appealed. The Supreme Court, Shenk, J., held that evidence supported finding that agreement of spouses that in case of death of one spouse the survivor should have the whole control of their property and that when spouses were gone certain realty should go in equal parts to their children and other realty should go to named son, was intended as testamentary instrument and not as third party beneficiary contract.

Affirmed.

Opinion, 315 P.2d 418, vacated.

1. Wills ⚡93

Evidence supported finding that agreement of spouses that in case of death of one spouse the survivor should have the whole control of their property and that when both spouses were gone certain realty should go in equal parts to their children and other realty should go to named son was intended as testamentary instrument and not as third-party beneficiary contract.

2. Contracts ⚡147(1), 152

The Civil Code provision that language of contract governs interpretation of contract and that contract must be so interpreted as to give effect to mutual intention of parties as it existed at time of contracting so far as the same is ascertainable are applicable to ascertain meaning of terms of

document where those terms are free from ambiguity. West's Ann.Civ.Code, §§ 1636, 1638.

3. Evidence ⚡428

Parol evidence is admissible to show that party never intended a writing to constitute a contract.

4. Wills ⚡324(1)

The question of intention of parties as to effect of instrument as a contract or as a testamentary instrument is a question of fact.

5. Wills ⚡93

Parol evidence that instrument was to be effective on death and that it was intended to be a will was admissible.

6. Evidence ⚡455

If agreement of spouses that in case of death of one spouse the survivor should have the whole control of their property and that when both spouses were gone certain realty should go in equal parts to their children and other realty should go to named son, was a contract, the words "whole control" were not so free from ambiguity as to prevent the court from resorting to extrinsic evidence to ascertain their meaning.

Macbeth & Ford and Patrick H. Ford, Los Angeles, for appellant.

Nicolas Ferrara, Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the plaintiff T. A. Halldin from a judgment for the defendants in an action for declaratory relief. In Count I the plaintiff sought a declaration that a certain document is a valid contract imposing a trust on two parcels of realty and on the proceeds from the sale of another parcel in favor of himself and others. No appeal was taken as to that portion of the judgment which denied other relief sought by the plaintiff in a second count and awarding damages to certain of the defendants on a cross-complaint.

The plaintiff and the defendants Raymond Halldin, Dexter Halldin and Ruth Halldin are the children of the defendant May L. Erickson and the deceased K. Henry Halldin. In 1945 when Mrs. Erickson was 71 years of age, she and K. Henry Halldin, then husband and wife, executed an instrument which provided as follows:

"July 5, 1945

"K. Henry Halldin and wife May L. Halldin herewith agree that in case of the death the one that survives shall have whole control of our property.

"We also state that when both of us are gone. The property 1041, 1043-1043½ at Magnolia Ave., Los Angeles shall in equal parts go to our children. But property 1236 Ritos Vitas Ave. Los Angeles and the lot in San Clemente go to our son T. A. Halldin as his special share besides his share in the Magnolia Ave. property.

"K. Henry Halldin

"May L. Halldin

"Subscribed and sworn to before me this 5th day of July 1945

Harry Christensen

Notary Public in and for the County of Los Angeles * * *."

The document is in the handwriting of Mr. Halldin except for the signature "May L. Halldin" and the notary's jurat.

In 1947 Mr. Halldin died, leaving as survivors the above mentioned children and his wife. Thereafter the widow remarried and became May L. Erickson. In 1955 she sold the Magnolia Avenue property to the defendants Usher and the plaintiff thereupon brought this suit, claiming that the instrument of July 5, 1945, was a contract between his parents for the benefit of himself and the other children, and sought declaratory relief to that effect as well as to other matters alleged but not in issue on this appeal. The trial court found that instrument of July 5, 1945, was intended as a testamentary disposition and not an enforceable contract, and that the plaintiff and the other children acquired no rights thereunder. It was also found that the de-

pendants Usher were bona fide purchasers for value. On these and other findings judgment was rendered against the plaintiff on both counts of the complaint and on the cross-complaint. The only questions on appeal concern the issue raised in Count I, namely, the construction of the above quoted document as a contract or as a testamentary instrument.

[1] The plaintiff contends that a written agreement between a husband and wife purporting to govern the disposition of their property on death is a valid contract; that it is not testamentary in effect; that equity will enforce a contract to transfer future interests without a present operative transfer, and that an implied covenant to make a will is created by law whenever necessary to complete the performance of a contract. But these contentions are of no avail unless it can first be shown that the document executed by the decedent and his wife constituted a contract. As to that issue the trial court admitted parol evidence of the intent of the subscribing parties with reference to the purpose of the document. Such evidence consisted in the main of testimony by Mrs. Erickson concerning conversations with her then husband to the effect that the instrument was to be effective only on death and that it was intended as a will. Findings were made from which the court concluded that the document was intended as a testamentary instrument and not as a third party beneficiary contract. These conclusions are supported by substantial evidence and are controlling on the record presented. The plaintiff contends, however, that parol evidence was improperly admitted and that the intention of the parties as to the document is to be ascertained from the document itself, citing section 1638 of the Civil Code providing that the "language of a contract is to govern its interpretation * * *" and section 1636 providing that a contract "must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable * * *." See also *In re Estate*

of Gaines, 15 Cal.2d 255, 264-265, 100 P.2d 1055.

[2, 3] The rule of law to which the plaintiff refers has to do with the ascertainment of the meaning of the terms of a document where those terms are free from ambiguity *Brant v. California Dairies, Inc.*, 4 Cal.2d 128, 133-134, 48 P.2d 13. But the rule is otherwise as to the admission of parol evidence for the purpose of ascertaining whether a document claimed to be a contract was not intended by the parties to have that effect. The rule is stated with supporting authorities in 20 Am.Jur. at page 955 as follows: "The rule that parol evidence is inadmissible to contradict or vary a written contract applies only to a written contract which is in force as a binding obligation. Parol evidence is always competent to show the nonexistence of the contract * * *. Evidence is admissible, at least in equity, to show that a writing which apparently constituted a contract was not intended or understood by either party to be binding as such. The oral testimony in such a case does not vary the terms of the writing, but shows that it was never intended to be a contract or to be of binding force between the parties." See also 18 Cal.Jur.2d 756-758. The rule was applied in *P. A. Smith Co. v. Muller*, 201 Cal. 219, at page 222, 256 P. 411, at page 412, where it was said: "It is well settled by the decisions in many jurisdictions that evidence that parties never intended a writing to constitute a contract * * * is not objectionable under the parol evidence rule. Such evidence does not change a written contract by parol, but serves to establish that such contract had no force, efficacy, or effect." The same principle of law was applied as to a document which purported to be a testamentary disposition in *Re Estate of Sargavak*, 35 Cal.2d 93, at page 96, 216 P. 2d 850, at page 851, 21 A.L.R.2d 307, where the court stated: "Regardless of the language of the allegedly testamentary instrument, extrinsic evidence may be introduced to show that it was not intended by the testator to be effective as a will."

[4, 5] The question of the intention of the parties as to the effect of the instrument as a contract or as a testamentary instrument is a question of fact. *Michels v. Olmstead*, 157 U.S. 198, 15 S.Ct. 580, 39 L.Ed. 671. As stated, there was substantial and admissible parol evidence to the effect that the instrument was to be effective only on death and that it was intended to be a will.

[6] Even if the document were a contract, as the plaintiff contends, he must further show that it is clear and unambiguous in order to justify his contention that parol evidence of its meaning was improperly admitted. He contends that by the language "in case of death the one that survives shall have whole control of our property," the parties intended by the use of such language that the survivor would have only a limited power to oversee and manage the property for the benefit of the children. Cases in other jurisdictions are cited by him to the effect that if it had been the intention of the parties to transfer a fee interest more apt language would have been used. On the other hand, in *Barnett v. Barnett*, 117 Md. 265, 83 A. 160, 162, it was held that the words "absolute control" transferred a fee interest, and in *Welsh v. Gist*, 101 Md. 606, 61 A. 665, it was held that the words "full control" also vested a fee interest. Accordingly it would seem that the words "whole control" in the present document are not so free from ambiguity as to prevent the court from resorting to extrinsic evidence to ascertain their meaning. That evidence clearly indicates as found by the court that it was not the intention of the parties to leave the survivor destitute and without means of support as might be the case if the construction urged by the plaintiff were adopted.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

William S. BECKETT, Respondent,
v.
KAYNAR MFG. CO., Inc., Appellant.
L. A. 24454.

Supreme Court of California,
In Bank.
Feb. 14, 1958.

Rehearing Denied March 12, 1958.

Proceeding on architect's application for order confirming arbitration award in his favor after corporation cancelled contract for architect to design factory building. The corporation filed motion to vacate arbitration award and objection to confirmation of award. The Superior Court, Los Angeles County, John J. Ford, J., entered judgment confirming award and corporation appealed. The Supreme Court, McComb, J., held that trial court could confirm arbitration award without hearing evidence and making findings of fact and conclusions of law with respect thereto where no evidence was offered for purpose of showing that a vacation, modification, or correction of the award was warranted.

Affirmed.

Opinion, 315 P.2d 425, vacated.

1. Motions ⇨37

Motions are usually made and determined on affidavits alone. *West's Ann. Code Civ.Proc.* §§ 1010, 2009.

2. Appeal and Error ⇨931(1)

On appeal involving issue which was tried on affidavits, those affidavits favoring contentions of prevailing party established not only the facts stated therein, but also all facts which reasonably could be inferred therefrom.

3. Appeal and Error ⇨1011(2)

Where there is a substantial conflict in facts presented by affidavits, the determination of the controverted facts by the trial court will not be disturbed on appeal.

4. Trial ⇨388(1)

There is no necessity to make findings on an order made after a motion has been ruled upon.

5. Appeal and Error ⇨905

Where it did not appear that rejected evidence or any other evidence was offered in hearing on motion for order confirming arbitration award for purpose of showing that a vacation, modification, or correction of the award was warranted, the Supreme Court would presume that hearing was conducted without error in exclusion of evidence. West's Ann.Code Civ.Proc. §§ 1285, 1287-1289.

6. Arbitration and Award ⇨72

Superior Court could confirm arbitration award without hearing evidence and making findings of fact and conclusions of law with respect thereto where no evidence was offered to show that vacation, modification, or correction of the award was warranted. West's Ann.Code Civ.Proc. §§ 1285, 1287-1289.

7. Contracts ⇨270(2)

One seeking to rescind a contract because of fraud must act promptly when aware of his right and free from undue influence or disability. West's Ann.Civ. Code, § 1691.

8. Appeal and Error ⇨949

The question of laches is for determination of trial court, and its conclusion thereon will not be set aside by an appellate court if there is substantial support in evidence for such conclusion. West's Ann. Civ.Code, § 1691.

9. Contracts ⇨270(2)

Where corporation which had cancelled contract for architect to design factory building discovered while arbitration proceedings were pending that contract had allegedly been induced by architect's fraud but corporation filed brief before arbitrators, agreed to extension of time for making of award and awaited results of award, corporation was guilty of laches for failure to rescind the contract promptly and corporation was estopped from asserting claim of architect's fraud four months after discovery in proceeding by architect

to confirm arbitration award in his favor. West's Ann.Civ.Code, § 1691.

10. Appeal and Error ⇨1010(1)

A trial court's finding which is supported by evidence is binding on the Supreme Court.

Mitchell, Silberberg & Knupp and Arthur Groman, Los Angeles, for appellant.

Wm. F. Clements, Los Angeles, for respondent.

McCOMB, Justice.

Kaynar Mfg. Co., Inc. appeals from a judgment entered upon an order confirming an award of arbitrators.

Chronology

(i) August 5, 1955, an agreement of employment was executed by the parties whereby appellant hired respondent, an architect, to design a factory building. Thereafter, work was undertaken by respondent pursuant to the terms of the contract and was continued until November 1955, when appellant cancelled the contract.

(ii) January 17, 1956, a controversy having arisen, three arbitrators were appointed pursuant to paragraph 21 of the agreement¹ and in accordance with the provisions of rule IV of the Commercial Arbitration Rules of the American Arbitration Association.

(iii) Arbitration hearings were held on March 15, March 28, and April 3, 1956. The matter was then submitted, with written briefs later filed by each party.

(iv) June 25, 1956, both parties consented to an extension of time as requested by the board of arbitrators in which they could make their award.

(v) July 12, 1956, the arbitrators rendered their award "in full settlement of all claims submitted" in favor of respondent and against appellant in the sum of \$5,-809.38. The arbitrators specifically found

1. Paragraph 21 of the agreement reads: "All questions in dispute under this agreement shall be submitted to arbitration at the choice of either party. Such

arbitration shall be conducted under the rules of the American Arbitration Association."

against appellant on its counterclaim for \$4,000 previously paid respondent under the terms of the contract and for an additional sum of \$10,000 damages for breach of contract.

(vi) July 23, 1956, respondent filed in the superior court his application for an order confirming the award of arbitration, and on July 27, 1956, filed his notice of motion for an order confirming the award.

(vii) August 2, 1956, appellant filed a notice of motion to vacate the arbitration award and objection to the motion to confirm. An affidavit by Kenneth Reiner was filed in opposition to the motion to confirm, in which it was claimed that respondent induced the contract by fraud.

(viii) Hearings on these motions were held on August 3, 1956, and August 10, 1956. It was stipulated by counsel for both parties that the hearings before the arbitrators occurred on March 15, March 28, and April 3, 1956, and that prior to the filing of the application for an order confirming the award, no notice of rescission was given to respondent by appellant.

(ix) At the conclusion of the hearings on August 10, 1956, the trial court (a) granted the motion for confirmation of the award and (b) denied the motion to vacate the arbitration award.

In support of its order, the court made the following findings of fact:

"That Kaynar Mfg. Co., Inc. has been guilty of laches with respect to the claim of fraud by waiting over three months, from the time it discovered the facts it claimed constituted fraud on the part of William S. Beckett, before taking any action to disaffirm or rescind the contract.

"That Kaynar Mfg. Co., Inc., is estopped from asserting the said claim of fraud by having continued on with the arbitration after receiving information of the alleged fraud, by having consented to an extension

of time in which the arbitrators should make their award, and by having waited until after an arbitration award had been rendered, and a notice of motion to confirm said award had been filed, before raising said claim of fraud."

Questions: First: *Did the trial court err in confirming the award without hearing evidence and making findings of fact and conclusions of law with respect thereto?*

No. The following rules are here applicable:

1. An application for confirmation or revocation of an award "shall be heard in a summary way in a manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." (Code Civ.Proc., § 1285.)²

2. The superior court is required to grant an order confirming an award unless the award is vacated, modified, or corrected as prescribed in section 1288 or section 1289 of the Code of Civil Procedure. (Code Civ.Proc., § 1287.)

3. Notices must be in writing, and the notice of a motion must state the grounds upon which it will be made and the papers, if any, upon which it is to be based. (Code Civ.Proc., § 1010.)

[1] 4. An affidavit may be used upon a motion. (Code Civ.Proc., § 2009.)³

[2,3] 5. In a matter in which an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contentions of the prevailing party establish not only the facts stated therein, but also all facts which reasonably may be inferred therefrom. Where there is a substantial conflict in the facts presented by the affidavits, the determination of the controverted facts by the trial court will not be disturbed on appeal. (Griffith Co. v. San Diego Col. for Women, 45 Cal.2d 501, 507 [7], 508 [9], 289 P.2d 476, 47 A.L.R.2d

2. There are no provisions expressly providing for the hearing of a motion other than those set forth in this opinion.

3. Motions are usually made and determined on affidavits alone. (Guardian-

ship of Van Loan, 142 Cal. 423, 426, 76 P. 37; People v. Albin, 111 Cal. App.2d 800, 806, 245 P.2d 660; People v. Eastman, 67 Cal.App.2d 357, 359 [1], 154 P.2d 37; Fuller v. Lindenbaum, 29 Cal.App.2d 227, 230 [1], 84 P.2d 155.)

1349; *Greenwell v. Caro*, 114 Cal.App.2d 35, 38 [4], 249 P.2d 573; *People v. Kirk*, 109 Cal.App.2d 203, 207 [4], 240 P.2d 630.)

[4] 6. There is no necessity to make findings on an order made after a motion has been ruled upon. (*Waymire v. California Trona Co.*, 176 Cal. 395, 399, 168 P. 563 et seq.; *Perez v. Perez*, 111 Cal.App.2d 827, 829 [3], 245 P.2d 344 et seq.)

The only showing in the record in this case concerning evidence rejected at the hearing before the court is in the court's minutes of August 10, 1956, which read: " * * * The model described in the affidavit of Arthur Groman is offered in evidence on behalf of Kaynar Manufacturing Co. and counsel for petitioner objects, which objection is sustained. The model is to be marked for identification and retained in the possession of Kaynar Manufacturing Co. to be produced before an Appellate Court on request. * * * "

[5,6] The only purpose for which it would have been proper to introduce evidence was to show that a vacation, modification, or correction of the award was warranted under either section 1288 or section 1289 of the Code of Civil Procedure. It does not appear that the rejected evidence, or any other evidence, in this case was offered for such purpose. Therefore, the hearing must be presumed to have been conducted without error in the exclusion of evidence. (*Marshall v. Hancock*, 80 Cal. 82, 84, 22 P. 61; *Ogden v. Title Ins. & Trust Co.*, 129 Cal.App.2d 26, 28, 276 P.2d 146; *Newman v. Sunde*, 23 Cal.App.2d 332, 335 [2], 73 P.2d 260; *Abrams v. Hubert*, 10 Cal.App.2d 404, 407 [4], 51 P.2d 884.)

In view of the rules set forth above, the award alone, in the present case, was sufficient basis for the judgment.

Second: *Was there substantial evidence to sustain the trial court's finding that appellant was guilty of laches with respect to the claim of fraud?*

Yes. The record discloses that appellant was guilty of laches for failing to rescind promptly upon discovery of the alleged facts constituting the claimed fraud. It

appears that the alleged fraud was discovered by appellant not later than April 3, 1956; that no notice of rescission was ever given to respondent; and that no claim that the contract was invalid for fraud in the inducement was made until August 2, 1956.

[7] One seeking to rescind a contract because of fraud must act promptly when aware of his right and free from undue influence or disability. (Civ.Code, § 1691; *Neet v. Holmes*, 25 Cal.2d 447, 460 [10], 154 P.2d 854; *Bancroft v. Woodward*, 183 Cal. 99, 108 [6], 190 P. 445; *Gedstad v. Ellichman*, 124 Cal.App.2d 831, 834 [3], 269 P.2d 661; cf. *Corcoran v. City of Los Angeles*, 136 Cal.App.2d 839, 842 [2], 289 P.2d 556 et seq.)

[8] Likewise, the question of laches is one for the determination of the trial court, and its conclusion thereon will not be set aside by an appellate court if there is substantial support in the evidence for such conclusion. (*Gedstad v. Ellichman*, supra, 124 Cal.App.2d at page 835 [11], 269 P.2d at page 663; *Fabian v. Alphonzo E. Bell Corp.*, 55 Cal.App.2d 413, 415, 130 P.2d 779.)

[9,10] The fact that appellant, knowing of the alleged fraud, waited for at least four months before alleging fraud, filed briefs before the arbitrators, agreed to an extension of time within which they might make their award and awaited the result of the award, which might have been favorable to it, is sufficient to sustain the trial court's finding that appellant was guilty of laches, and the finding is therefore binding on this court. (*Sanders v. Magill*, 9 Cal. 2d 145, 155 [8], 70 P.2d 159; see also cases listed in *Fabian v. Alphonzo E. Bell Corp.*, supra, 55 Cal.App.2d at page 416 [1c], 130 P.2d at page 781.)

In view of the foregoing conclusions, it is unnecessary to discuss other questions argued by counsel.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

157 Cal.App.2d 670

**MAURICE L. BEIN, Inc., a corporation;
The Bein Construction Co., a co-partnership composed of Joseph A. Bein, William A. Bein and Eugene Alches; R. J. Daum Construction Company, a corporation, Joint Venturers, Plaintiffs and Respondents,**

v.

**HOUSING AUTHORITY OF The CITY OF
LOS ANGELES, California, Defendant
and Appellant.**

**MAURICE L. BEIN, Inc., a corporation;
The Bein Construction Co., a co-partnership composed of Joseph A. Bein, William A. Bein and Eugene Alches; R. J. Daum Construction Company, a corporation, Joint Venturers, Plaintiffs, Cross-Defendants, and Cross-Appellants,**

v.

BERG ELECTRIC CORPORATION, S. A. Cummings, Hood Construction Company, Sam Della, and Ben F. Smith, Inc., Defendants, Cross-Complainants, and Cross-Respondents.

**MAURICE L. BEIN, Inc., a corporation;
The Bein Construction Co., a co-partnership composed of Joseph A. Bein, William A. Bein and Eugene Alches; R. J. Daum Construction Company, a corporation, Joint Venturers, Plaintiffs and Respondents,**

v.

**HOUSING AUTHORITY OF The CITY OF
LOS ANGELES, California, a public corporation; Hood Construction Company, a corporation; Berg Electric Corporation, a corporation; Ben F. Smith, Inc., a corporation; Sam Della; S. A. Cummings; and Doe I to Doe XX, Inclusive, Defendants,**

**Housing Authority of the City of Los Angeles, California, a public corporation,
Appellant.**

Civ. 22325, 22436.

District Court of Appeal, Second District,
Division 3, California.

Feb. 19, 1958.

Rehearing Denied March 12, 1958.

Action by prime contractor against municipal housing authority for declaratory relief and damages for breach of contract. The Superior Court, Los Angeles County,

Parks Stillwell and Leon T. David, JJ., entered a judgment and order adverse to housing authority, and it appealed. The District Court of Appeal, Vallée, J., held *inter alia*, that in view of fact that housing authority is an agency of the state, it was not liable for interest on an award of damages against it for breach of contract until effective date of statute authorizing recovery of interest from political subdivision of the state, such date being subsequent to date from which interest would otherwise have run.

Judgment modified in accordance with opinion, and as modified, affirmed.

Order appealed from reversed.

1. Estoppel ⇨118

In action by prime contractor against municipal housing authority for declaratory relief and damages for breach of contract, evidence including testimony that authority misrepresented to contractor that all obstacles in connection with commencement of the project have been overcome, sustained finding that housing authority was estopped from asserting contract provision absolving it from damages because of hinderance or delay from any cause.

2. Municipal Corporations ⇨219

In action by prime contractor against municipal housing authority for declaratory relief and damages for breach of contract, trial court did not err in ruling that executive director of housing authority was its agent for purposes of the contract, in view of fact that such director was the person who carried on the day-to-day operations as responsible head of the authority, and authority held such director out as the person with authority and responsibility in dealing with all phases of the contract.

3. Estoppel ⇨83(1)

Representation by director of municipal housing authority to a contractor that all legal obstacles to commencement of work had been removed, was a representation of fact rather than of law, but even if merely an expression of opinion, in view of direc-

tor's superior knowledge and special information concerning subject matter of the representation, court was warranted in finding that contractor was entitled to rely on such opinion in executing contract in question, and that because of such representation authority was estopped to assert a contract defense contrary thereto.

4. Appeal and Error ⇨1010(1)

A reviewing court cannot reject testimony of a witness that has been believed by the trier of fact unless there exists either a physical impossibility that it is true or its falsity is apparent without resorting to inferences or deductions.

5. Appeal and Error ⇨1010(1)

Testimony which is subject to justifiable suspicion does not warrant reversal of a judgment.

6. Trial ⇨105(1)

A rule of evidence which is not invoked is waived.

7. Pleading ⇨430(2)

Where, defendant failed to object to introduction of certain evidence for purpose of showing defendant was estopped to raise a certain portion of contract as a defense, defendant would be deemed to have waived objection of fatal variance between pleading and proof.

8. Appeal and Error ⇨907(2)

District Court of Appeal will presume that record contains evidence to sustain every finding of fact.

9. Release ⇨57(1)

In action by prime contractor against municipal housing authority for declaratory relief and damages for breach of contract, evidence sustained finding that document providing that contractor would release authority from all claims arising out of the contract upon payment of a certain amount, was not a release by contractor of its claims for damages under the contract, nor was it intended by either of the parties thereto to be such a release.

10. Municipal Corporations ⇨1002

States ⇨171

Generally, in absence of some statutory provision authorizing it, interest may

not be recovered against the state or any of its subdivisions.

11. Municipal Corporations ⇨1002

In action by prime contractor against municipal housing authority for declaratory relief and damages for breach of contract, in view of fact that housing authority is an agency of the state, it was not liable for interest on an award of damages against it for breach of contract until effective date of statute authorizing recovery of interest from political subdivision of the state, such date being subsequent to date from which interest would otherwise have run. West's Ann.Civ.Code, § 3287.

12. Damages ⇨67

Generally, interest in the form of damages is not allowed prior to rendition of judgment on an unliquidated claim or on the amount of a demand which cannot be ascertained either from the face of the contract or by reference to a well-established market value.

13. Interest ⇨39(2)

Where in action by prime contractor against municipal housing authority for declaratory relief and damages for breach of contract, authority never actually denied contractor's claim for damages for delay, and contractor supplied authority with detailed statements of data necessary to determine amount due, contractor was entitled to interest not from date of judgment, but from effective date of amendment of statute allowing an award of interest against a state agency, such date being subsequent to date of completion of contract. West's Ann.Civ.Code, § 3287.

14. Municipal Corporations ⇨374(2)

Where contractor presented its claim for damages for breach of contract to housing authority and requested final decision from contracting officer, and executive director of authority told contractor claim would not be paid, and contracting officer never entered a decision as required by specifications of contract, contractor was not barred from commencing an action for damages on theory that specifications

provided an administrative remedy which contractor failed to exhaust.

15. Municipal Corporations Ⓒ374(4)

In action by prime contractor against municipal housing authority for declaratory relief and damages for breach of contract, evidence sustained award of damages sustained by contractor due to delay and hinderance caused contractor and sub-contractors by virtue of housing authority's breach of contract in regard to obtaining authority for commencement of construction and approval of plans for the construction in question.

16. Municipal Corporations Ⓒ1038

Personal property of a municipal housing authority is not exempt from execution. West's Ann.Health & Safety Code, § 34217.

17. Municipal Corporations Ⓒ1039

In view of fact a municipal housing authority is a state agency and functions as an administrative arm of the state in pursuing the state concern and effecting legislative objectives, it is not required to give an undertaking on appeal. West's Ann.Code Civ.Proc. § 1058.

18. Municipal Corporations Ⓒ1038

Where effect of an order denying a motion to vacate an order for issuance for a writ of execution and levy on a municipal housing authority's bank account was to compel money levied upon to remain on deposit in lieu of an undertaking pending final determination of housing authority's appeal from an adverse judgment, it was equivalent to requiring filing of an undertaking by the authority, and therefore improper under statute providing that in a civil action no undertaking can be required of any instrumentality or agency of the state. West's Ann.Code Civ.Proc. § 1058.

19. Appeal and Error Ⓒ437

When a municipal housing authority's appeal from an adverse judgment was perfected, such appeal released bank account of the authority which had been levied under a writ of execution. West's Ann.Code Civ.Proc. §§ 946, 1058.

James J. Arditto, Los Angeles, and Stanley A. Furman, Beverly Hills, for appellant, Housing Authority of the City of Los Angeles, California.

Max F. Deutz, Chief Asst. U. S. Atty., Richard A. Lavine, Asst. U. S. Atty., Chief of Civil Division, and Jordan A. Dreifus, Asst. U. S. Atty., Los Angeles, amici curiae on behalf of appellant.

Anderson, McPharlin & Connors, Eldon V. McPharlin, and Robert E. Jones, Los Angeles, for respondents and cross-appellants.

Harry A. Franklin, Los Angeles, for cross-respondent Berg Electric Corp.

Leon J. Garrie, Los Angeles, for cross-respondents S. A. Cummings, Hood Construction Co., and Sam Delia.

Boyle, Bissell & Atwill, and Robert C. Mardian, Pasadena, for cross-respondent Ben F. Smith, Inc.

VALLÉE, Justice.

Plaintiffs brought this action against defendant Housing Authority of the city of Los Angeles for declaratory relief and damages for breach of contract.

On June 30, 1952 plaintiffs, sometimes referred to as Bein-Daum or as the prime contractor, entered into a written contract with Housing Authority for the construction of a low-rent housing project for the agreed consideration of \$4,195,000. Prior to entering into this contract plaintiffs entered into written contracts with certain individuals and corporations, referred to as subcontractors, for performance of various parts of the work to be performed under the prime contract. The subcontractors were named as defendants in the action. Plaintiffs sought judgment declaring the rights and obligations of all the parties and against Housing Authority for \$115,-845.55 for its own damages plus the amounts, if any, which the subcontractors might be awarded as damages against plaintiffs. The subcontractors filed cross-complaints against plaintiffs seeking damages against them. The complaint was amended to conform to the claims of certain of the subcontractors. Judgment was for plaintiffs

against Housing Authority for \$209,510.77, and for the various subcontractors against plaintiffs in varying amounts. Housing Authority appealed from the judgment. It also appealed from an order denying its motion to quash a writ of execution. Plaintiffs filed a precautionary cross-appeal from the judgment in favor of the subcontractors.

About August 10, 1949 Housing Authority entered into an agreement with the city of Los Angeles whereby the city agreed to cooperate in the construction of the housing project, to vacate certain streets and alleys, and to annex certain territory in the county of Los Angeles, referred to as the County Strip, which was necessary to the project site. The invitation for bids for construction of the project provided that no bid should be withdrawn for a period of 30 days after the opening of bids without the consent of Housing Authority. Bids were opened on November 27, 1951 and Bein-Daum was the successful bidder. Thereafter, at the request of Housing Authority, Bein-Daum from time to time extended the period within which it would not withdraw its bid up to and including June 30, 1952 because Housing Authority was engaged in a dispute and litigation with the city concerning the cooperation agreement, the closing of the streets and alleys, and the annexation of the County Strip which ran about through the middle of the project site.

On June 28, 1952 and again on June 30, 1952, prior to the execution of the contract by plaintiffs, Housing Authority represented to plaintiffs that all obstacles in connection with the annexation by the city of Los Angeles of the County Strip had been overcome. The court found the representations were false and known to Housing Authority to be false; plaintiffs relied upon the representations and were thereby induced to execute the contract.

On June 30, 1952, the date the contract was executed, Housing Authority gave plaintiffs written notice to proceed as of

that date with performance of the contract. A few days thereafter Housing Authority gave plaintiffs a second notice to proceed which was also dated June 30, and plaintiffs returned the first notice. The second notice ordered plaintiffs to proceed with the work on that date provided that no construction work should be commenced on the area of the streets and alleys to be closed until that action had been accomplished and that no construction work should be commenced on the County Strip until it was annexed, "both of which proceedings have been in process for some time and the accomplishment of which is required by the peremptory writ of mandate issued by the California Supreme Court in the case of Housing Authority of City of Los Angeles v. City of Los Angeles."¹ The court found that Housing Authority represented to plaintiffs that the return of the original notice to proceed and the delivery of the second notice to proceed was merely a formality and that there had been no change in the situation and that plaintiffs would be given possession of the County Strip area within a matter of days or a week or so; the representations were false and known by Housing Authority to be false; plaintiffs relied upon the representations and were thereby induced to return the original notice to proceed and to acknowledge receipt of delivery of the second notice to proceed.

The general scope of the work provided for in the prime contract consisted of the construction of sixty-two 2-story frame, stucco and concrete block apartment buildings totaling 601 dwelling units, and an administration and maintenance building, with all the necessary clearing, grading, excavation, demolition of existing concrete slabs, footings, etc., site improvements, sewer collection system, storm drain, pumps, water, gas and electrical distribution systems, landscape work, and all the appurtenant facilities necessary to put these units into satisfactory operation. The part of the

1. Housing Authority of City of Los Angeles v. City of Los Angeles, 38 Cal. 2d 853, 243 P.2d 515. Also see Hous-

ing Authority of City of Los Angeles v. City of Los Angeles, 40 Cal.2d 682, 256 P.2d 4.

work required by the contract to be constructed on the County Strip consisted of eleven 2-story frame, stucco and concrete block apartment buildings totaling 104 dwelling units with excavations, site improvements, and appurtenant facilities.

By the contract, Housing Authority agreed to furnish to the city of Los Angeles drawings and specifications for the work and to obtain approval thereof from the department of building and safety and the engineer's office in order that plaintiffs could obtain the necessary permits for construction from the city. The court found Housing Authority failed and refused to furnish to and obtain approval from the city of the drawings and specifications for the work within a reasonable time; and as a result, plaintiffs were prevented from commencing the preliminary site work or any work whatsoever until August 23, 1952. The building permits for the dwelling buildings were not issued until September 12, 1952. The sewer and storm drain permits were not issued until October 16, 1952. The permit for installation of gas mains was not issued until December 4, 1952. The permit for house sewer connections was not issued until April 13, 1953. The County Strip was annexed to the city on June 29, 1953, one year after the prime contract was executed. Bein-Daum and the subcontractors were not given possession of, and were prevented from doing the work on, the County Strip until that date.

A construction progress chart was prepared by Bein-Daum and approved by Housing Authority. The chart provided that the entire work covered by the contract would be completed in 257 days plus 19 days for inclement weather, a total of 276 days. The court found the progress chart was a reasonable and accurate schedule of the time required for the completion of the work shown therein, and that plaintiffs and their subcontractors would have substantially complied with it had it not been for the delay occasioned by the County Strip; that plaintiffs could and would have fully completed the entire project within the period of 276 days from June 30, 1952,

or on or before April 2, 1953, except that as a direct result of the failure and refusal by Housing Authority to deliver full possession of, and to permit commencement of construction on, the County Strip and to furnish to and obtain approval within a reasonable time of the plans and specifications from the city of Los Angeles, plaintiffs and the subcontractors were delayed, hindered, and prevented from completing the work until April 15, 1954, when the project was actually completed; and that the total delay was 378 days.

Plaintiffs and the subcontractors were required to carry on their work in a piecemeal and inefficient manner and were unable to coordinate the many operations required in completing the project. There resulted greatly increased overhead expense, loss of efficiency of labor, loss of the use of equipment, and other expenses which would not have been encountered had they been able to proceed without delay.

On July 19, 1954, three months after the work was completed, Housing Authority prepared a document in which it acknowledged that plaintiffs had been delayed for 365 days by reason of unforeseen causes beyond their control and specifically by reason of the failure of Housing Authority to issue a notice to proceed on the County Strip. This document was executed by Ralph S. Harper who was designated Clerk of the Works for Housing Authority in the contract, by the Development Counsel for Housing Authority, and by plaintiffs.

The court found plaintiffs performed all conditions and provisions of the contract on their part to be performed; and that by reason of and as a direct result of the refusal on the part of Housing Authority and the delay thereby caused, plaintiffs were damaged in the sum of \$209,510.77, consisting of \$115,413.86 directly sustained by plaintiffs and \$94,096.91 sustained by the subcontractors.

The Appeal of Housing Authority from the Judgment

[1] The specifications for the project contained this provision (13b):

"b. No payment or compensation of any kind shall be made to the Contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable."

The court found facts giving rise to an estoppel as to this provision and concluded that Housing Authority was estopped to assert it as a defense. It found at the time of the execution of the prime contract Housing Authority represented to plaintiffs that all obstacles in connection with the County Strip or relating to the project had been overcome; that Housing Authority knew at the time of making said representations that there were still obstacles and there would be a lengthy delay before the entire site would be available to plaintiffs; that said representations were made for the purpose of inducing plaintiffs to execute the contract and with the intention that plaintiffs rely thereon; that plaintiffs were ignorant of the true facts and in reliance on the representations of Housing Authority executed the contract and commenced work thereunder. Housing Authority contends the evidence does not support the finding in this respect in that the party estopped must be apprised of the facts (*Safway Steel Products, Inc., v. Lefever*, 117 Cal.App.2d 489, 491, 256 P.2d 32), and that it is clear Housing Authority was ignorant of the true state of facts.

In flagrant violation of the rules, counsel for Housing Authority have not given us the faintest idea respecting the evidence that caused the court to find the facts on which it based its conclusion that Housing Authority was estopped to assert this provision of the contract as a defense. We have neither the time nor the inclination to search the 1,498 pages of the reporter's transcript to find it. *Nichols v. Mitchell*, 32 Cal.2d 598, at page 600, 197 P.2d 550, at page 552, says:

"Such contention requires defendants to demonstrate that there is no substantial evidence to support the challenged findings."

As we said in *Re Estate of Good*, 146 Cal. App.2d 704, at page 706, 304 P.2d 196, at page 197:

"We have had occasion to remark before in a similar situation that a claim of insufficiency of the evidence to justify findings, consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration, when it is apparent, as it is here, that a substantial amount of evidence was received on behalf of the respondents. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner. [Citation.] And upon more than one occasion we have called attention to our statement to the same effect in *Goldring v. Goldring*, 94 Cal.App.2d 643, 645, 211 P.2d 342, and we have said we must either abide by our former statements or tolerate practices which are contrary to first principles of appellate procedure and which place undue burdens upon the court."

Counsel for plaintiffs assumed the burden which counsel for Housing Authority unfairly placed upon them. Shortly before the date of execution of the contract Housing Authority's executive director promised and assured plaintiffs that all legal obstacles to the execution of the contract had been removed, and requested plaintiffs to come to the office of the Authority to execute the contract. Prior to the execution of the contract nothing whatsoever was disclosed to plaintiffs concerning the County Strip or the possibility that it might not be available. At the time plaintiffs were given the second notice to proceed they were told by Housing Authority's representative that the situation had not changed in any way, that the

County Strip would be annexed within a week or ten days. At the time the prime contract was signed, and at the time the second notice to proceed was given, Housing Authority knew the city and the city council had taken and would continue to take the position that the writ of mandate of the Supreme Court in *Housing Authority of City of Los Angeles v. City of Los Angeles*, 38 Cal.2d 853, 243 P.2d 515, did not require annexation of the County Strip. The representations of Housing Authority were directly contrary to the facts of which it had knowledge at the time it made the representations. The executive director of Housing Authority who made the representations to plaintiffs was an attorney at law, which fact was known to plaintiffs. If Housing Authority had been unable to induce plaintiffs to execute the contract on June 30, 1952 it would have lost its appropriation from Public Housing Authority for the project. Patently the foregoing evidence supports the finding that Housing Authority knew the true facts at the time it made the representations to plaintiffs.

[2] It is urged the court erred in ruling that the executive director of Housing Authority was its agent for the purposes of the contract. We find no error. It was conceded below that the executive director was the person who carried on the day-to-day operations as the responsible head of Housing Authority, and that as executive director he carried out the policies of the housing commission. The representations which induced plaintiffs to execute the contract were made before the contract was signed and the notice to proceed issued. Housing Authority held its executive director out as the person of authority and responsibility in dealing with all phases of the contract.

[3] It is argued that the representation by the executive director of Housing Authority to plaintiffs that all legal obstacles had been removed was the expression of an opinion on a matter of law, and since there was no confidential relation between the executive director and plaintiffs there was no misrepresentation. We think

the representation was one of fact. However, if it be assumed the executive director was expressing an opinion, his superior knowledge and special information concerning the subject matter of the representation as shown by the record warranted the court in finding that plaintiffs were entitled to rely on the opinion. *Sime v. Malouf*, 95 Cal.App.2d 82, 101, 212 P.2d 946, 213 P.2d 788.

[4, 5] On the oral argument it was urged that it is inconceivable the president of Maurice L. Bein, Inc., relied on the representations of Housing Authority. It was said his testimony is inherently improbable. A reviewing court cannot reject the testimony of a witness that has been believed by the trier of fact unless there exists either a physical impossibility that it is true or its falsity is apparent without resorting to inferences or deductions. Even testimony which is subject to justifiable suspicion does not warrant the reversal of a judgment. *People v. Cahan*, 141 Cal.App.2d 891, 897, 297 P.2d 715. Mr. Bein, president of Maurice L. Bein, Inc., testified he relied on the representations of Housing Authority. This testimony is enough to sustain the finding.

Housing Authority, without reference to the record, says the matters involved were equally available to all parties, and that plaintiffs assumed the risk of the length of the delay. These were questions for the trial court. It appears the city council of Los Angeles did not publicly announce its position that annexation of the County Strip was not required by the writ of mandate until July 15, 1952, more than two weeks after plaintiffs signed the prime contract.

[6, 7] It is claimed there was a fatal variance between pleading and proof. The complaint was on contract and for declaratory relief. In its answer Housing Authority pleaded paragraph 13b of the specifications as an affirmative defense. In response to this defense plaintiffs, without objection, introduced evidence for the purpose of showing that Housing Authority

was estopped to raise paragraph 13b as a defense. It is said this evidence was a variance from the complaint. A rule of evidence not invoked is waived. Not having objected to the introduction of the evidence, Housing Authority is deemed to have waived the objection. *Sanders v. Riviera Realty Co.*, 104 Cal.App.2d 70, 76, 230 P.2d 856.

The specifications for the project contained the provision set forth in the margin.² Housing Authority says this provides in effect that plaintiffs' remedy for any delay for any reason whatsoever is an extension of time for completion of the contract. The court found Housing Authority waived this provision and found facts giving rise to an estoppel as to it. Housing Authority claims it did not waive the provision. Since the court concluded on adequate findings based on substantial evidence that Housing Authority is estopped to assert this provision of the specifications as a defense, the point is immaterial. There was much evidence which supports the finding in this respect. On numerous occasions throughout the progress of the work plaintiffs advised Housing Authority they were sustaining damages for which they expected compensation. Housing Authority repeatedly represented to and assured plaintiffs that compensation would be paid for the additional costs and expenses being sustained by them by reason of the delay. It stated to plaintiffs in writing that an audit would be made on substantial completion of the project to determine the loss sustained by plaintiffs and their subcontractors.

2. "13. a. * * * [T]he right of the Contractor to proceed shall not be terminated or the Contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to * * * acts of the Local Authority * * * or delays of subcontractors due to such causes, if the Contractor shall within 10 days from the beginning of any such delay (unless the Local Authority, with the

The court found that plaintiffs, in good faith and in reliance on all of the representations, assurances, and promises of Housing Authority, in turn made the same representations, assurances, and promises to its subcontractors. Housing Authority asserts error. The argument in this as in most respects goes merely to the weight of the evidence and does not require further notice.

The court found that about July 1952 plaintiffs and Housing Authority entered into an oral agreement by which the latter agreed to deliver full possession of, and to permit commencement of construction on, the County Strip within a few weeks from that date. Housing Authority asserts the finding was error because it had no right under the law to make the County Strip available to plaintiffs until it had been annexed by the city of Los Angeles. Assuming, without deciding, that it was error, the finding is immaterial and the error, if any, is not ground for reversal. *Moore v. Mosher*, 88 Cal.App.2d 324, 325-326, 198 P.2d 714. The findings in other respects fully support the judgment.

On June 17, 1954, plaintiffs signed and delivered to Housing Authority a document titled "Certificate and Release." The document in paragraph 1 states that plaintiffs certify "that there is due and payable under the contract and duly approved Change Orders and modifications the balance of \$226,097.22"; and in paragraph 2 that in addition to that amount there are outstanding and unsettled various items which plaintiffs claim are due and owing by Housing Authority to them including an item

approval of the PHA, shall grant a further period of time prior to the date of final settlement of the Contract) notify the Contracting Officer in writing of the causes of delay, who shall ascertain the facts and the extent of delay and the Local Authority shall, subject to prior approval of the PHA extend the time for completing the work when in its judgment the findings of fact of the Contracting Officer justify such an extension, and his findings of fact thereon shall be final and conclusive upon the parties hereto."

reading "Claim for damages in connection with County Strip. 180,000." The document says:

"The Contractor further certifies that upon the payment of the amount listed in paragraph 2 hereof, and of any amount which may be deducted from paragraph 1 hereof, he will release The Housing Authority of The City of Los Angeles, California from any and all claims of any nature whatsoever arising out of said contract or modification thereof, and will execute such further releases or assurances as The Housing Authority of The City of Los Angeles, California may request."

The court found that this document "was not a release by plaintiffs of its claims for damages in connection with the County Strip, nor was it intended by either of the parties thereto, to be such a release. Plaintiffs are not limited to the amount as listed in the exceptions in the release and that the exact amount of the claim was not required to be inserted in said exceptions. That defendant Housing Authority had, throughout the progress of the work on said project, represented and assured plaintiffs that they would be compensated for the additional costs due to the delays resulting from the County Strip, and that there would be an equitable adjustment made of their claim; that plaintiffs and defendant subcontractors relied upon the representations and assurances of the Housing Authority that they would be compensated for said additional costs, and the sum of \$180,000 was listed in the exceptions in Paragraph II of Exhibit H in reliance upon the representations and assurances from the Housing Authority that an audit would be made to determine the additional costs and an equitable adjustment thereafter, made." Housing Authority asserts there is no evidence to support this finding.

[8,9] We start with the presumption that the record contains evidence to sustain every finding of fact. *Kruckow v.*

Lesser, 111 Cal.App.2d 198, 200, 244 P.2d 19. There is no showing to the contrary. Plaintiffs direct our attention to much evidence which supports the finding. Beginning August 27, 1952 plaintiffs repeatedly complained to Housing Authority about the delay and stated it was costing them unnecessary expenses for which they would expect compensation. On December 16, 1953 Housing Authority stated in writing that it was mutually agreed the most practical and equitable adjustments of the damages sustained by plaintiffs in connection with the delay in acquisition of the County Strip could be made only after a complete audit of plaintiffs' and their subcontractors' payrolls and accounts of the items related to the claim, that the final claim would be prepared on the substantial completion of the project, and that it was further agreed that as soon as it was "practical" to do so after January 1, 1954 an audit would be started on the records of each subcontractor. Plaintiffs agreed to make all their records available for audit. On July 19, 1954, more than a month after the so-called Certificate and Release was signed, Housing Authority prepared and sent plaintiffs "Change Order No. 34" stating that completion of the work had been delayed by reason of unforeseeable causes beyond the control of plaintiffs and without their fault or negligence, and specifically by reason of failure of the Authority to issue a notice to proceed on the County Strip; that start of work on the County Strip was authorized 365 days after issuance of the first notice to proceed; that plaintiffs' written request for an equitable extension of contract time for 365 calendar days was justified; that execution of the change order by plaintiffs should in no way prejudice their rights in connection with any claims they might wish to assert. On July 20, 1954 plaintiffs sent a long letter to Housing Authority detailing added costs to themselves and their subcontractors "in connection with the failure to annex the County Strip."³ On Nov-

3. The claim of Bein-Daum was about \$115,800. The claims of the subcontractors totaled about \$60,000. When Hous-

ing Authority declined to pay the claims and litigation ensued, Bein-Daum's claim decreased to about \$115,000 and the sub-

ember 1, 1954 Housing Authority sent plaintiffs a letter detailing various delays, stating the total delay had been 284 days, and extending the time for completing the work to May 4, 1954. The letter stated that other delays claimed by plaintiffs did not impede completion of the work. On November 12, 1954 plaintiffs wrote Housing Authority, stating they took exception to the statement that other delays did not impede completion of the work and that they intended to pursue all remedies available to them. On November 22, 1954 plaintiffs wrote Housing Authority, stating that the subcontractors in presenting their claims had not added certain items as allowed by the contract and asked that they be added to the amount of plaintiffs' claim. Housing Authority requested plaintiffs to keep accurate records of their costs and expenses resulting from the delay. There was testimony that it was mutually understood between Housing Authority and plaintiffs that the extent of the damage caused by the delay could not be ascertained until the project was completed because only then could a complete audit be made. The project was not completed until April 15, 1954.

The finding with respect to the Certificate and Release is fully supported by the evidence. Furthermore, the document may be properly construed not to be a release. It says "that upon the payment" of the \$180,000 and other items plaintiffs "will release" Housing Authority from all claims arising out of the contract, and "will execute" such further releases or assurances as Housing Authority may request. Housing Authority never paid plaintiffs any part of the \$180,000.

[10, 11] The court awarded plaintiffs interest from April 15, 1954, the date the project was completed. Housing Authority asserts it is an agency of the state and that as such it is immune from an award of interest. *Housing Authority of City of Los Angeles v. City of Los Angeles*, 38 Cal.2d

853, at page 861, 243 P.2d 515, at page 519, says: "The housing authority was thereby [Health & Saf.Code, § 34240] created as a state agency, 'a public body corporate and politic' * * *," the Housing Authority functions as an administrative arm "of the state in pursuing the state concern and effecting the legislative objective." It is the general rule that in the absence of some statutory provision authorizing it, interest may not be recovered against the state or any of its subdivisions. *McGuire & Hester v. City and County of San Francisco*, 113 Cal.App.2d 186, 193, 247 P.2d 934. In 1955 Civil Code section 3287 was amended to read:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including any political subdivision of the State."

Thus from the effective date of the amendment—September 7, 1955—interest was properly awarded. We find no authority, and we have been cited none, authorizing an award of interest prior to that date. There is nothing in the language of the amendment indicating the Legislature intended it should operate retrospectively. See *State of California Subsequent Injuries Fund v. Industrial Acc. Com.*, 48 Cal.2d 355, 361, 310 P.2d 1.

[12, 13] Housing Authority contends plaintiffs are not entitled to interest at any time prior to judgment. It is argued the damages plaintiffs sought and were awarded were neither certain nor capable of being made certain by calculation. As a general rule interest in the form of damages is not allowed prior to rendition of judgment

contractors' total claims increased to about \$94,000. There was testimony that the figure of \$60,000 first submitted

by the subcontractors was for the purpose of getting the matter settled without litigation.

on an unliquidated claim or on the amount of a demand which cannot be ascertained either from the face of the contract or by reference to a well-established market value. (14 Cal.Jur.2d 703, § 78.) It has frequently been held that the defendant will be charged with interest for his failure to pay the plaintiff's claim where he has been supplied by invoice or statement with the data necessary to determine the amount due. (14 Cal.Jur.2d 704, § 79.) In the present case plaintiffs, from the inception of their claim from damages resulting from the delay—August 1952—until after the project was completed, supplied Housing Authority with detailed statements of the data necessary to determine the amount due. *Anselmo v. Sebastiani*, 219 Cal. 292, 26 P.2d 1, is directly in point. There the plaintiff constructed a building on a cost-plus basis. The defendant did not pay. The trial court awarded interest. On appeal it was held (219 Cal. at page 301, 26 P.2d at page 5):

"Was it error for the court to allow interest from the date of the filing of the complaint? The record shows that, shortly after the filing of the complaint, the plaintiffs furnished to the defendants a bill of particulars showing every item of cost incurred in the erection of the preserving building. * * * The contention is made that the amount which the plaintiffs are entitled to recover in this case is unliquidated, and therefore interest should not be allowed until the entry of judgment. This contention, however, is not determinative of the question of interest. If the amount of the indebtedness or the amount owing can be calculated and determined from the statements rendered by the plaintiffs to the defendants, and that statement is found to be true and correct, it is a matter of mere calculation. The court in the instant case found the costs just as set forth by the plaintiffs in their

bill of particulars furnished the appellants.

"[219 Cal. at page 302, 26 P.2d at page 5.] * * * 'Where the data necessary to determine the amount due are supplied to the debtor by an invoice or statement, he will be charged with interest for failure to pay.'

"Again, in 15 Ruling Case Law, 7, the rule is thus stated: 'While, as a general rule, interest is not allowable on unliquidated demands, yet it has frequently been held that interest may be allowed as damages, even in the case of unliquidated demands, where the latter are capable of ascertainment by calculation or where they may be determined by reference to well-established market values, together with computation.'

"It does not appear that the accuracy of the bill of particulars rendered by the plaintiffs to the appellants was questioned at the trial of this action. It was urged that certain work was not done, and that the work done was not of the value set forth in the bill of particulars, and a counterclaim was set up in the answer. All of these matters were found against the contention of the appellants. This brings the circumstances within the case of *McCowen v. Pew*, 18 Cal.App. 482, 123 P. 354, where, under similar circumstances, interest was allowed."

(Also see *Koyer v. Detroit F. & M. Ins. Co.*, 9 Cal.2d 336, 345-346, 70 P.2d 927.) As the trial judge stated, Housing Authority "never actually denied plaintiff's claim for damages for county strip delay." The court erred in awarding interest against Housing Authority prior to September 7, 1955. It did not err in awarding interest against it subsequent to that date.

[14] The specifications contain a provision with respect to disputes which is set out in the margin.⁴ Housing Authority as-

of the General Conditions arising under this Contract or its interpretation, whether involving law or fact or both,

4. "15. Disputes

"a. All disputes other than those required to be handled under Section 44

serts this is an administrative remedy; that plaintiffs did not exhaust it; therefore they were barred from commencing this action. The point is wholly without merit. The provision is in the nature of a condition precedent to the bringing of an action. Plaintiffs presented their claim to Housing Authority and requested a final decision from the contracting officer. The executive director of Housing Authority told plaintiffs the claim would not be paid. The contracting officer never rendered a decision as required by the specifications. Plaintiffs did not file suit until February 3, 1955. They did all they could to comply with section 15 of the specifications.

[15] Housing Authority contends the damages awarded are excessive. The contract provided that plaintiffs complete the work within 390 days exclusive of landscaping. The court found plaintiffs could and would have completed the entire project within a period of 276 days except that, as a direct result of the refusal to permit commencement of construction on the County Strip and the failure to obtain ap-

proval within a reasonable time of the plans and specifications from the city of Los Angeles, they were delayed, hindered, and prevented from completing the work until April 15, 1954, resulting in a delay to plaintiffs of 378 days. The court awarded damages for the delay in completing the project based on a period of 257 days as provided in the progress schedule plus 19 days of inclement weather, a total of 276 days. As we understand the argument of Housing Authority, it is that damages should have been awarded on the basis of 390 days rather than 276 days. The 390 days fixed in the contract were not an estimate of the time in which plaintiffs would actually complete the project; it simply required completion within not more than 390 days. See *Peter Kiewit Sons' Co. v. United States*, Ct.Cl., 151 F.Supp. 726.

In this connection Housing Authority argues that the court did not determine and deduct the length of the delay actually contemplated by the parties. It does not point to any evidence that a delay of the short time represented in which the County Strip

or extra work, and all claims for alleged breach of contract shall within ten days of the dispute be presented to the Contracting Officer for decision. A copy of the notice of the dispute shall be forwarded to the Field Office of the Public Housing Administration. Such notice need not detail the amount of the claim but shall state the facts surrounding the claim in sufficient detail to identify the claim, together with its character and scope. In the meantime the Contractor shall proceed with the work as directed. The parties agree that any claim not presented within the time limit specified within this subsection is waived, except that if the claim is of a continuing character and notice of the claim is not given within ten days of its commencement, the claim will be considered only for a period commencing ten days prior to the receipt by the Local Authority of notice thereof.

"b. The Contractor shall submit in detail his claim and his proof thereof. The decision of the Contracting Officer shall be approved in writing by the Public Housing Administration prior to its issuance. Any decision not so approved shall be a nullity. Each decision by the Contracting Officer shall be in writing

and shall be mailed to the Contractor by registered mail, return receipt requested. A copy shall be delivered to the Project Engineer.

"c. If the Contractor does not agree with any decision of the Contracting Officer, he shall except from the final release the decision in question.

"d. Provided the Contractor has:

"(1) given notice of any dispute within the time limit stated in 15a. above;

"(2) presented his dispute to the Contracting Officer;

"(3) taken exception in his release from the Contracting Officer's decision; and

"(4) brought suit within 120 days after receipt of final payment under this Contract or within six months of a written request by the Local Authority that he submit a final voucher and release, whichever time is the lesser;

"the Contracting Officer's decision shall not be final and conclusive but the dispute shall be tried in court on its merits. In the event the above conditions precedent have not been met, the Contractor hereby agrees that his non-compliance with the conditions precedent constitutes a waiver of his right to assert said claim."

would be available—a week or 10 days—would have delayed completion of the entire project within the time specified in the contract. Obviously from June 30, 1952, the date the contract was signed, several weeks would be required for engineering, organization, surveying, clearing of land, and other preliminary work in preparation for the actual construction on a project of this size. Housing Authority admitted in writing the period of delay was not less than 365 days. Again the argument goes to the weight of the evidence, a matter with which we have no concern.

The court included in the award to plaintiffs the damages sustained by the subcontractors and rendered judgment in favor of the subcontractors for their damages against plaintiffs. One of the subcontractors was S. A. Cummings. Of the total awarded to plaintiffs, \$54,191.82 is attributable to damages sustained by Cummings. Housing Authority claims this amount is not supported by the evidence; that \$3,339 only should have been awarded. Again counsel for Housing Authority does not give us all the evidence bearing on the subject. They omit mention of some 100 pages of testimony relative to Cummings' damages. Suffice it to say there was evidence that the loss sustained by Cummings included basic direct loss from operation—\$26,830.78; rise in prices on materials—\$9,744.03; lost time, grade crew and equipment—\$3,339; loss on general overhead—\$14,278.01; total, \$54,191.82, the amount awarded.

5. The order reads:

"It Is Hereby Ordered:

"That said defendant's motion to set aside the *ex parte* order of this Court made on November 21, 1956, directing the Clerk of this Court to issue a writ of execution on behalf of plaintiffs herein and against defendant Housing Authority of the City of Los Angeles, California, is denied;

"That said defendant's motion to quash the said writ of execution is denied;

"That said defendant's motion to vacate the levy made under said writ of execution upon the Bank of America National Trust and Savings Association, Main Office, Los Angeles, California, for all moneys, goods, credits, effects, debts due or owing, or any personal

The Appeal of Housing Authority
from the Order re Execution

Housing Authority's notice of appeal from the judgment was filed on July 26, 1956. On November 21, 1956 plaintiffs obtained an order for the issuance of a writ of execution. The writ was issued and levied on Housing Authority's bank account. Housing Authority moved the court for an order vacating the order for issuance of the writ and quashing the writ and levy on the ground all its property is exempt from execution, and on the further ground execution was automatically stayed by the filing of the notice of appeal under section 1058 of the Code of Civil Procedure. The trial court made an order denying the motion to vacate the order for issuance of the writ and denied the motion to quash the writ and the levy, and ordered that further proceedings under the writ and levy and delivery of the funds in the bank account be stayed under section 1058 of the Code of Civil Procedure pending final determination of the appeal from the judgment.⁵ Housing Authority appeals from that order.

[16] Section 34217 of the Health and Safety Code in pertinent part provides:

"Execution or other judicial process shall not issue against the *real property* of an authority nor shall any judgment against an authority be a charge or lien upon its *real property*." (Emphasis added.)

property of said defendant, including the bank account of said defendant entitled 'Housing Authority of the City of Los Angeles, California, Development Fund No. 4 for project CAL 4-13 to CAL 4-22' is denied;

"That all further proceedings herein, including further proceedings under said writ of execution and levy thereunder and delivery of said funds in said bank account under said levy of execution to the Sheriff of the County of Los Angeles for or on behalf of plaintiffs are stayed under the provisions of Section 1058 of the Code of Civil Procedure pending final determination of the appeal from the judgment rendered herein."

The statute exempts from execution the real property of a housing authority—not the personal property. It seems evident that if the Legislature had intended that personal property of a housing authority should be exempt from execution it would have said so. This view is reinforced by the fact that nowhere in the housing authority law or elsewhere is any method provided by which a housing authority can raise money to pay a judgment against it. The judge who heard the motion was of the opinion that if plaintiffs do not have the legal right to execution on the personal property of Housing Authority their judgment must remain unsatisfied. Housing Authority says the Public Housing Authority of the United States will be required to supply the funds to pay the judgment. Neither the United States nor the Public Housing Authority is a party to this lawsuit and we are not advised how plaintiffs could compel either to pay the judgment.

Section 1058 of the Code of Civil Procedure provides that in any civil action “no bond, written undertaking, or security can be required of the State, or the people thereof, or any officer thereof, or of any county, city and county, city, district, or town, or of the United States or any instrumentality or agency thereof, or any officer thereof.”⁶

Housing Authority is a state agency. Housing Authority of City of Los Angeles v. City of Los Angeles, 38 Cal.2d 853, 861, 243 P.2d 515. It is a public corporation. Housing Authority of Los Angeles County v. Dockweiler, 14 Cal.2d 437, 458, 94 P.2d 794. Public housing projects are public

uses and purposes. *Id.*, 14 Cal.2d 449-452, 94 P.2d 802. “Section 4 of the Housing Authorities Law, *supra*, defines an authority as ‘a public body, corporate and politic’. Such an authority is not unlike an irrigation district which, though held not to be a municipal corporation within the meaning of the quoted constitutional provision [Art. XIII, § 1], has been held to be a public corporation for municipal purposes whose property is exempt from taxation.” *Id.*, 14 Cal.2d 453, 94 P.2d 802. “The public purpose here involved was declared and made law by the legislature of this state when it enacted the housing authorities law and related acts. That law applies to and affects the entire citizenry of the state as a body, whether the details incident thereto be executed in one or another, in several or in all of the political subdivisions authorized to act thereunder.” *Kleiber v. City etc. of San Francisco*, 18 Cal.2d 718, 723, 117 P.2d 657, 659.

Referring to section 1058, the court in *Lamberson v. Jefferts*, 116 Cal. 492, at page 493, 48 P. at page 485, stated:

“It will be observed that the section makes special mention of the state and state officers, but, while it mentions counties, it omits the mention of county officers; hence it is argued with considerable force that the design was to exclude them. And as it is provided in section 940 that no appeal is effectual unless an undertaking be given, every exception must be express, and none can be implied.

“The county is, however, the real party in interest. It was held in

6. Section 1058 reads: “In any civil action or proceeding wherein the State, or the people of the State, is a party plaintiff, or any State officer, in his official capacity or on behalf of the State, or any county, city and county, city, district, or town, or the United States or any instrumentality or agency thereof, or any Federal officer, in his official capacity or on behalf of the United States or any instrumentality or agency thereof, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the State, or the people thereof, or any officer thereof, or of any

county, city and county, city, district, or town, or of the United States or any instrumentality or agency thereof, or any officer thereof; but on complying with the other provisions of this code the State, or the people thereof, or any State officer acting in his official capacity, or the United States or any instrumentality or agency thereof, or any Federal officer acting in his official capacity, shall have the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code.”

Scheerer v. Edgar, 67 Cal. 377, 7 P. 760, that in such matters the auditor does not act in his individual right, but in that of the city and county. For that reason it was held that section 946 was applicable, and the court might, by order, dispense with the undertaking. If that be so, the county is the real party in interest, and the case is evidently within the reason of the rule laid down as to counties."

San Francisco Law & Collection Co. v. State of California, 141 Cal. 354, at page 356, 74 P. 1047, at page 1048, states:

"It is claimed that the appeal is ineffectual for any purpose by reason of the fact that no undertaking on appeal for damages and costs has ever been filed by the state, or deposit of money made in lieu thereof, and that the giving of such undertaking has not been waived. Code Civ.Proc., §§ 940, 941.

"This claim is based upon the fact that section 1058, Code Civ.Proc., does not, in terms, exempt the state from giving undertakings when it is a party *defendant*, although the section does in terms so except the state when it is a party plaintiff, and exempts any state officer, when, *in his official capacity or in behalf of the state*, he is a party plaintiff or defendant. The intention to dispense with the bond in all cases where the state, or the people of the state, or any state officer in behalf of the state, or any county, city and county, city, or town is a party plaintiff or defendant, is clear, and the reason for the omission from section 1058, Code Civ.Proc., of any provision in terms exempting the state from the giving of bonds and undertakings in actions wherein it is a party defendant was probably, as suggested by plaintiff, that at the time of the last amendment of said section the state could not be brought into court as a defendant. The general provisions relative to the giving of an undertaking on appeal as security for damages and costs (sec-

tions 940 and 941 of the Code of Civil Procedure) have not been amended since the year 1874. As originally enacted, and as last amended they were not intended to include the state, for by section 1058, Code Civ.Proc., as originally enacted in 1872, explicit provision was made for the exemption of the state from the effect of such provisions in all cases in which it could then be made a party.

"This being the condition of the legislation at the time of the enactment of the various provisions authorizing suits against the state on claims for money, the general words of the statutory provisions relative to undertakings on appeal should not be held applicable to the state, unless the intention of the Legislature that they should be so applicable is clearly shown. [Citations.] No such intention anywhere appears."

Mercantile Trust Co. of San Francisco v. Miller, 166 Cal. 563, 137 P. 913, was mandate to compel the superior court to issue a writ of execution. Because of insolvency, the superintendent of banks had taken possession of the affairs and assets of a bank for the purpose of liquidation. After judgment in a suit in the superior court the superintendent of banks had appealed. The superior court had ruled that on the appeal the superintendent of banks should have a stay of proceedings without executing any undertaking. After quoting section 1058 the court stated (166 Cal. at page 567, 137 P. at page 915.):

"It seems clear to us that the state superintendent of banks when performing the duties of his office required of him by the statute in taking possession of and proceeding to liquidate the assets of a banking corporation, is acting as a state officer in his official capacity within the meaning of this section, and that the effect of the section is to exempt him from the obligation to give an undertaking on appeal, for a stay of execution, when, as such officer, he takes an appeal from any judgment

in which, as such superintendent of banks, he is interested on behalf of any bank under his control, and of whose assets he has taken possession. He is not acting under appointment from the court or by authority of the court, but by authority of the statute which creates his office, authorizes his appointment, and enjoins upon him the duties which he is at that time performing. The effect of this statute is to justify the court in its refusal to order the execution."

Jones v. Richardson, 9 Cal.App.2d 657, 659, 50 P.2d 810, held that the building and loan commissioner, acting as liquidator of a building and loan association, was not required to give an undertaking in procuring the appointment of a receiver.

[17] The principle applied in the foregoing cases is applicable here. Housing Authority is a state agency and functions as an administrative arm of the state in pursuing the state concern and effecting the legislative objective. It is not required to give an undertaking on appeal.

[18, 19] The effect of the order appealed from is to compel the money levied upon to remain on deposit in lieu of an undertaking pending final determination of Housing Authority's appeal from the judgment. It is equivalent to requiring the filing of an undertaking. When the appeal from the judgment was perfected it released from levy the property which had been levied upon under the writ of execution. Code Civ.Proc., § 946.

The Cross-Appeal of Plaintiffs

Plaintiffs' cross-appeal is precautionary only. They say it is their position "that the judgment entered by the trial court was proper but that should the Court reverse or modify the judgment of the Prime Contractor against the Housing Authority, it should to the same extent reverse or modify the judgments of the Subcontractors against the Prime Contractor." Interest was properly awarded the subcontractors against plaintiffs. Plaintiffs do not contend

otherwise. Since we have concluded that the judgment in favor of plaintiffs against Housing Authority should be affirmed except as to the award of interest, it is unnecessary to consider plaintiffs' cross-appeal.

The judgment is modified by striking from paragraph (1) thereof the phrase "from April 15, 1954," and inserting in lieu thereof the phrase "from September 7, 1955." As thus modified, it is affirmed. The order appealed from is reversed. The costs on appeal shall be borne as follows: In Civil No. 22325 Housing Authority shall bear its own costs and those of plaintiffs; plaintiffs shall bear those of the subcontractors. In Civil No. 22436 plaintiffs shall bear the cost of the clerk's transcript.

SHINN, P. J., and PATROSSO, J. pro tem., concur.



Anthony J. COMUNALE, Plaintiff and Appellant,

v.

TRADERS & GENERAL INSURANCE COMPANY, a corporation, Defendant and Respondent.*
Civ. 22343.

District Court of Appeal, Second District,
Division 3, California.

Feb. 17, 1958.

Rehearing Denied March 10, 1958.

Hearing Granted April 16, 1958.

Action by assignee of insured for damages sustained in excess of automobile liability policy limit, against insurer which denied coverage when there was coverage and refused to defend insured and declined to consider offer of compromise. The Superior Court of Los Angeles County, J. F. Moroney, J., rendered judgment for the defendant notwithstanding the verdict, and

* Opinion vacated 328 P.2d 198.

the plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence raised question for jury as to insurer's lack of good faith toward insured in refusing to assume defense of personal injury action against insured and in declining to consider offer of compromise.

Reversed with directions.

1. Insurance ⇨514½

Automobile liability insurer's refusal to defend action against insured constitutes a breach of contract.

2. Insurance ⇨146(2, 3)

The understanding of an ordinary person is the standard used in construing a contract of insurance, and any ambiguity in the language must be resolved against the insurer.

3. Insurance ⇨514½

In automobile liability policy, the agreement to defend is not a covenant subordinate to or dependent on the agreement to indemnify; it is distinct from, different from, independent of and broader than the insurer's promise to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of bodily injury.

4. Insurance ⇨514½

Where the defense covenant in automobile liability policy is clear, positive, and unambiguous, it should be accorded its plain and ordinary meaning.

5. Insurance ⇨594

Insured's cause of action against automobile liability insurer which denied coverage when there was coverage, refused to defend insured and declined to consider an offer of settlement within policy limits was assignable, notwithstanding policy provision that assignment of interest under policy would not bind insurer until a consent was endorsed on policy, and that no such consent was ever given or had. West's Ann.Civ.Code. §§ 953, 954, 1458.

6. Limitation of Actions ⇨65(3)

Where automobile liability policy provided that no action would lie against insurer until amount of insured's obligation to pay shall have been finally determined against insured after actual trial, insured's cause of action against insurer for breach of covenant to defend accrued when judgment in personal injury action against insured became final, and action against insurer commenced within four years after such time was not barred by limitation. West's Ann.Code Civ.Proc. §§ 312, 337.

7. Insurance ⇨514½

The obligation of liability insurer to defend action brought against insured by third party is to be determined by the allegations of the complaint in the action; if there is potentially a case within policy coverage under the negligence complaint, it is the duty of the insurer to defend.

8. Insurance ⇨514½

The positive obligations of liability insurer created by unjustified refusal to defend action against insured are: (1) liability for amount of judgment rendered against insured or of settlement made by him, (2) liability for expenses incurred by insured in defending suit and (3) liability for any additional damage traceable to insurer's refusal to defend.

9. Insurance ⇨514½

If liability insurer desires to show that claim against insured is based on facts excluded from policy coverage, and under those circumstances refuses to defend and decides to await the determination of its obligation in a later suit against it, it does so at its peril; and if it guesses wrong, it must bear the legal consequences of its breach of contract.

10. Insurance ⇨514½

Refusal of liability insurer to defend action based on claim actually within coverage of policy because of insurer's erroneous assumption that such claim is outside policy coverage, even though based on honest mistake of insurer, constitutes an unjustified refusal and a breach of contract which ren-

ders insurer liable to insured for all damages resulting to insured as a result of such breach.

11. Insurance ⇨514½

Where recovery is had against insurer by a third party over amount payable under liability policy on ground that insurer had not acted in good faith in connection with its contract to defend, the normal recovery by the insured against the insurer is the amount for which the insured becomes charged in excess of policy coverage.

12. Damages ⇨117

The measure of damages for breach of obligation arising from contract is amount which will compensate party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. West's Ann.Civ.Code, §§ 3300, 3301.

13. Insurance ⇨514½

One of the obligations created by the liability insurer's unjustified refusal to defend action against insured on ground that claim is outside policy coverage is to pay the insured all the expenses he incurred in making such defense himself; such expenses may include attorney's fees, court costs, witness' and stenographer's fees, costs of appeal and appeal bonds, and investigation expenses.

14. Insurance ⇨514, 514½

Even though automobile liability insurer has not taken over complete control of defense of action against insured, nevertheless the damages recoverable for insurer's bad faith refusal to defend and to compromise the action may be the amount for which the insured becomes charged in excess of its policy coverage.

15. Insurance ⇨612(1)

Where automobile liability insurer in bad faith refuses to defend action against insured and refuses to consider offer of compromise and judgment in excess of policy coverage is rendered against insured, insured's payment of the excess is not condition precedent to recovery from insurer of the excess as damages.

16. Appeal and Error ⇨863

Judgment ⇨199(3.3)

On motion for judgment notwithstanding verdict, neither the trial court nor the reviewing court may weigh the evidence or judge the credibility of the witnesses.

17. Judgment ⇨199(3.10)

A defendant's motion for judgment notwithstanding the verdict may properly be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is a determination that there is no evidence sufficiently substantial to support the verdict.

18. Insurance ⇨668(13)

In action by assignee of insured for damages sustained in excess of automobile liability policy limit against insurer which denied coverage when there was coverage and refused to defend insured and declined to consider offer of compromise, evidence raised question for jury as to insurer's lack of good faith toward insured in refusing to assume defense of personal injury action and in declining to consider offer of compromise.

19. Insurance ⇨538

Insured's notice to automobile liability insurer's authorized agent that insured had struck a pedestrian was notice to insurer.

Newlin, Tackabury & Johnston and Frank R. Johnston, Los Angeles, for appellant.

W. P. Smith and Henry F. Walker, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from a judgment for defendant, referred to as Traders, notwithstanding the verdict.

The principal question to be decided is whether an insurance company which denied coverage when there was coverage, refused to defend its insured and declined to consider an offer of settlement, is liable

to the assignee of the insured for damages sustained in excess of the policy limit. There are other subsidiary questions.

In June 1947 Traders issued its automobile liability policy to Felie Sloan. The term of the policy was from July 9, 1947 to July 9, 1948. Germane provisions of the policy are these:

"Item 3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of each company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

"Coverages. A. Bodily Injury Liability. Limits of Liability \$10,000.00 each person \$20,000.00 each accident."

"Insuring Agreements

"I Coverage A—Bodily Injury Liability

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile."

"II Defense, Settlement, Supplementary Payments

"As respects such insurance as is afforded by the other terms of this policy

"(a) under coverages A and B the company shall

"1. defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof; even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or

suit as may be deemed expedient by the company; * * *

"The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy."

"Conditions * * *

"3. Limits of Liability—Coverage

A. The limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to 'each accident' is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident."

"The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident."

The same coverage existed under the policy in favor of Percy Sloan, husband of Felie Sloan, as that of his wife.

On March 27, 1948 Percy Sloan, while driving his brother John's truck to his aunt's home for a social visit, struck Anthony Comunale and Carmela Comunale who were crossing Olympic Boulevard in a marked crosswalk on foot. Anthony Comunale was severely injured.

On March 29, 1948 Percy Sloan telephoned Frank Sloan, Traders' duly appointed and authorized agent (who is not related to Felie or Percy Sloan), through whom he had purchased the policy, and told him the facts about the accident. He asked Frank

if he was covered. Frank told him that since he was driving someone else's truck he was not covered and that Traders was not responsible under the policy. Frank had been handling Percy's insurance business for some time.

In November 1948 the Comunales filed suit against Percy Sloan. On February 3, 1950 Mr. Leppek, attorney for Percy Sloan, tendered the defense of the accident to Traders, informing it of the trial date. On February 8, 1950 Mr. Leppek delivered copies of the complaint and answer in the action to Traders. Traders requested its local counsel to secure time for investigation, and on February 14, 1950 its local counsel advised it that Mr. Leppek had agreed to let the case go "off calendar." On February 24 Traders decided to deny coverage and to refuse to take any part in the defense of the action. On May 15, 1950 Mr. Leppek again tendered the defense of the action to Traders. On May 18, 1950 defendant advised Mr. Leppek there was no coverage for the accident in question; that Percy Sloan had not complied with the terms of the policy by giving immediate notice of the accident; and that it declined to defend or to pay any expense of the defense or to pay any judgment that might be rendered.

Mr. Allport was substituted for Mr. Leppek as attorney for Percy Sloan and conducted the defense at the trial which began on June 7, 1950. During the trial Mr. Allport informed Traders' local counsel the plaintiffs in the personal injury action would accept \$4,000 in settlement of the case. Traders declined to consider the offer of compromise which was within the policy limit.

Anthony Comunale recovered judgment in the personal injury action against Percy Sloan in the amount of \$25,000. The judgment became final. Comunale, pursuant to the provisions of the policy and section 11580(b) (2) of the Insurance Code, then brought suit against Traders for the policy limit for bodily injuries of \$10,000. He recovered judgment against Traders in the amount prayed. The court in that action found that Percy Sloan was covered and

protected by the policy with respect to his liability arising out of the accident. The judgment was affirmed on appeal. *Comunale v. Traders & General Ins. Co.*, 116 Cal.App.2d 198, 253 P.2d 495. Traders paid the amount of the judgment in that action. The judgment in favor of Comunale in the personal injury action was thus left unsatisfied to the extent of the difference between the amount paid by Traders and the total amount of the judgment which—in May 1954, with interest—was \$19,198. In a second cause of action it was sought to recover \$800 as the reasonable amount of attorneys' fees incurred in the defense of the original action. Under stipulation entered into at the opening of the trial this amount was paid by Traders. Percy Sloan's rights under the policy were assigned to Anthony Comunale, who then brought this action against Traders for the excess above the policy limit.

The jury rendered a verdict in favor of plaintiff in the amount prayed for. On motion of Traders the court rendered judgment notwithstanding the verdict that plaintiff take nothing and that Traders have judgment for its costs. Plaintiff appeals.

The assignments of error are: 1. Having breached its contract by refusing to defend, and having declined to consider the offer of compromise, Traders is liable for the amount of the judgment in the personal injury action in excess of the bodily injury limit of the policy. 2. The court erred in granting the motion for judgment notwithstanding the verdict. Traders contends: 1. The action is *ex delicto* in nature. 2. The claim sued on was not assignable. 3. If the action is in contract, the provisions of the policy with respect to assignment were not complied with. 4. The action is barred by the statute of limitations. 5. The mere failure or refusal to defend the bodily injury action does not impose on an insurer a liability in excess of the policy limit for or on account of an award in excess of the policy limit for such bodily injury damage. 6. There was no proof of bad faith or negligence. 7. There was no proof of damage.

[1-4] The action is in contract. The refusal to defend constitutes a breach of contract.¹ Traders argues that the covenant to defend is not severable from the agreement to indemnify. We deem this construction of the policy entirely untenable. The understanding of an ordinary person is the standard used in construing a contract of insurance, and any ambiguity in the language must be resolved against the insurer.² Construing a similar policy in *Financial Indemnity Co. v. Colonial Ins. Co.*, 132 Cal. App.2d 207, at page 210, 281 P.2d 883, at page 885, the court stated:

"[T]he duty to defend was an absolute one by each insurer and is severable and independent of the undertaking for payment of damages. (See 3 Richards on Insurance, 5th ed., § 421, p. 1390.) * * *

"[132 Cal.App.2d at page 211, 281 P.2d at page 885.] * * * [T]he agreement to defend is not only completely independent of and severable from the indemnity provisions of the policy, but is completely different. Indemnity contemplates merely the payment of money. The agreement to defend contemplates the rendering of services. The insurer must investigate, and conduct the defense, and may if it deems it expedient, negotiate and make a settlement of the suit."

In *Grand Union Co. v. General Accident, etc., Assur. Corp.*, 254 App.Div. 274, 4 N.Y.S.2d 704, affirmed 279 N.Y. 638, 18 N.E.2d 38, the insurer refused to defend the personal injury action on the ground there

was no coverage. The court stated (4 N.Y.S.2d 711):

"The accident being within the coverage defendant was obligated to defend and having refused to do so is liable to plaintiff for damages caused by its failure to defend. In considering the quantum of damages it must be kept in mind that plaintiff's right of action herein is not founded on defendant's agreement to indemnify nor on its additional agreement to pay the costs taxed against plaintiff in actions defended by the insured. Plaintiff here is suing for defendant's breach of an entirely separate agreement, viz., the express covenant to defend."³

"The principle that 'the duty to defend is broader than the duty to pay' is now beyond cavil."⁴ The agreement to defend is not a covenant subordinate to or dependent on the agreement to indemnify; it is distinct from, different from, independent of, and broader than the insurer's promise to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of bodily injury. There is no language in the policy making the defense covenant dependent on the amount of liability for bodily injury. The defense covenant is clear, positive, and unambiguous, and should be accorded its plain and ordinary meaning.

[5] The contention that the cause of action sued on is not assignable cannot be sustained. In the recent case of *Brown*

1. *Henkel v. Pacific Employers Ins. Co.*, 140 Cal.App.2d 301, 305-306, 295 P.2d 80; *Lamb v. Belt Casualty Co.*, 3 Cal. App.2d 624, 630, 40 P.2d 311; *Liberty Mut. Ins. Co. v. Atlantic Coast L. R. Co.*, 66 Ga.App. 826, 19 S.E.2d 377, 382; *Butler Bros. v. American Fidelity Co.*, 120 Minn. 157, 139 N.W. 355, 357, 44 L.R.A., N.S., 609; *South Knoxville Brick Co. v. Empire State Surety Co.*, 126 Tenn. 402, 150 S.W. 92, 94; *Pennsylvania Thresh., etc. Ins. Co. v. Messenger*, 181 Md. 295, 29 A.2d 653, 656; 45 C.J.S. Insurance § 933 b, p. 1059.

2. *Artukovich v. St. Paul-Mercury Indem. Co.*, 150 Cal.App.2d 312, 324, 310 P. 2d 461.

3. Also see *City Poultry & Egg Co. v. Hawkeye Cas. Co.*, 297 Mich. 509, 298 N.W. 114, 115; *Union Indemnity Co. v. Mostov*, 41 Ohio App. 518, 181 N.E. 495, 496; *American Cas. Co. of Reading, Pa. v. Howard*, 4 Cir., 187 F.2d 322, 326; *Hoosier Cas. Co. v. Chimes, Inc.*, D.C., 95 F.Supp. 879, 883-884.

4. *American Employers Ins. Co. v. Goble Aircraft SP*, 205 Misc. 1066, 131 N.Y.S. 2d 393, 399.

v. Guarantee Ins. Co., 155 Cal.App.2d 679, 319 P.2d 69, it was expressly held that an insured's cause of action against his insurer for its wrongful refusal to accept a compromise offer to settle an automobile accident personal injury claim against the insured is assignable. Traders claims this provision of the policy controls, "Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; * * *", and that no such consent was ever given or had. Appleman says, "after a loss has occurred and rights under the policy have accrued, an assignment may be made without the consent of the insurer, even though the policy prohibits assignments. Under such circumstances, the assignment of a right under the policy is not regarded as a transfer of the policy itself, but rather of a chose in action. This rule has been set forth and followed in cases involving * * * automobile liability insurance."⁵ *Southwestern Bell Tel. Co. v. Ocean Acc. & Guar. Corp.*, D.C., 22 F.Supp. 686, 687, says it is uniformly ruled that a right of action arising out of a contract may generally be assigned;⁶ and holds that a provision in a policy against assignment does not apply to assignment after loss, and a specific provision against such assignment is null and void as inconsistent with the covenant of indemnity and contrary to public policy.

[6] Traders' contention that the action is barred by the statute of limitations is without merit. The policy provides that no action shall lie against Traders until the amount of the insured's obligation to pay shall have been finally determined against the insured after actual trial. There is no liability under the policy until a final judgment is recovered against the

insured. *Linkenhogor v. American Fid. & Cas. Co.*, 152 Tex. 534, 260 S.W.2d 884, holds that the statute of limitations begins to run as of the date the judgment against the insured becomes final. The judgment in the personal injury action became final on August 13 or 14, 1950. The cause of action did not accrue until that date. The complaint in the present action was filed May 28, 1954, within four years from the date the cause of action accrued. An action on any contract, obligation, or liability founded on an instrument in writing may be commenced within four years after the cause of action shall have accrued.⁷ The action is not barred by the statute of limitations.

The principal question is: When the insurer refuses to undertake the defense of an action brought against the insured and explicitly bases its refusal on the ground that the claim on which the action is based is not within the coverage of the policy, what is the legal effect of its refusal to defend when in fact the claim is within the coverage of the policy?

[7] The obligation of a liability insurer to defend an action brought against the insured by a third party is to be determined by the allegations of the complaint in the action.⁸ If there is potentially a case within the policy coverage under the negligence complaint, it is the duty of the insurer to defend.⁹ The complaint in the personal injury action against Percy Sloan clearly showed a claim within the coverage of the policy. Traders was obligated to defend, regardless of its ultimate liability.

"When the company accepted the premium charged for the policy, it impliedly undertook to use this control and management [of any suit that might be brought against the insured for any claim that

5. 7 Appleman, *Insurance Law and Practice*, 45, § 4269. See *Civ.Code*, §§ 953, 954, 1458.

6. See 6 C.J.S. *Assignments* § 31, p. 1080.

7. *Code Civ.Proc.* §§ 312, 337.

8. 28 Cal.Jur.2d 213, § 495.

9. *Boutwell v. Employers' Liability Assur. Corp.*, 5 Cir., 175 F.2d 597, 600; *Saragan v. Bousquet*, 322 Mass. 14, 75 N.E.2d 649, 651-652; *Pow-Well Plumbing & Heating Co. v. Merchants' Mut. Cas. Co.*, 195 Misc. 251, 89 N.Y.S.2d 469, 474.

would show liability on the part of the insurer] for the mutual benefit of the parties to the contract. Their relations became mutually fiduciary; and each owed the other the duty of the utmost good faith in their dealings together, and in exercising the privileges and discharging the duties specified in and incident to the policy contract."¹⁰

[8,9] It is held that the positive obligations of the insurer created by its unjustified refusal to defend are: 1. Liability for the amount of the judgment rendered against the insured or of the settlement made by him. 2. Liability for the expenses incurred by the insured in defending the suit. 3. Liability for any additional damage traceable to its refusal to defend.¹¹ If the insurer desires to show that the claim against the insured is based on facts excluded from the policy coverage, and under those circumstances refuses to defend and decides to await the determination of its obligation in a later suit against it, it does so at its peril; and if it guesses wrong, it must bear the legal consequences of its breach of contract.¹²

The mere rejection of an offer of compromise within the policy limit does not render the insurer liable for the amount of a judgment in excess of the policy limit. The decisions split on the question whether the insured's obligation is to act in good faith in considering such an offer or whether it is required to exercise due care only and is liable for the negligent rejection of the compromise.¹³ The majority of the courts follow the former rule—good faith.¹⁴ In *Brown v. Guarantee Ins. Co.*,

155 Cal.App.2d 679, 319 P.2d 69, it was held that the good faith rule is applicable in this state.

"The mere rejection of a settlement offer does not suffice to save the insurer harmless, nor is it sufficient to show that the insurer, in rejecting a settlement offer, had no evil purposes. Negative elements do not meet the demands of good faith. A decision by one who is ignorant of the controlling facts is worthless. Only a decision made by one who exercised due diligence in apprising himself of the material facts is entitled to respect as made in good faith."¹⁵

"The phrase 'good faith' in common usage has a well-defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation."¹⁶ "When a liability insurance company by the terms of its policy obtains from the insured a power, irrevocable during the continuance of its liability under the policy, to determine whether an offer of compromise of a claim shall be accepted or rejected, it creates a fiduciary relationship between it and the insured with the resulting duties that grow out of such a relationship. Under policies like those here involved, the insurer and the insured owe to each other the duty to exercise the utmost good faith. While the insurance company, in determining whether to accept or reject an offer of compromise, may properly give consideration to its own interests, it must, in good faith, give at least equal consideration to

10. *Johnson v. Hardware Mut. Casualty Co.*, 109 Vt. 481, 1 A.2d 817, 820.

11. *Arenson v. National Automobile & Cas. Ins. Co.*, 45 Cal.2d 81, 286 P.2d 816; *Ritchie v. Anchor Cas. Co.*, 135 Cal.App. 2d 245, 286 P.2d 1000; *Lamb v. Belt Cas. Co.*, 3 Cal.App.2d 624, 631, 40 P. 2d 311; *Hully v. Aluminum Co. of America, D.C.*, 143 F.Supp. 508, 514; see cases collected 49 A.L.R.2d 717.

12. See cases collected 41 A.L.R.2d 434; 49 A.L.R.2d 700.

13. See cases collected 40 A.L.R.2d 168; XXVI Journal of the State Bar of California, 355.

14. See cases collected 40 A.L.R.2d 178.

15. *Radcliffe v. Franklin National Ins. Co. of New York*, 208 Or. 1, 298 P.2d 1002, 1024.

16. *People v. Nunn*, 46 Cal.2d 460, 468, 296 P.2d 813, 818, citing 18 Words and Phrases, Good Faith; 35 C.J.S. (1943), p. 488; 1 Bouv., Law Dict., Rawle's Third Revision 1914, p. 1359.

the interests of the insured and if it fails so to do it acts in bad faith."¹⁷

The decisions which follow the good faith rule seem to agree that the insurer's negligence is a relevant consideration in determining whether the insurer exercised the requisite good faith.¹⁸ The fact that the evidence as to liability and damages was strongly against the insured in the personal injury action and that a recovery might be had in excess of the insurer's liability is an element to be considered as indicative of a want of good faith.¹⁹ The fact that the insurer failed to investigate

the claim properly so as to be able to assess the probabilities intelligently is an element to be considered as indicative of a want of good faith.²⁰

[10-12] The refusal of the insurer to defend an action based on a claim actually within the coverage of the policy because of its erroneous assumption that such claim is outside policy coverage, even though based on an honest mistake of the insurer, constitutes an unjustified refusal and a breach of contract which renders it liable to the insured for all damages resulting to him as a result of such breach.²¹ The

17. *American Fidelity & Cas. Co. v. G. A. Nichols Co.*, 10 Cir., 173 F.2d 830, 832; *Johnson v. Hardware Mut. Casualty Co.*, 109 Vt. 481, 1 A.2d 817, 820; *Hilker v. Western Auto. Ins. Co.*, 204 Wis. 1, 231 N.W. 257, 235 N.W. 413, 415; *American Mut. Liability Ins. Co. of Boston, Mass. v. Cooper*, 5 Cir., 61 F.2d 446, 448; *American Fidelity & Cas. Co. v. All American Bus Lines*, 10 Cir., 190 F.2d 234, 238; *National Mutual Casualty Co. v. Britt*, 203 Okl. 175, 200 P.2d 407, 411, 218 P.2d 1039; *Southern Fire & Casualty Co. v. Norris*, 35 Tenn.App. 657, 250 S.W.2d 785, 790; *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346, 348.

18. *Brown v. Guarantee Ins. Co.*, 155 Cal. App.2d 679, 319 P.2d 69; *Traders & General Ins. Co. v. Rudeco Oil & Gas Co.*, 10 Cir., 129 F.2d 621, 626-627, 142 A.L.R. 799; *Royal Transit v. Central Surety & Ins. Corp.*, 7 Cir., 168 F.2d 345, 348-349; *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185, 87 N.E.2d 347, 349-350; *Boling v. New Amsterdam Cas. Co.*, 173 Okl. 160, 46 P.2d 916, 919; *National Mutual Casualty Co. v. Britt*, 203 Okl. 175, 200 P.2d 407, 413, 218 P.2d 1039; *Hilker v. Western Auto. Ins. Co.*, 204 Wis. 1, 231 N.W. 257, 260, on rehearing 204 Wis. 12, 235 N.W. 413.

19. *Ballard v. Citizens Cas. Co. of N. Y.*, 7 Cir., 196 F.2d 96, 101; *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185, 87 N.E.2d 347, 349; *McCombs v. Fidelity & Cas. Co. of N. Y.*, 221 Mo. App. 1206, 89 S.W.2d 114, 121-122; *National Mutual Casualty Co. v. Britt*, 203 Okl. 175, 200 P.2d 407, 412, 218 P.2d 1039; *American Fidelity & Casualty Co. v. G. A. Nichols Co.*, 10 Cir., 173 F.2d 830, 832-833; *Mendota Electric Co. v. New York Indem. Co.*, 169 Minn. 377, 211 N.W. 317, 319; *Noshey v.*

American Auto. Ins. Co., 6 Cir., 68 F.2d 808, 810; annotation: 40 A.L.R.2d 196.

20. *Johnson v. Hardware Mut. Cas. Co.*, 109 Vt. 481, 1 A.2d 817, 822-823; *Royal Transit v. Central Surety & Ins. Corp.*, 7 Cir., 168 F.2d 345, 348; *Ballard v. Citizens Cas. Co. of N. Y.*, 7 Cir., 196 F.2d 96, 102; *Southern Fire & Casualty Co. v. Norris*, 35 Tenn.App. 657, 250 S.W.2d 785, 790-791; *Hilker v. Western Auto. Ins. Co.*, 204 Wis. 1, 231 N.W. 257, 260, on rehearing 204 Wis. 12, 235 N.W. 413, 415.

"The following have been held indicative of bad faith:

"Serious injuries and large special damages indicating that a verdict for the plaintiff will be in excess of the policy limits.

"Refusal to follow the advice of trial counsel.

"Failure to advise the assured of possible excess liability and to disclose the status of settlement negotiations.

"Failure to make an offer or counter-offer to settle.

"Clear liability on the part of the assured.

"Failure of the home office to give adequate consideration to all the facts." XXVI Journal of the State Bar of California 355, 358.

21. *St. Louis Dressed Beef & Provision Co. v. Maryland Cas. Co.*, 201 U.S. 173, 26 S.Ct. 400, 50 L.Ed. 712, 717; *Arenson v. National Auto. & Cas. Ins. Co.*, 45 Cal.2d 81, 84, 286 P.2d 816; *Greer-Robbins Co. v. Pacific Surety Co.*, 37 Cal.App. 540, 542, 174 P. 110; *O'Morrow v. Borad*, 27 Cal.2d 794, 801, 167 P.2d 483, 163 A.L.R. 894; *Lamb v. Belt Casualty Co.*, 3 Cal.App.2d 624, 631, 40 P.2d 311; *American Casualty Co. of Reading, Pa. v. Glorfield*, 9 Cir., 216 F.2d 250; 8 Appleman, Insurance Law and Practice 32, § 4689.

author of an annotation in 49 A.L.R.2d 711 says all the cases agree that this is the law. In *Brown v. Guarantee Ins. Co.*, 155 Cal.App.2d 679, 319 P.2d 69, 74, the court stated: "An action for wrongful refusal to settle is to be distinguished from one for wrongful failure to defend the action against the insured, where mere negligence is held sufficient to justify recovery. [Citation.] The insurer's duty to defend any action against the insured is clearly expressed in the insurance policy, whereas the policy provision concerning settlement by the insurer is usually permissive in form. The mandatory duty to defend justifies the implication of a requirement that the insurer exercise ordinary care in conducting such defense." While these statements were dicta in that case, they are correct statements of the law and in accord with the great weight of authority.²² *A fortiori*, a recovery may be had against the insurer by a third party over the amount payable under the policy where the insurer has not acted in good faith in connection with its contract to defend. The normal recovery where the insurer's actionable bad faith is established and an excess judgment is recovered is the amount for which the insured becomes charged in excess of his policy coverage.²³ The damage proximately caused by Traders' breach of its contract is not measured by the policy limit. The measure of damages for the breach of

an obligation arising from contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."²⁴ The detriment proximately caused by Traders' breach of its contract by refusing to defend is the excess of the judgment in the personal injury action above the policy limit.²⁵ These damages are clearly ascertainable in both their nature and origin.²⁶

[13] It is well settled that one of the obligations created by the insurer's unjustified refusal to defend an action against the insured on the ground the claim is outside policy coverage, is to pay the insured all the expenses he incurred in making such defense himself.²⁷ Such expenses may include attorney's fees,²⁸ court costs,²⁹ witness' and stenographer's fees,³⁰ costs of appeal and appeal bonds,³¹ and investigation expenses.³² Traders concedes that "if the reasonable expenses of the insured in defending the accident action (after insurer breached its contract by refusal to defend) exceeds the policy limits for bodily injury damage, the insured is entitled to recover the same." We see no difference in principle between the reasonable expenses of the insured in defending the accident action which exceed the policy limit and the excess of the judgment in the accident action above the policy limit.

22. See cases collected 131 A.L.R. 1499, 1510.

23. 45 C.J.S. Insurance § 933 b, p. 1059; 5A Am.Jur. 119, § 115.

24. Civ.Code, § 3300.

25. *Arenson v. National Automobile & Cas. Ins. Co.*, 45 Cal.2d 81, 84, 286 P.2d 816; *American Casualty Co. of Reading, Pa. v. Glorfield*, 9 Cir., 216 F.2d 250, 253. Cf. *Henkel v. Pacific Employers Ins. Co.*, 140 Cal.App.2d 301, 305, 295 P.2d 80.

26. Civ.Code, § 3301.

27. See cases collected 49 A.L.R.2d 721.

28. *Arenson v. National Automobile & Cas. Ins. Co.*, 45 Cal.2d 81, 84, 286 P.2d 816; *O'Morrow v. Borad*, 27 Cal.2d 794, 167 P.2d 483, 163 A.L.R. 894; *Mercer Casualty Co. v. Lewis*, 41 Cal.App.2d 918, 321 P.2d—49½

923, 108 P.2d 65; *Ritchie v. Anchor Casualty Co.*, 135 Cal.App.2d 245, 258, 286 P.2d 1000.

29. *Arenson v. National Automobile & Cas. Ins. Co.*, 45 Cal.2d 81, 286 P.2d 816; *Greer-Robbins Co. v. Pacific Surety Co.*, 37 Cal.App. 540, 174 P. 110.

30. *Murphy v. Hopkins*, 68 S.D. 494, 4 N.W.2d 801, 805; *Buquo v. Title Guar. & T. Co.*, 20 Tenn.App. 479, 100 S.W.2d 997, 999.

31. *Grand Union Co. v. General Acc. etc. Corp.*, 254 App.Div. 274, 4 N.Y.S.2d 704, 711, affirmed 279 N.Y. 638, 18 N.E.2d 38.

32. *Commercial Casualty Ins. Co. v. Tri-State Transit Co.*, 190 Miss. 560, 1 So. 2d 221, 225, 133 A.L.R. 1510; *Southwestern Bell Tel. Co. v. Ocean Acc. & G. Corp.*, D.C., 22 F.Supp. 686, 688.

The policy limit of bodily injury liability in the present case is \$10,000. This is not a limit of Traders' liability for breach of the covenant to defend. The damages sought in this action are not bodily injury damages nor do they arise out of bodily injury. They are damages proximately caused by Traders' refusal to defend and to compromise.

[14] Traders says the good faith rule requires that the insurer actually has taken over the complete control of the defense of the personal injury action; and where this is lacking, the insurer cannot be held beyond the policy limit. It would be an anomalous situation if the law permitted an insurer, at the expense of the insured, to secure a more favorable position by a complete denial of coverage and a refusal to consider an offer of compromise rather than by assuming the defense and in bad faith rejecting an offer of compromise. Traders will not be permitted to profit by its own wrong.³³

[15] Traders argues that Percy Sloan must pay the excess over the policy coverage as a condition precedent to recovering damages resulting from its refusal to defend and its refusal to consider the offer of compromise. This point needs no discussion. It was decided contrary to Traders' contention in *Brown v. Guarantee Ins. Co.*, 155 Cal.App.2d 679, 319 P.2d 69. No purpose would be served in repeating what is said in that opinion.³⁴

[16-18] It seems necessary to repeat the rule governing the granting of a judgment notwithstanding the verdict. The rule does not seem to have acquired any degree of authority from its repetition—it tends to be forgotten. It is axiomatic that neither the trial court nor the reviewing court may weigh the evidence or judge the credibility of the witnesses. "A defendant's motion for judgment notwithstanding the verdict '* * * may properly be granted only

when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is a determination that there is no evidence sufficiently substantial to support the verdict.'" ³⁵ Viewing the evidence in the light most favorable to plaintiff, disregarding all conflicts and inconsistencies, we are of the opinion the record is permeated with evidence from which the jury could conclude that Traders did not exercise good faith toward its insured in refusing to assume the defense of the personal injury action and in declining to consider the offer of compromise.

[19] The defense of the personal injury action was tendered to Traders in ample time for it to make a complete investigation before trial. Relying on the statement of Traders' agent that he was not covered and that it was not necessary to take any further steps, Percy Sloan did not produce the policy for his attorney's inspection until February 3, 1950. The statement to Traders' agent was in strict compliance with the policy. On February 3 Mr. Leppek, counsel for Percy Sloan, by letter told Traders the Comunales claimed very serious injuries; Percy Sloan had informed its agent of the accident and had been told by the agent he was not covered under the policy and that it was not necessary for him to take any further steps; that the case was set for trial for February 15, 1950; up to that time Percy Sloan had relied on the agent's statements; that he (Mr. Leppek) had read the policy and in his opinion there was coverage; and he tendered the defense of the action to Traders. Mr. Leppek further stated he was willing to substitute any attorney Traders chose; the Comunales' attorneys had not been informed of the policy; and "If you refuse to defend this action we will, in the event of a judgment against us, look to you for reimbursement [sic] of any judgment, costs and expenses." On February 8, 1950 Mr. Leppek delivered

33. *Hacker Pipe & Supply Co. v. Chapman V. Mfg. Co.*, 17 Cal.App.2d 265, 271, 61 P.2d 944.

34. Also see cases collected 49 A.L.R.2d 735.

35. *Champion v. Bennetts*, 37 Cal.2d 815, 820, 236 P.2d 155, 158.

to one of Traders' adjusters two copies of the complaint and two copies of the answer of Percy Sloan in the personal injury action. The complaint showed the severity and seriousness of Mr. Comunale's injuries and on its face it was the duty of Traders to defend. Mr. Leppek had investigated the circumstances surrounding the accident including the place where it occurred, caused photographs to be made of the scene, secured the names of witnesses, interviewed them and prepared statements of the interviews. He tendered all of this material to Traders. Between February 8 and 14, 1950, Mr. Leppek told Traders' local counsel that paragraph V of the policy provided coverage. On February 14, 1950 he sent Traders' local counsel a copy of a stipulation in which it was agreed between counsel for the plaintiffs in the personal injury action and himself that the case go off calendar. On February 14 its local counsel wrote Traders, "The interpretation of this policy is puzzling to me," and "The whole thing sounds screwy to me but I must confess that the language of Paragraph V above quoted looks very much like we may be stuck for our defense and coverage of Percy Sloan on this accident."³⁶ Traders completely disregarded this advice. On February 24, 1950 the manager of Traders' claims department wrote its local counsel that "it is the general concensus [sic] of opinion that since we feel so definitely that we have no coverage for this accident and resulting claims, we should refuse to take any part in the defense of this lawsuit. Percy Sloan is represented by attorneys and it seems that the case will be defended and a default judgment will not be permitted. We think, therefore, that we can safely refuse to take any part in this suit and assert our policy defenses if and when we are sued on the policy." On the same day the claims manager sent a communication to Traders' reinsurer in which he said that "Percy Sloan struck and severely injured two pedestrians who were crossing in a designated crosswalk. We do not have any

medical information but the allegations indicate serious injuries. The accident was reported to our agent two or three days after it happened, but he advised our assured that our policy did not cover the accident and did not report the matter to us. Percy Sloan has employed his own attorneys and we are refusing to defend this accident and are denying coverage." On March 8, 1950 Traders wrote Felie Sloan, stating the first notice it had of the accident was the letter of February 3, 1950 from Mr. Leppek; it had not been notified as required by the policy; it denied coverage; and it "declines to assume the defense of this action, and further declines to assume any liability for payment of any judgment that may be rendered against Mr. Percy Sloan." Of course, notice to the agent was notice to Traders. On May 15, 1950 Mr. Leppek notified Traders the personal injury action was set for trial for June 7, 1950, again tendered the defense to Traders, and stated, "That at this time we have awaiting your instructions copies of all pleadings, medical reports and depositions." On May 18 Traders replied to Mr. Leppek, reiterating its denial of coverage, stating the required notice had not been given to it, and that it declined the defense of the action.

On May 31, 1950 the manager of Traders' claims department in Dallas, Texas, wrote to the manager of its Los Angeles claims department saying, "We, of course, do not want to involve ourselves in this case but possibly by discreet inquiries you can find out what happens to it when it comes up for trial." Trial of the action began on June 7, 1950. All of the witnesses to the accident who were available at the time it occurred were available at the time of the trial. Traders did not defend the action. Mr. Allport, who was substituted for Mr. Leppek, conducted the trial on behalf of Percy Sloan.

On June 8, 1950, during the trial, Mr. Allport wrote Traders, stating that on June 7 and 8 he had endeavored to effect settle-

36. See *Tully v. Travelers Ins. Co.*, D.C., 118 F.Supp. 568, in which a similar letter was written.

ment of the personal injury action and had discussed it with all parties concerned, including Traders' local counsel, requesting that he endeavor to secure Traders' cooperation in effectuating it; that he had again called its local counsel at noon that day by telephone and told him that the plaintiffs in the action had informed him they would accept \$4,000 in settlement of the case; that his clients did not have the money with which to effect the settlement; and in view of the fact that Traders had consistently refused the defense of the action and the settlement thereof, his clients were advised to proceed with the trial. On behalf of his clients Mr. Allport demanded that Traders immediately assume the defense and settlement of the action. He stated that in his opinion it was highly probable a verdict would be rendered in excess of Traders' policy limit and in that event his clients would expect Traders to pay any excess judgment above the policy limit as well as the policy limit.

On June 9, 1950 Traders replied to Mr. Allport, stating that, as it had previously advised the defendants in the personal injury action and Mr. Leppek, it was its opinion the policy did not cover the accident; it was not given notice as the policy required; and it declined to take any part in the defense or to pay anything by way of settlement. On June 15, 1950 Mr. Allport wrote Traders advising that the jury had returned a verdict in favor of Mr. Comunale against Percy Sloan for \$25,000.

In the accident Anthony Comunale suffered an extensive fracture of the skull, going completely around the skull, with severe brain injury. The physician who attended him testified it was the most extensive fracture he had ever seen in one who was living. The brain injury prevented him from carrying on his work as a plumbing contractor because he was unable to recognize the tools of his trade. He also sustained three fractures of the ankle which required an open reduction and the insertion of metal screws to replace the fragments of the bones.

Traders had knowledge of the severity and seriousness of Comunale's injuries about four months prior to the trial of the personal injury action. Mr. Allport, an experienced lawyer in the field of personal injury litigation, testified in this action that settlement of the personal injury action for \$4,000 would have been wise and prudent, and gave detailed and convincing reasons for his opinion. Mr. Allport's testimony was not contradicted or challenged. The result of the personal injury action confirmed the soundness of his advice to Traders. The evidence is uncontradicted that plaintiffs in the personal injury action would have accepted \$4,000 in settlement.

This is not merely a case of rejection of an offer of compromise, nor is it a case in which the insurer assumed the defense and then declined an offer of compromise. It was Traders' duty to defend. Traders, without justification, absolutely and unequivocally refused to assume the defense of the personal injury action and then refused to even consider an offer of compromise. It is inferable from the evidence that denial of coverage resulted from the fact that Traders' general counsel either failed to read the policy or read it erroneously. He persisted in his erroneous conclusion that "the policy afforded no coverage * * * for the use of a non-owned commercial vehicle," which was contrary to the express provisions of the policy, until June 11, 1951, during the pendency of the action by Comunale against Traders, when Traders' local counsel advised him that he could not find the language he (general counsel) relied on and that the significant element was the use to which the vehicle was being put and not its type, and that being true he was "not so certain of our position." A cursory examination of the policy would have revealed there was coverage. Traders did not provide its local counsel with an exact copy of the policy until after June 11, 1951, and it is inferable that its general counsel had not had a copy up to that time. It was not until August 3, 1951 that any California authority on

construction of the policy was referred to in correspondence between Traders and its counsel. On that date its local counsel called Traders' attention to a California case which definitely showed there was coverage. So far as appears, Traders did not even offer to defend under a unilateral reservation of rights³⁷ nor did it seek an adjudication of nonliability by way of a declaratory judgment.

The offer of \$4,000 to compromise was for a figure within the policy limit. Traders knew the insured was unable to pay that amount. It refused to consider or weigh the wisdom of accepting the offer. The fact that Traders, although there was coverage, made a firm decision not to consider any offer of compromise is a circumstance indicative of a want of good faith.³⁸ Traders thrust all the risk on the insured. It forced the insured to incur a hazard in excess of the coverage of the policy.³⁹

Traders persisted in the wholly unsupported position that it did not receive immediate notice. Even as late as the trial of the present action it disclaimed the agency of Frank Sloan notwithstanding that prior to the accident it had duly designated him as its agent in California with the Insurance Commissioner.⁴⁰

The facts of the personal injury action were either well known to Traders or should have been well known to it had it investigated the facts and the law fully. It is a fair inference from the record that Traders, when it refused to defend, gave no consideration whatsoever to the interests of its insured. On March 10, 1952 Traders' reinsurer wrote it that according to the information it had from Traders, Percy Sloan "was involved in an accident under circumstances indicating liability." A reasonable inference from the evidence is that Traders was looking solely after its

own interests and wholly disregarding the interests of Percy Sloan when it cast aside the offer of compromise. Traders' attitude throughout is manifest from a letter of November 25, 1953 from its general counsel to its local counsel, after the decision in *Comunale v. Traders & General Ins. Co.*, 116 Cal.App.2d 198, 253 P.2d 495, reading in part: "In view of the decision of the Appellate Court, we are exposed to liability for the amount expended for attorney's fees in the defense of this case. *The additional insureds under the policy, however, have presented no such bill and we see no particular reason for educating them.*" (Emphasis added.)

The cumulative effect of the evidence and the reasonable inferences which may be drawn therefrom is such as to preclude a holding as a matter of law that there is no evidence tending to show a lack of good faith on the part of Traders. The bone of contention is merely the significance of facts. As said of Traders in *Traders & General Ins. Co. v. Rudco Oil & Gas Co.*, 10 Cir., 129 F.2d 621, at page 628, 142 A.L.R. 799: "Under the peculiar facts, shown here to exist, we hold that the course of conduct pursued by the Traders & General does not square with the standard of good faith and fair dealing which underlies the contract between the parties, and it is therefore without standing to assert its only defense." The question of good faith is one of fact.⁴¹ The jury by their verdict, have in effect said that Traders did not act in good faith. That finding should not have been disturbed by the granting of Traders' motion for judgment notwithstanding the verdict.

The judgment is reversed with directions to the superior court to enter judgment for plaintiff on the verdict.

37. See *Bear Film Co. v. Indemnity Ins. Co.*, 22 Cal.App.2d 520, 71 P.2d 603; 8 Appleman, *Insurance Law and Practice*, 62, § 4694.

38. *Tully v. Travelers Ins. Co.*, D.C., 118 F.Supp. 568, 570.

39. See cases collected 40 A.L.R.2d 220.

40. Traders now concedes Frank Sloan was its authorized agent.

41. *Johnson v. Goldberg*, 130 Cal.App.2d 571, 578, 279 P.2d 131; *Brown v. Guarantee Ins. Co.*, 155 Cal.App.2d 679, 319 P.2d 69.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I concur in the judgment. In my opinion the question of defendant's liability is a narrow one, namely, whether there was substantial evidence to support a finding by the jury that defendant acted in bad faith either in refusing to defend the action or in refusing to settle it. We have learned arguments in the briefs with respect to situations in which defendant could be found liable for the full amount of the judgment in favor of the Comunales. In my opinion these arguments are irrelevant. They are not available to defendant.

At the request of the defendant the court gave the following instructions: "There is no duty on the part of an insurance company to settle a personal injury damage action for an amount which is within or less than the policy limits where the insurance company is not in bad faith refusing and continuing to refuse to assume defense of the personal injury action." "There is no duty on the part of an insurance company to settle a personal injury action for an amount which is within or less than the policy limits where the insurance company is not in bad faith asserting that no coverage is provided by the insurance policy." "If it has not been established by a preponderance of the evidence that defendant acted in bad faith either in its refusal to defend the personal injury damage action or in continuing so to refuse, then you are instructed that defendant is not liable for any excess of policy limits." At the request of the defendant the jury was instructed further that the burden rested upon the plaintiff to prove by a preponderance of the evidence that defendant acted in bad faith. There were other instructions given at defendant's request of the same tenor and the effect of them was to instruct the jury that plaintiff was entitled to recover the amount of the unpaid balance of the judgment if it was found that defendant acted in bad faith, either in refusing to defend the action or in refusing

to settle it. These were the issues that were submitted to the jury and they were decided against the defendant. The "liability" to which the instructions related was for the unpaid balance of the judgment. That was the only remaining issue.

How then can defendant argue here that its bad faith either in refusing to defend or in refusing to settle would not subject it to liability? It cannot submit its case to a jury on one theory of nonliability and, after it has lost, contend on appeal that it was an erroneous theory and switch to another one. It cannot be heard to say that its instructions did not state the law correctly.

We must presume in support of the judgment that the jury found defendant to have acted in bad faith in the refusal to defend and also in the refusal to settle. I agree that there was ample evidence to justify a finding by the jury that it acted in bad faith with respect to each of its duties. The implied finding is, therefore, conclusive as to liability.



157 Cal.App.2d 706

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Manuel FREYTAS and Jose Serrano,
Defendants and Appellants.

Cr. 3339.

District Court of Appeal, First District,
Division 2, California.

Feb. 20, 1958.

Rehearing Denied March 21, 1958.

Hearing Denied April 17, 1958.

Defendants were convicted of selling and furnishing a narcotic to a minor and from the judgment of the Superior Court, City & County of San Francisco, C. Harold Caulfield, J., they appealed. The District

Court of Appeal, Kaufman, P. J., held *inter alia*, that under the evidence defendants' guilt was for jury.

Affirmed.

1. Poisons ⚡9

In prosecution for unlawfully furnishing a narcotic to a minor, whether a co-defendant furnished such narcotic to minor was for jury under conflicting evidence. West's Ann.Health & Safety Code, § 11714.

2. Criminal Law ⚡1159(2, 4)

Reviewing court may not reappraise credibility of witnesses and reweigh evidence. West's Ann.Code Civ.Proc. § 1847.

3. Criminal Law ⚡507(1)

Under statutory definition of "accomplice" requiring corroboration, mere fact that witness is punishable for cooperation with defendant in illegal transaction does not make him an "accomplice". West's Ann.Pen.Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

4. Criminal Law ⚡507(1)

The purchaser of narcotics is not an "accomplice" of the seller, as the offense of purchaser is "possession" and not "selling". West's Ann.Pen.Code, § 1111; West's Ann.Health & Safety Code, § 11714.

5. Criminal Law ⚡507(1)

To be an "accomplice" within statute requiring corroboration of accomplice, one must knowingly, voluntarily, and with common intent unite with principal offender in commission of the crime. West's Ann. Pen.Code, § 1111.

6. Criminal Law ⚡780(1)

In prosecution for selling and furnishing a narcotic to a minor, proffered instructions about accomplice testimony and the requirement of corroboration were properly refused since if minor were charged with furnishing narcotics to defendant it would be a separate and distinct charge, and not the "identical offense" with which defendant was charged so as to make the minor an accomplice. West's Ann.Health

& Safety Code, § 11714; West's Ann.Pen. Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Identical Offense".

7. Criminal Law ⚡795(1)

In prosecution for selling and furnishing a narcotic to a minor in violation of Health and Safety Code, proffered instructions on included offenses were properly refused notwithstanding offense of violating statute relating to contributing to delinquency of minor was necessarily included in offense under Health and Safety Code, since mere fact that it is so included does not require court to give such instruction unless circumstances of the case warrant it. West's Ann.Health & Safety Code, § 11714; West's Ann.Welfare & Inst.Code, § 702.

8. Criminal Law ⚡414

The false and contradictory statements of a defendant in relation to a charge are themselves corroborating evidence. West's Ann.Pen.Code, § 1111.

9. Criminal Law ⚡768(1)

In prosecution for furnishing a narcotic to a minor, refusal to give cautionary instruction that where the only available direct witnesses are the complaining witness and defendant, the charge is easy to make and difficult to prove was not error on theory that there was no or little other corroborating evidence than that of prosecuting witness, where there was evidence of defendant's statement to the police made after his arrest in which statement, contrary to his testimony at trial, defendant admitted being at scene of the crime. West's Ann.Health & Safety Code, § 11714; West's Ann.Pen.Code, § 1111.

10. Poisons ⚡9

In prosecution for selling, furnishing and giving away a narcotic to a minor, wherein defendant's theory was that under evidence prosecuting witness was used only as an intermediary in transportation of narcotics, jury was not required to believe that portion of evidence which supported defendant's theory, and hence his guilt was

for jury. West's Ann. Health & Safety Code, § 11714.

11. Criminal Law ☞369(2)

The general tests of admissibility of evidence in a criminal case are, does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense, and, if it does, it is admissible, regardless of whether it embraces the commission of another crime, whether the crime is similar in kind and whether it is part of a single design.

12. Criminal Law ☞369(2)

In prosecution for furnishing a narcotic to a minor, evidence as to defendant's prior and subsequent sales of narcotics to state and federal agents was properly admitted for purpose of corroborating testimony of prosecuting witness of alleged sales to her, especially where trial court cautioned jury that defendant was not being tried for such possession. West's Ann. Health & Safety Code, § 11714.

13. Criminal Law ☞369(2), 371(12), 372(1)

Evidence of other acts of similar nature may be admitted when not too remote to prove a material fact or when they tend to show motive, scheme, plan or system and such similar acts may be either before or after perpetration of crime charged.

14. Criminal Law ☞1171(1)

Record in prosecution for furnishing a narcotic to a minor failed to disclose prejudicial misconduct on part of prosecuting attorney on ground that when a witness was off the witness stand, he pointed to back of the room to two or three people, one of whom was a negro, and asked: "Is this your husband here to see you?", where there was nothing in record outside of remarks of counsel to show alleged conduct, no affidavit was filed and trial court observed nothing calling for an admonition. West's Ann. Health & Safety Code, § 11714.

Benjamin M. Davis, San Francisco, Don Wilson, San Francisco (of counsel), for appellant Jose Serrano.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Marvin Christiansen, G. A. Strader, Deputies Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

The defendants were charged by indictment as follows: "Manuel Freytas, Jose Serrano, and Louis Doe, whose true name is unknown to the Grand Jury are accused by the Grand Jury of the City and County of San Francisco, State of California, by this indictment, of the crime of felony, to wit: Violation of Section 11714 of The Health and Safety Code of California, committed as follows: The said Manuel Freytas, Jose Serrano, and Louis Doe, whose true name is unknown to the Grand Jury on or about the 4th day of August, 1956, at the City and County of San Francisco, State of California, did unlawfully sell, furnish and give away, and did offer to sell, furnish and give a narcotic to Barbara Garcia, a minor. Dated August 20, 1956." Louis Doe was never apprehended. After entering pleas of not guilty the defendants were tried together before a jury which found them guilty as charged. Defendant Jose Serrano was committed to the Youth Authority; he appeals from the judgment and order denying his motion for a new trial, contending that the verdict is not supported by the evidence and that the trial court erred in its refusal to give certain instructions. Defendant Manuel Freytas was sentenced to the State prison, sentence to run consecutively with any other sentence being served; he appeals from the judgment of conviction, contending that the verdict is not supported by the evidence; that the trial court erroneously admitted evidence of a prior and subsequent sales and incorrectly instructed the jury on the effect of this evidence and certain prejudicial misconduct on the part of the district attorney.

The facts leading to the indictment, according to the prosecuting witness, Bar-

George T. Davis, San Francisco, for appellant, Manuel Freytas.

bara Garcia, age 15, are as follows: On Thursday, August 2, 1956, she and her friend, Virginia Ramirez, saw the defendant Freytas, whom she had known for about three months by his nickname "Golo". He told her "he just got out of jail and he wanted to raise money to get Manuel Nieto out," and that "he had about 20 lbs. he wanted to sell." This conversation took place between 3:00 and 6:30 p. m. at the pool hall on 24th Street, owned by the defendant Freytas. On Saturday, August 4, 1956, the defendant Jose Serrano, whom she had known for three to four years by his nickname "Frenchy", came to her house with Manuel Nieto whom she also knew.

She was home alone and Frenchy "wanted to know if I could get two tins for him. Frenchy said he had to have the stuff by six o'clock p. m. as he had to meet some guy. * * *" She then made several telephone calls but got no result. All three of them left and drove Nieto to the barber-shop. Then as she was riding around with Frenchy in his car, she accidentally saw Golo by the pool hall. Frenchy parked the car across the street from the pool hall and remained in the car, while she got out of the car and talked to Golo. The conversation was as follows: "I asked him if he wanted to take the chance. First I told him that the guy in the car wanted two tins and I asked him if he wanted to take the chance and sell them to me. * * He said he did, he had about 20 pounds to get rid of. * * * I told him that I had to get it before six o'clock, and he said he had to go get it from somebody. * * * He said he'd try to get them off this guy. This guy was holding them for him. * * * He told us to come back in about a half an hour."

When she and Frenchy returned, he again remained in the car across the street from the pool hall while she got out to talk to Golo, who "told us to go park on 24th Street between Shotwell and South Van Ness, between Capp and South Van Ness." This they did and then saw Golo walk three blocks up 24th Street and knock on the door to a house. The door was opened by a per-

son known to her only as "Louie", whom she had known for about one month and had seen at the pool hall. Golo talked to Louie and then both of them came back to the car and talked to her and Frenchy. "Golo told me to hand him the money, that Louie would take me and get two tins." Frenchy then gave her \$40 which she handed to Golo. Golo took the money, said Louie would go get the two tins and then turned around and walked away. Louie got in the back seat of the car and said to drive to 20th and Shotwell about six blocks away. The car stopped there, Louie got out and walked around the corner. He returned in 20 minutes with two tins and "handed them to me and got in the car. I put them in the front seat, between Frenchy and me."

They then drove to 22nd or 23d Street where Louie got out. Frenchy got out of the car and opened the hood and put the two tins in the engine area. She and Frenchy drove back to his home near Precita Avenue. A blond man about 22 whom she had never seen was waiting there in a pink and black '51 Cadillac. Frenchy took the tins out of his car, gave them to the driver of the Cadillac. It was about 6:45 p. m. All three of them got into the Cadillac, Barbara sitting in the middle, drove up to Bernal Heights, and parked in a deserted place. The driver of the Cadillac took some marijuana from one of the tins and put it on blue paper; Frenchy took the seeds out and rolled 4 cigarettes in brown paper. They smoked two of these cigarettes. The driver lit one cigarette but she was not sure who lit the other one. The driver passed the cigarette around and played the phonograph in the glove compartment of the Cadillac. They left Bernal Heights about 7:30 p. m. and returned to Frenchy's house. There, the Cadillac and its driver left, while Frenchy drove her home in his car, a pink 1949 Ford. After she arrived home, she went out again but returned before 12:00.

The prosecuting witness further testified that she had been smoking marijuana for about six months, since her release from a tuberculosis hospital in February 1956, and had smoked it about 40 times during that

period, always in groups of people. She stated that August 4th was the first time she had ever bought any marijuana. She testified that Frenchy never sold or gave her any marijuana and that August 4th was the only time she had smoked marijuana with Frenchy. Her testimony before the Grand Jury, a transcript of which was introduced at the trial, substantially corroborated the above facts, except that there was no mention of the conversation with the defendant Freytas on August 2nd.

The defendant Serrano took the stand on his own behalf and testified that he would be twenty years old on his next birthday, that he had been employed as a painter by the same firm for the last six years; that he had known the prosecuting witness for three or four years and had taken her out five or six times. As to the events of Saturday, August 4, 1956, he testified as follows: Although he was employed on that date, he stayed home as his mother wanted him to help her. After taking his mother to and from a launderette, he left home around 11:00 a. m. and bumped into Manuel Nieto, whom he had known for three years and seen around the pool hall, but did not know had handled narcotics and had just gotten out of jail. He offered Nieto a ride and Nieto asked to be driven to the barbershop. He parked across the street from the barbershop around noon and saw Barbara Garcia in the window of her home above the barbershop. Nieto talked to Barbara and asked her to come down and wait for him while he got his hair cut. She came downstairs but didn't want to wait in the barbershop, so she and the defendant Serrano sat on her stairs and talked for about 10-15 minutes during which time he asked her to go to a movie with him but she refused. Then he was called into the barbershop and Barbara went upstairs, returning later when Nieto was getting ready to leave. The two boys left in the car. Barbara walked alone towards Mission Street. He dropped Nieto at 26th and Folsom, then went home and stayed there until 4:00 p. m. and returned home, where he remained un-

til he went to work at 8:00 a. m. the next day.

He denied knowing the defendant Freytas until after the arrest but had heard his name and had seen him at his pool hall. He denied all the other details as related by the prosecuting witness, and further testified that he had never smoked or bought marijuana, although he had been where people smoked; that he had never seen the prosecuting witness smoke marijuana. He further testified that he also used the name Arbelaez, but preferred Serrano, his mother's name.

A statement he had made to the police after his arrest on August 16th was then introduced, and contradicted the above testimony as follows: While Manuel was getting his haircut, Barbara went with me to my house in order to get my union card. There, we saw this "kid in a pink Cadillac parked in front of my house. I started to talk to him about going to the river some weekend. Barbara and I got into the car and we drove around the block and then we parked at Bernal Heights and he offered us a drink of whiskey. At first I turned him down because Barbara didn't want a drink and I would have felt out of place drinking. I then took one drink. We then left. He drove us to 24th Street and went to get Manuel. The owner of the car left." The statement also contained further testimony that he had a friend "Rickey" who had a pink Cadillac with a 45 r. p. m. record player in the glove compartment.

He further testified that the above statement was untrue, but he had been kicked six times and hit on the head with a book by several of the four or five police officers who arrested and questioned him from 7:30 a. m. until noon, without any breakfast. Two of the police officers who participated in the arrest and questioning, denied that the defendant Serrano had been threatened, kicked or beaten, but admitted that he had been questioned by several officers for several hours, without breakfast and without the presence of a stenographer or anyone

but the officers who took turns in typing his statement. Both of the officers also stated that at all times during the questioning the defendant Serrano denied smoking marijuana or furnishing it to anyone; that no marijuana or any traces thereof was found on his person or in his home. Mrs. Serrano the defendant's mother testified that five to six police officers came to arrest her son on the morning of August 16, that one of them pushed her aside to come in and that she saw another grab her son by the hand and push him against the wall.

The witness Olivia Oretger, aged 16, testified that she had once in April, May or June 1956, on a date she could not remember, smoked marijuana with the defendant Serrano, which he had supplied, in a car in front of his house. This occurred after a party and after she had drunk a considerable amount of beer; she was a little high but knew what she was doing, although the marijuana had no effect on her.

[1,2] First as to the contentions of the defendant Jose Serrano. The defendant Serrano maintains that the only theory on which the verdict can be supported is that he "furnished" marijuana to the prosecuting witness by passing a cigarette to her during the alleged smoking session on Bernal Heights. As indicated above, the only evidence on this theory is the testimony of the prosecuting witness which was that she was not sure who lit the second cigarette or who handed it to her. However, the testimony of the prosecuting witness indicates that both defendants furnished marijuana to her; that defendants acted together in the entire transaction, the fact that only one of them lit the cigarette is immaterial. The jury chose to believe the testimony of the prosecuting witness, rather than the testimony of the defendant as to these matters, and could properly infer from the testimony of Olivia Oretger that the defendant had supplied her with marijuana and had smoked with her, that the defendant was not telling the truth. This is an issue clearly within the province of the jury, Code of Civil Procedure, section 1847 and cannot be disturbed on appeal as

Cal.Rep. 321-322 P.2d-21

it is not the function of a reviewing court to reappraise the credibility of witnesses and reweigh the evidence. *People v. McKinney*, 152 Cal.App.2d 332, 313 P.2d 163; *People v. De Paula*, 43 Cal.2d 643, 276 P.2d 600.

[3] The next question is whether the trial court correctly refused the defendant Serrano's proffered instruction on accomplice testimony and the requirement of corroboration. An accomplice is defined in Penal Code, Section 1111 as one "who is liable to prosecution for the identical offense charged against the defendant on trial." As stated in *People v. Clapp*, 24 Cal.2d 835, at page 838, 151 P.2d 237, 239;

"Under the statutory definition, the mere fact that the witness is punishable for his cooperation with the defendant in the illegal transaction does not make him an accomplice. It is necessary to determine whether sections 31 and 971 of the Penal Code or other provisions of the criminal law subject the witness to prosecution under the provisions that the defendant is accused of violating, or whether the acts of the witness participating in the transaction constitute a separate and distinct offense."

In *People v. De Paula*, 43 Cal.2d 643, 276 P.2d 600, in affirming conviction under Health and Safety Code, section 11714 for using a minor to transport narcotics, our Supreme Court held that the instruction had been properly refused as a minor was the victim and not an accomplice, as the minor's offense was the distinct one of "possession." The facts of the *De Paula* case were that the defendant paid the minor's room rent and bought her the syringe and needle which the minor used in administering narcotics to him in her room. On one occasion, the defendant gave her some money which she handed to one White who handed her the drug. All three of them then re-entered the defendant's car and drove to her room and were apprehended as they were walking from the car. The court pointed out in 43 Cal.2d at page 648, 276 P.2d at page 602 that if the defendant in the *De Paula* case had been charged and

convicted of the unlawful possession of narcotics under Health and Safety Code, Section 11500, the minor would have been an accomplice as she would have been "liable to prosecution for the identical offense charged against the defendant."

[4] The authorities relied on in *People v. De Paula*, supra, are *People v. Deibert*, 117 Cal.App.2d 410, 256 P.2d 355, which involved the sale of coca-cola with whiskey to several high school students who were held not to be accomplices; *People v. Doetschman*, 69 Cal.App.2d 486, 159 P.2d 418, which involved a charge of statutory rape and contributing to the delinquency of a minor, a violation of Welfare and Institutions Code, Section 702; and *People v. Baskins*, 72 Cal.App.2d 728, 165 P.2d 510, which involved the solicitation to commit murder, in which it was held that the person solicited was not an accomplice as the "accomplice must stand in the same relation to the crime as the person charged and approach it from the same direction," 72 Cal.App.2d at page 731, 165 P.2d at page 511. The purchaser of narcotics is not an accomplice of the seller, as the offense of the purchaser is "possession" and not "selling". *People v. Mimms*, 110 Cal.App.2d 310, 242 P.2d 331; *People v. Galli*, 68 Cal.App. 682, 230 P. 20, exceptions to the above view of an accomplice are recognized in case of a conspiracy, *People v. Lima*, 25 Cal.2d 573, 154 P.2d 698 and crimes which can be committed only by the cooperation of two or more persons, *People v. Wertz*, 145 Cal. App.2d 395, 302 P.2d 613; *People v. McMahon*, 116 Cal.App.2d 883, 254 P.2d 903. In *People v. Ramirez*, 113 Cal.App.2d 842, 249 P.2d 307, it was held that the person hired by state narcotics officers to buy narcotics from the defendant was an accomplice of the defendant charged with the sale of heroin in violation of Health & Safety Code, Section 11500, both as a matter of fact and a matter of law.

[5,6] The defendant here argues that the language "identical offense" means only that the accomplice can be charged under the same Penal Code section as the defendant, that Barbara Garcia, by her own

testimony, is an accomplice, as she obtained the marijuana for the defendant and she could thus also be charged with furnishing narcotics to the minor defendant. The statement we quoted above from *People v. Clapp* shows that this view of the statute is erroneous. "To be an accomplice one must knowingly, voluntarily, and with common intent unite with the principal offender in the commission of the crime." *People v. Olds*, 154 Cal.App.2d 78, 315 P.2d 881, 883. Furthermore, in the recent case of *People v. Drake*, 151 Cal.App.2d 28, 310 P.2d 997, a similar issue to the one here presented was raised. The defendants were charged with the violation of Health and Safety Code, sections 11501 and 11721, inducing and encouraging the minor prosecutrix, Jo Ann Williams, to use a narcotic and be in a place where narcotics were used. In upholding an instruction that Jo Ann was not an accomplice as a matter of law of contributing to the delinquency of the two other minor prosecuting witnesses, Mary Price and Adele Williams, the court said in 151 Cal.App.2d at page 42, 310 P.2d at page 1005, "Any claimed act of Jo Ann, the minor, involving these named minors, would be a separate and distinct charge against different victims. (Citing cases)." Thus, if Barbara Garcia here were charged with furnishing narcotics to the defendant Serrano it would be a separate and distinct charge, and not the "identical offense" with which the defendant is charged. We conclude therefore that the trial court correctly refused the proffered instructions about accomplice testimony and the requirement of corroboration.

[7] The court also correctly refused the instructions on included offenses. Although the offense of violating Welfare and Institutions Code, § 702 is necessarily included in the offense defined in Health and Safety Code, Section 11714, *People v. Krupa*, 64 Cal.App.2d 592, 149 P.2d 416, the mere fact that it is so included does not require the court to give such an instruction unless the circumstances of the case warrant it. *People v. Romersa*, 111 Cal. App.2d 173, at page 177, 244 P.2d 98. In

People v. De Paula, 43 Cal.2d 643, at pages 648 and 649, 276 P.2d 600, 603, the court said:

"In the first place, defendant could be convicted of the violation of section 11714 without also being convicted of the violation of section 11500, Health and Safety Code. In the second place, even if possession should be regarded as an included offense in using a minor to transport narcotics, the girl's testimony related to the greater offense (use of the minor to transport narcotics), * * * this case presents no basis for application of the law on accomplice testimony, the trial court properly refused to instruct upon that theory."

[8,9] The defendant Serrano's final contention is that the court erred in refusing to give the cautionary instruction that where the only available direct witnesses are the complaining witness and the defendant, the charge is easy to make and difficult to disprove. He admits that there is no case in this state in which it has been held that such an instruction is required in a narcotics case. As recently pointed out in *People v. Hunter*, 146 Cal.App.2d 64, at page 66, 303 P.2d 356, the requirement of such an instruction has not been extended beyond the sex cases. Defendant, citing *People v. McGhee*, 123 Cal.App.2d 542, 266 P.2d 874 and *People v. Quock Wong*, 128 Cal.App.2d 552, 275 P.2d 778, both pandering cases, that there are other types of cases where the instruction is proper. This may be so where there is no or little other corroborating evidence than that of the prosecuting witness, as in the *McGhee* and *Quock Wong* cases. In the instant case, however, there was the evidence of the defendant's statement to the police, made after his arrest. In this statement, contrary to his testimony at the trial, the defendant Serrano admitted being at the scene of the crime. The false and contradictory statements of a defendant in relation to a charge are themselves corroborating evidence. *People v. Farrell*, 133 Cal.App.2d 427, 284 P.2d 29; *People*

v. Wayne, 41 Cal.2d 814, 264 P.2d 547. There being no merit in any of the above contentions, we conclude that the judgment against the defendant Serrano must be affirmed.

Apart from the testimony of the prosecuting witness set forth in great detail above, the following evidence was offered against the defendant Freytas: A federal narcotics agent stated that with the help of an informer who introduced him to the defendant Freytas, he had bought some marijuana from the defendant Freytas on August 8, 1956. An undercover state narcotics agent testified that he had bought some marijuana from the defendant Freytas on July 13, 1956, at the pool hall on 24th Street. When he attempted to make another purchase on July 17th, the defendant Freytas said: "No, I am not dealing here anymore; the Federals were in and shook the place down, I am not dealing at all, and people like you don't come back." The narcotics bought by these officers were introduced into evidence and identified by expert witnesses. Both of these agents admitted that they did not know the defendant Serrano or anything about the particular transaction of August 4th which was the subject of the indictment.

The defendant Freytas did not take the stand but offered the following evidence in his behalf. Connie Lamboy, age 17, who knew the prosecuting witness and both defendants, testified that Barbara's reputation for truth and veracity was bad. This statement was corroborated by another witness, Virginia Ramirez, age 16, who also testified that she smoked marijuana, and that she had smoked with Barbara Garcia about 40 times. Virginia further stated that at a dance in June 1956, Barbara had told her and Rose Garcia, that she was mad at Golo, that she thought he didn't like her because she had TB, that if she couldn't have him, no one could and that if they ever got caught smoking marijuana, they were to blame it all on Golo. When arrested on June 6th, Virginia Ramirez gave a statement to the police which stated that she had bought marijuana from Golo about 30

times through Barbara and numerous other connections; that she had smoked with Lupe Martinez, Frenchy Aviles and Shark.

At the trial, Virginia Ramirez stated that portions of this statement were not true, that she had given it only because of what Barbara had told her at the dance and because she was scared of Barbara; that the truth was that she knew the defendant Serrano but had never seen him smoke or smoked with him or heard of him giving marijuana to anyone; nor had she bought any cigarettes from the defendant Freytas or smoked with him.

The witness, Rose Garcia, age 17, testified that she had smoked marijuana with Barbara Garcia and Virginia Ramirez, and corroborated the latter's testimony about Barbara's statements at the dance, the fact that Barbara was mad at the defendant Freytas because of her past relationship with him, and Barbara's bad reputation. She further testified that she had never bought any marijuana from the defendant Freytas or smoked in his presence.

[10] The defendant Freytas first contends that the verdict is not supported by the evidence which at the most shows only the use of a minor in the transportation of narcotics, as the prosecuting witness was used only as an intermediary. However, the jury was not required to believe that portion of the evidence which supports the defendant's theory of the case, *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778, but could believe the prosecuting witnesses' testimony that although the defendant Freytas knew she was buying the stuff for the "guy in the car", he took the money from her and arranged for Louie to hand the two tins to her. (*People v. Sykes*, 44 Cal.2d 166, 280 P.2d 769. There is therefore no merit in this contention.

The defendant Freytas further contends that the trial court improperly admitted the evidence as to his prior and subsequent sales of narcotics to a state and federal agent, and that the introduction of the narcotics involved in those transactions served only to prejudice the minds of the jury.

[11] The rule as to the admissibility of evidence relating to prior crimes was clearly stated in *People v. Peete*, 28 Cal.2d 306, at page 315, 169 P.2d 924, at page 929,

"The general tests of the admissibility of evidence in a criminal case are: * * * does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not.' (Citing cases) 'It is true that in trying a person charged with one offense it is ordinarily inadmissible to offer proof of another and distinct offense, but this is only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged; But, whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion.' *People v. Ellis*, 188 Cal. 682, 689, 206 P. 753; *People v. Walters*, 98 Cal. 138, 141, 32 P. 864; *People v. Ebanks*, 117 Cal. 652, 663, 49 P. 1049, 40 L.R.A. 269."

This rule has been consistently followed and cited with approval, most recently in *People v. Moore*, 48 Cal.2d 541, at page 547, 310 P.2d 969; *People v. Sykes*, 44 Cal.2d 166, 170, 280 P.2d 769; *People v. Quisenberry*, 151 Cal.App.2d 157, 163, 311 P.2d 99. In *People v. Torres*, 98 Cal.App. 2d 189, at page 192, 219 P.2d 480, at page 482, somewhat similar in its facts to the instant case, in rejecting the identical contention the court, after citing the *Peete* case, said:

"Evidence of other acts of a similar nature may be admitted when not too remote, to prove a material fact, or where it tends to show motive, scheme,

plan or system, or to show *guilty knowledge* and intent. *People v. Henderson*, 97 Cal.App.2d 94, 119, 179 P.2d 406; *People v. Hennessey*, 201 Cal. 568, 582, 258 P. 49; *People v. Brown*, 72 Cal.App.2d 717, 720, 165 P.2d 707; *People v. Bercovitz*, 163 Cal. 636, 639, 126 P. 479, 43 L.R.A.N.S. 667.”

The court further indicated that the evidence of defendant's prior acts of transporting marijuana was relevant to show knowledge of the presence of the drug in his automobile on the later occasion, and that the remoteness of the evidence was a question for the jury, while the question of whether or not it was too remote rested in the discretion of the trial court. Since *People v. Winston*, 46 Cal.2d 151, 293 P.2d 40, the prosecution in narcotics cases has had the burden of proving that a defendant knew the objects in his possession were narcotics; more recently it has been held that the type of evidence here introduced is relevant for such purpose, its weight to be determined by the jury. *People v. Torres*, 140 Cal.App.2d 571, 295 P.2d 904; *People v. Tabb*, 137 Cal.App.2d 167, 289 P.2d 858.

Defendant contends that the evidence could not be admissible to show knowledge or intent or common plan or scheme as the defendant denied the charge. However, in *People v. Channell*, 136 Cal.App.2d 99, at page 112, 288 P.2d 326, 335, the court pointed out: “Evidence of other offenses should be admitted for the purpose of showing intent only when the intent accompanying the act is equivocal, or where it is claimed by the defendant that the act was the result of mistake, accident, or inadvertence, or where intent is otherwise denied.”

[12, 13] Defendant argues that the evidence should not have been admitted. The other sales were distinct and independent offenses, since they were not sales to minors. However, we think that the other sales were circumstances corroborating the testimony of the prosecuting witness of the alleged sale to her on August 4, 1956. Evidence of other acts of a similar nature

may be admitted when not too remote to prove a material fact or when they tend to show motive, scheme, plan or system and such similar acts may be either before or after perpetration of the crime charged, *People v. Darnell*, 97 Cal.App.2d 630, 218 P.2d 172.

In *People v. Bean*, 149 Cal.App.2d 299, 308 P.2d 27, it was held that evidence of possession of narcotics 17 days after the offense charged was admissible to show familiarity with the drug as well as plan, scheme or guilty knowledge, particularly where the court cautioned the jury that the defendant was not being tried for such possession. In the instant case the court also so cautioned the jury. We can see no error, therefore, in the admission of the evidence objected to, nor in the instructions to the jury on the consideration of such evidence.

[14] Defendant Freytas' final assignment of error is that the prosecuting attorney committed prejudicial misconduct when the witness Rose Garcia was off the witness stand; he pointed to the back of the room to two or three people standing here, one of whom was a negro, and asked: “Is this your husband here to see you?” The court made the following remark about this incident:

“The Court: Well, as a matter of fact, I recall that incident. There were two or three people standing in the back of the court. Only one of them was colored and, as I looked and saw at the time, there wasn't one of the jurors that was looking in that direction, at the time. The thing came and went, was over. There was no designation of any individual, at all, and no characterization of the person at the time.”

There is nothing in the record outside of the remarks of the defendant's counsel to show such alleged conduct; no affidavit was filed and as the trial court observed nothing calling for an admonition, we find no prejudicial misconduct and no reversible error. *People v. Buratti*, 96 Cal.App.2d 417, 215 P.2d 500.

There being no merit in any of the contentions of the defendant Freytas, the judgment of conviction must be sustained.

In view of the foregoing the judgments of conviction must be and are hereby affirmed.

DRAPER, J., concurs.

DOOLING, Justice (concurring).

I concur. However, as applied to the facts of this case, I cannot agree with some of the sweepingly general language of the main opinion in considering the application of the exception to the general rule that evidence of other crimes is not admissible against a defendant in the trial of a criminal case. No rule is better settled than the one that proof of other crimes is generally not admissible. The exception is applied only when the evidence of other crimes tends to prove a material fact in the trial of the particular case. *People v. Peete*, 28 Cal.2d 306, 315, 169 P.2d 924. If the exception is too loosely or generally applied without the materiality of the evidence of other crimes to prove a material fact in the particular case being actually established the time may well come when the exception will for all practical purposes swallow up the rule.

As I read the main opinion it relies on two branches of the exception: 1. that evidence of other similar crimes committed in a particular or distinctive manner may be proved to establish a common plan, design or system and 2. that evidence of other crimes may be admitted to prove guilty knowledge and intent.

I cannot agree that under the evidence in this case the proof of the other sales was admissible to prove a common plan, design or system. The only thing in common in the crimes here proved is that they were all sales of marijuana. The sales to the officers were not made in the same manner at all as the sale to the minor with which the defendant Freytas was charged in this proceeding. They did not follow any common or distinctive pattern of operation. It is well settled that evidence of other similar crimes is not admissible to prove "criminal disposition or propensity on the part of the

accused to commit the crime charged." *People v. Westek*, 31 Cal.2d 469, 476, 190 P.2d 9, 13. To hold that evidence of any sales of marijuana, however dissimilar the manner in which they were handled, may be admitted to show a common plan, system or design is to stretch and distort this exception to the point where there is no distinction between evidence to show common plan, design or system and evidence to show "criminal propensity on the part of the accused to commit the crime charged." As so applied the exception has, in fact, already swallowed up the rule. I therefore must dissent from the portion of the opinion which relies in this case on the exception based on proof of common plan, design or system.

I agree that in this case the proof of the other sales was material to prove knowledge and intent, for the following reason not developed in the main opinion. The complaining witness testified that she arranged to purchase "two tins" from Freytas and that a "tin" among marijuana users meant a tobacco can filled with marijuana. The word "marijuana" was not at any time used in her conversations with Freytas. It therefore became material to prove that Freytas understood the words "two tins" to refer to two tobacco cans containing marijuana and that that was what he intended to sell through his confederate, who made the actual delivery in his absence. The evidence of other sales of marijuana shortly before and after this transaction was material to prove that Freytas understood the words "two tins" as referring to marijuana, the commodity in which the evidence of the other sales shows that he was dealing at about that time. Whether proof of other sales may be introduced to prove knowledge and intent depends on the facts of the particular case. It should not be admitted where such knowledge and intent are otherwise so clearly established that they are not a real issue in the case (*People v. Spencer*, 140 Cal.App.2d 97, 104, 294 P.2d 997), but in this case for the reasons given I agree that the evidence was properly admitted.

Hearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

158 Cal.App.2d 41

**Edna REEDER and Max Reeder, Plaintiffs
and Appellants,**

v.

**Al HOAG, Individually and dba Budd's
Brake Shop; Joseph Mzzle, Individually
and dba Skiles and Mzzle Shell Service
Station; and Skiles and Mzzle Shell Serv-
ice Station, a co-partnership, Defendants
and Respondents.**

Civ. 17491.

**District Court of Appeal, First District,
Division 2, California.**

Feb. 26, 1958.

Action against service station opera-
tor, and operator of brake repair shop to
which he had sent plaintiffs' vehicle for re-
pairs, to recover for personal injuries and
property damage allegedly sustained by rea-
son of brake failure. The Superior Court,
Alameda County, Chris B. Fox, J., rendered
the judgment challenged by the plaintiffs'
appeal. The District Court of Appeal,
Draper, J., held that evidence would sup-
port findings (1) that service station opera-
tor had been negligent in telling driver that
vehicle was safe and returning it to her for
use without examining or testing brakes,
but (2) that brake repair shop operator,
who had been engaged to do only such
work as could be completed within time
allotted and had advised driver that he
could not guaranty brakes in their then
condition, had not been negligent; and
held that therefore there was no incon-
sistency in verdicts holding service station
operator liable but absolving brake repair
shop operator.

Affirmed.

1. Damages ⚡63

In action against service station opera-
tor, and operator of brake repair shop to
which he had sent plaintiffs' vehicle for
repairs, to recover for personal injuries
and property damage allegedly sustained
by reason of brake failure, any verdict
in driver's favor was required to be dimin-
ished by sum she had received from service

station operator in return for covenant not
to execute, and jury was correctly so in-
structed.

2. Appeal and Error ⚡930(4)

In action against service station opera-
tor and operator of brake repair shop, to
which he had sent plaintiffs' vehicle for
repairs, to recover for personal injuries
and property damage allegedly sustained
by reason of brake failure, verdict in
driver's favor against service station opera-
tor for "zero dollars" clearly amounted to
finding that her damages did not exceed
\$600 which she had received from service
station operator in return for covenant
not to execute and which jury had been
instructed to deduct from any amount
found due her; and it could properly be
assumed that verdict in favor of brake re-
pair shop operator had been similarly pred-
icated upon driver's failure to show com-
pensable damage, notwithstanding fact that
verdict took form it did rather than con-
sisting of verdict for driver, and against
brake repair shop operator, for nothing.

3. Judgment ⚡695

Judgment against principal in negli-
gence action based wholly upon respondeat
superior presupposes finding that agent was
negligent.

4. Appeal and Error ⚡171(1)

Appellants cannot, on appeal, urge in-
consistencies which could be found only if
verdicts were based upon theory never pre-
sented to trial court.

5. Appeal and Error ⚡930(1)

On plaintiffs' appeal, reviewing court
was required to view evidence in light most
favorable to the jury's conclusion.

6. Automobiles ⚡368

In action against service station opera-
tor, and operator of brake repair shop to
which he had sent plaintiffs' vehicle for
repairs, to recover for personal injuries and
property damage allegedly sustained by rea-
son of brake failure, evidence would sup-
port findings (1) that service station opera-
tor had been negligent in telling driver
that vehicle was safe and returning it to

her for use without examining or testing brakes, but (2) that brake repair shop operator, who had been engaged to do only such work as could be completed within time allotted and had advised driver that he could not guaranty brakes in their then condition, had not been negligent; and, therefore, there was no inconsistency in verdicts holding service station operator liable but absolving brake repair shop operator.

7. Appeal and Error ⇨216(1)

In action against service station operator, and operator of brake repair shop to which he had sent plaintiffs' vehicle for repairs, to recover for personal injuries and property damage allegedly sustained by reason of brake failure, plaintiffs, who had requested no instruction upon law of principal and agent, could not successfully urge on appeal that trial court had erred in not instructing jury upon law of principal and agent.

Popper, Burnstein & Michaels, Oakland, for appellants.

Keith, Creede & Sedgwick, San Francisco, for respondent.

DRAPER, Justice.

Plaintiff Edna Reeder drove the automobile of her son, Max, from San Lorenzo to Oakland. She had some difficulty with the brakes and took the car to the service station of defendant Mazzie to have them repaired. Mazzie examined the brake system, determined that the difficulty was in the master cylinder, and told Mrs. Reeder that he would not have time to repair it but would arrange to have the job done by another. He sent the car to defendant Hoag, who operated a brake repair shop, at about 3 o'clock p. m. Mazzie told Mrs. Reeder to return for the car at 5 p. m., although he knew the job could not be done in two hours. Mrs. Reeder returned for her car at about that time. Mazzie telephoned Hoag who said that he was having trouble with the master cylinder. The car was returned to the service station at about

5:30. Hoag told Mrs. Reeder that the brake system should be gone over completely, that it would work for a while, and that he did not guarantee the brakes. Mazzie's usual practice was to test cars on which work had been done. He did not check this job, but nonetheless told Mrs. Reeder that the car was safe. On her way home, as Mrs. Reeder drove at about 10 miles per hour, the brakes failed. To avoid collision with other cars, she turned into the curb and struck a parking meter. She brought this action for personal injuries, and her son joined as a plaintiff, seeking recovery for the damage to his car. Both Mazzie and Hoag were made defendants. Before trial, Mazzie paid \$600 to Mrs. Reeder and took from her a covenant not to execute. He was not represented at trial. Upon Mrs. Reeder's claim, jury verdict was in her favor and against Mazzie in the sum of "zero dollars" and in favor of defendant Hoag and against her. As to Max Reeder, verdict was against Mazzie in the sum of \$238.75, the amount claimed as property damage, but in favor of Hoag. Both plaintiffs appeal.

Appellants urge that Mazzie could be held liable only as principal and that a finding against him necessarily implies a finding that his agent, Hoag, was negligent. Upon this premise, they contend that the verdicts against Mazzie and in favor of Hoag are inconsistent with each other and with the evidence, and that the court erred in instructing that such verdicts could be returned.

[1,2] Even if the claims of error are sound, Mrs. Reeder is not a party prejudiced. The jury was instructed that any verdict in her favor must be diminished by the \$600 she had received from Mazzie. This instruction was correct (*Laurenzi v. Vranizan*, 25 Cal.2d 806, 813, 155 P.2d 633). The jury was fully and fairly instructed as to damages which might be awarded to Mrs. Reeder. Thus the verdict in her favor against Mazzie for "zero dollars" clearly amounts to a jury finding that her damages did not exceed \$600. It is therefore proper to assume that the verdict in favor

of Hoag was similarly predicated upon Mrs. Reeder's failure to show compensable damage (see *Nelson v. Black*, 43 Cal.2d 612, 275 P.2d 473). It would be an idle act to remand this case for entry of a judgment in favor of Mrs. Reeder and against Hoag for nothing, in place of the present judgment in favor of Hoag.

[3, 4] Max Reeder recovered the full amount for which he prayed, \$238.75. However, he apparently claims prejudice in the failure of the jury to hold Hoag, as well as Mazzie, liable. Of course, in a negligence action based wholly on respondeat superior, judgment against the principal presupposes a finding that the agent was negligent (*Spruce v. Wellman*, 98 Cal.App.2d 158, 219 P.2d 472). But this case was not tried on the theory that Mazzie was the principal and Hoag his agent. No instructions upon agency were requested or given. Appellants cannot, on appeal, urge inconsistencies which can be found only if the verdicts were based upon a theory never presented to the trial court.

[5, 6] We are required to view the evidence in the light most favorable to the jury's conclusion (*Jordan v. Guerra*, 23 Cal.2d 469, 476, 144 P.2d 349). So viewed, the evidence supports the verdicts against Mazzie upon a theory other than that of agency, and thus defeats the claim of inconsistency. The testimony is subject to the construction that Hoag was free of negligence because he was engaged by Mazzie to do such work as could be completed within the time allotted, performed this task, and advised Mrs. Reeder that further work was needed and that he could not guarantee the brakes in their then condition. Mazzie, who ordered the work done by Hoag, told Mrs. Reeder to return for the car at an hour he knew would not allow the time needed for the repairs. Even when Hoag advised that he was having trouble with the work, Mazzie did not extend the time. Then, without examining or testing the brakes, he told Mrs. Reeder that the car was safe and returned it to her for use. Under all the circumstances, the jury could well find that he

breached his duty of care and is liable independently of Hoag.

[7] Appellants also assert error in the court's failure to instruct upon the law of principal and agent. But appellants requested no such instruction, and thus present no question for review (*McFate v. Zuckerman*, 130 Cal.App. 172, 179, 19 P.2d 532; 3 Cal.Jur.2d 643-5).

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



157 Cal.App.2d 806

J. Vance HORNING, as Special Administrator of the Estate of Theron E. Horning, Deceased, Plaintiff and Respondent,
v.

Thornton LADD, Defendant and Appellant.
Civ. 22656.

District Court of Appeal, Second District,
Division 1, California.

Feb. 24, 1958.

Rehearing Denied March 24, 1958.

Hearing Denied April 23, 1958.

Action to enforce a contract. From a judgment of the Superior Court, Los Angeles County, Burnett Wolfson, J., in favor of the plaintiff the defendant appealed. The District Court of Appeal, White, P. J., held, inter alia, that where written contract provided for sale of realty for \$15,000, purchaser to pay \$75 per month and to pay taxes, assessments etc., that when one-third of principal amount had been paid purchaser might execute his note for unpaid balance secured by deed of trust, and that contract could not be sold, assigned or transferred by purchaser nor by operation of law without vendor's consent, and there was no provision for return of principal payments upon purchaser's death or upon option of vendor, and purchaser did not exercise the right to make note and

execute deed of trust, contract was not terminated by death of purchaser.

Affirmed.

1. Trial $\Rightarrow$ 136(3)

Whether a writing is ambiguous is a question of law and should be determined from the writing itself.

2. Contracts $\Rightarrow$ 311

Executors and Administrators $\Rightarrow$ 202½

Contracts generally do not die with the contractor unless they contain provision to that effect.

3. Contracts $\Rightarrow$ 318

Contracts will be construed, where possible, to avoid forfeiture, and burden of establishing right to forfeiture is upon one claiming that right.

4. Contracts $\Rightarrow$ 318

Forfeitures of estates should never be enforced unless the terms of the agreement are so plain as to need no construction.

5. Executors and Administrators $\Rightarrow$ 135

Where written contract provided for sale of realty for \$15,000, purchaser to pay \$75 per month and to pay taxes, assessments etc., that when one-third of principal amount had been paid purchaser might execute his note for unpaid balance secured by deed of trust, and that contract could not be sold, assigned or transferred by purchaser nor by operation of law without vendor's consent, and there was no provision for return of principal payments upon purchaser's death or upon option of vendor, and purchaser did not exercise the right to make note and execute deed of trust, contract was not terminated by death of purchaser.

G. Harold Janeway, W. I. Titus, Los Angeles, for appellant.

McCutchen, Black, Harnagel & Green, George Harnagel, Jr., Frederick J. Kling, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant appeals from the judgment that the contract between Theron E. Horning, Deceased, and himself, dated October 31, 1951 "is still in force and effect and was not terminated by the death of Theron E. Horning, deceased, and that plaintiff, as special administrator of decedent, is entitled to possession of the premises described in said contract, and upon performance of the obligations of said contract is entitled to all the rights and privileges thereunder".

By the pleadings of the parties the court was asked to declare their respective rights under the agreement of October 31, 1951, defendant seller contending that plaintiff's only right under said agreement is "to receive from this defendant upon entry of such judgment the repayment of all amounts paid to and received by this defendant on the principal of the purchase price provided by the terms of said agreement", and plaintiff maintaining that said agreement "is in full force and effect; that plaintiff is an equitable owner of said land, and upon completing said payments will have the legal title".

The court found that by said written contract of October 31, 1951, the "decedent agreed to buy and the defendant agreed to sell certain real property * * *"; that the agreement was fully performed by both parties until decedent's death; that thereafter decedent's special administrator (plaintiff herein) "has tendered timely and full performance of all the obligations imposed upon the decedent"; and that defendant refused to accept said tender.

It was then concluded "that the contract between the parties is unambiguous"; that it "was not personal in nature" and was not terminated by decedent's death; "that the decedent's rights under the contract passed at his death to plaintiff as special administrator of his estate, and that plaintiff is entitled to all of the rights of the decedent under said contract"; and that plaintiff "is entitled to possession of the premises, and

upon performance of the obligations of said contract is entitled to all of the rights and privileges thereunder".

There is no controversy over the facts. The written contract provides that seller agrees to sell and buyer agrees to buy certain real property; that buyer agrees to pay \$15,000 at the rate of \$75 per month commencing June 1, 1951, together with interest thereon at the rate of 5% per annum, "which said \$75.00 monthly payment, or any multiple thereof, shall first be applied upon interest * * * and the remainder of said payment to the principal thereof"; the buyer agrees to pay taxes, assessments, insurance and utilities; to keep the place free of liens "resulting from any act or failure to act of the buyer"; to keep the premises "in a first class condition of repair" and "in a neat and orderly condition"; that when one-third of the principal amount has been paid buyer may execute his promissory note for the unpaid balance secured by a deed of trust and seller will execute a deed to "buyer or his nominee" upon the same terms of payment. Buyer agreed "to use the premises only as a private dwelling". Said contract also contains the following paragraphs:

"It is specifically agreed between the parties hereto that this contract cannot be sold, assigned or transferred by the Buyer, nor by operation of law. Under no circumstances shall this contract, or any facsimile thereof, be made a matter of public record.

"It is further specifically understood and agreed between the parties that at no time during the life of this contract will the Buyer rent or sublet the house upon the described premises to any other person or persons, without the written consent of Seller having been first obtained."

It is also provided that, in the event of Buyer's default, all moneys theretofore paid by him "shall be retained by the seller as rent for the use and occupancy of the said premises up to the date of default".

And Seller further agrees:

"(1) That should the Buyer wish to terminate the contract, he may do so by no-

tifying the Seller, in writing, of his desires ten days prior to date on which default would occur.

"(2) That he will pay to the Buyer a sum equal to the amount paid by the Buyer on the principal sum of \$15,000 (fifteen thousand) at the time of termination of the contract.

"Time is the essence of this agreement and this agreement shall be binding upon the executors, administrators, heirs and assigns of the parties hereto, except as hereinbefore limited."

The Buyer never tendered to the Seller his note and trust deed for the unpaid balance of principal. Nor did he ever communicate to the Seller his wish to terminate the agreement and have the amount of principal paid by him returned pursuant to the provisions of paragraph (2) hereinabove quoted. After Buyer's death, his special administrator, respondent herein, tendered performance of the agreement in all respects. Seller refuses to accept such tenders, offers to pay to the special administrator the amount of principal paid by decedent, and insists that Seller has no other obligation.

Respondent cites and relies upon *Burns v. McGraw*, 75 Cal.App.2d 481, 171 P.2d 148, an action for declaratory relief involving the construction of a lease of real property used for business. Lessee died leaving a will which bequeathed the lease to her adopted daughter, respondent therein. The successor to the lessor objected to the distribution of the lease to the legatee thereof upon the ground that such distribution would be a breach of the lease provisions against assignment. The petition for distribution then went off calendar and an action for declaratory relief was started. The lease provided that "Lessee shall not assign this lease, or any interest therein, * * * without the written consent of the lessor first had and obtained * * * This lease shall not, * * * be assignable as to the interest of the Lessee, by operation of law, without the written consent of the Lessor". The only point presented was that

the distribution by the executrix pursuant to the purported bequest would be a breach and would entitle the Lessor to terminate the lease. This court affirmed the judgment for the legatee, and approved and followed the decisions in *Southern Pacific Co. v. Swanson*, 73 Cal.App. 229, 234, 238 P. 736; *Stratford Co. v. Continental Mtg. Co.*, 74 Cal.App. 551, 554, 241 P. 429; and *Joost v. Castel*, 33 Cal.App.2d 138, 91 P.2d 172, to the effect that the lessee's death did not terminate such a lease, did not give to lessor the option to terminate it, or release lessee's estate from liability for rent for the unexpired term of the lease, and that a covenant against assignment contained in a lease does not bind the tenants executors and is not broken by a transfer by the death of the tenant.

Appellant urges that in the instant action "the only right passing by operation of the law of intestacy to plaintiff, as administrator, was to receive back Horning's payments on the principal of the contract, which refund defendant offers in his answer". Appellant further states that "in the situation here presented no 'forfeiture' is involved or results because plaintiff administrator (by reason of defendant's tender of repayment) will receive the return in full of the consideration paid by decedent under the contract", as the interest payments represent the "agreed price of the use of the premises by the buyer". Appellant does not indicate what language of the agreement gives to the seller the option to terminate the agreement. Nor does he specify the language of the agreement which gives the respondent "the right to receive back Horning's payments on the principal". We have examined the entire written agreement and, while provision is made that, in the event of Buyer's default, Seller may retain all moneys (both interest and principal) theretofore paid by Buyer, which shall be the agreed value of Buyer's use of the premises, and provision is also made, upon notice from the Buyer to the Seller that the Buyer wishes to terminate

the agreement, Seller will repay to Buyer the amount theretofore paid on the principal sum, there is no provision for the return of the principal payments upon Buyer's death, or at the option of the Seller.

Appellant further urges that because of such claimed provisions under which respondent will receive back everything of value paid by decedent, the instant action is governed by *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 182 P.2d 182, and particularly the language of several paragraphs quoted in appellant's opening brief from 30 Cal.2d at page 352, 182 P.2d at page 192 of the dissenting opinion. The *Trubowitch* case, *supra*, involved an assignment of a contract for the sale of tomato paste. The contract contained no provision against assignment "by operation of law". The assignment was by the corporate buyer to its stockholders upon its dissolution. That decision is in no way helpful to the appellant in the instant action.

[1-4] Whether a writing is ambiguous is a question of law. *Brant v. California Dairies, Inc.*, 4 Cal.2d 128, 133, 48 P.2d 13. It should be determined from the writing itself. The contract now engaging our attention contains no language, ambiguous or otherwise, respecting its termination upon the death of the buyer. Contracts do not die with the contractor (with a few exceptions not here involved) unless they contain provision to that effect. Contracts will be construed, where possible, to avoid forfeiture. The burden of establishing the right to a forfeiture is upon the one claiming that right. Forfeitures of estates should never be enforced unless the terms of the agreement are so plain as to need no construction. *O'Morrow v. Borad*, 27 Cal.2d 794, 800, 167 P.2d 483, 163 A.L.R. 894.

[5] We are convinced that the written contract which gave rise to the instant action was not terminated by the death of the buyer.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.

157 Cal.App.2d 766

J. Dale GENTRY, doing business as California Hotel, Respondent,

v.

CULINARY WORKERS, BARTENDERS AND HOTEL SERVICE EMPLOYEES, LOCAL 535, AFL-CIO, an unincorporated association, et al., Appellants.

Civ. 5705.

District Court of Appeal, Fourth District, California.

Feb. 21, 1958.

Rehearing Denied March 21, 1958.

Hearing Denied April 17, 1958.

Action to enjoin defendant from maintaining a picket line. From a judgment of the Superior Court, San Bernardino County, Meredith Wingrove, J., the defendants appealed. The District Court of Appeal, Waite, J. pro tem., held, inter alia, that in action to enjoin union from picketing plaintiff's hotel on ground that union had breached agreement not to attempt to organize hotel employees for one year if an election which was to be held was unfavorable to union, evidence supported finding that hotel owner did not breach the agreement materially because owner had called a meeting of employees two days prior to date when election was to be held.

Affirmed.

1. Appeal and Error ⇨989

While question of sufficiency of evidence, as a matter of law, to support a verdict or finding may be presented to appellate court for review, court's duty stops when it has determined that there is some substantial supporting evidence.

2. Labor Relations ⇨940

In action to enjoin union from picketing plaintiff's hotel on ground that union had breached agreement not to attempt to organize hotel employees for one year if an election which was to be held was unfavorable to union, evidence supported finding that hotel owner did not breach the agreement materially because owner had called a meeting of employees two days prior to date when election was to be held. West's Ann.Labor Code, § 1126.

3. Labor Relations ⇨991

Where an unlawful demand may be divorced from concerted action otherwise lawful, it is permissible for court to enjoin union from making such demand but not to prohibit the lawful activity.

4. Labor Relations ⇨995

The right to picket for any purpose may be lawfully surrendered by a valid agreement. West's Ann.Labor Code, § 1126.

5. Labor Relations ⇨993

Where evidence sustained finding that picketing by union was not for organizational purposes and to advertise substandard wages and working conditions, but for purpose of gaining exclusive recognition as bargaining representative of hotel employees, and such picketing was in violation of agreement between union and hotel owner that if election of hotel employees went against union, union would not attempt to organize employees for one year, injunction prohibiting all picketing by union at hotel until union complied with terms of agreement was not too broad. West's Ann.Labor Code, § 1126.

6. Labor Relations ⇨993

Where union was picketing hotel for purpose of gaining exclusive recognition as bargaining representative of hotel employees in violation of agreement that union would abide by result of election and would not attempt to organize employees if election went against the union, injunction prohibiting picketing until union complied with terms of agreement was not too broad as regards duration on theory that it was difficult, if not impossible, to determine whether picketing could have been resumed on date one year after election was supposed to have been held, since decree placed responsibility for duration directly on the union. West's Ann.Labor Code, § 1126.

Lewis Garrett and Lionel Richman, Los Angeles, for appellants.

Bert L. Lunceford, San Bernardino, for respondent.

WAITE, Justice pro tem.

Plaintiff filed this action to enjoin defendants from maintaining a picket line at or about the California Hotel in San Bernardino, and the court granted an injunction.

While the evidence was in many respects conflicting, such conflict was resolved by the trial court and a review of the transcript reveals the following to be a fair summary of the material facts: Following certain preliminary negotiations between plaintiff and representatives of the Central Labor Council of San Bernardino County, Mr. Rees, executive secretary of the defendant Union, together with Mr. DeWolfe, of the State Conciliation Service and Mr. Miramonte, the Union organizer, met with plaintiff and Mr. Stone, his hotel manager, on August 28, 1956. Mr. Rees said that the Union proposed to organize the hotel employees and a discussion was had concerning the proper method to be used for determining whether a majority of the employees desired the Union as their representative. Finally, it was agreed to hold an election by secret ballot and Mr. DeWolfe stated that he would write a contract which provided that if the election results were favorable to the Union, plaintiff would agree to negotiate with the Union, but if such results were unfavorable to the Union, then the Union would agree not to bother or molest plaintiff or the hotel employees for one year. Mr. Rees stated that if plaintiff would agree to an election the Union, if it lost the election, would not bother plaintiff and would take no action for one year to organize the employees.

Mr. DeWolfe then prepared a Memorandum of Agreement For Representation Election, using the printed form provided by the State Conciliation Service, and plaintiff signed the agreement, relying on the representations above mentioned. Mr. Rees also signed the agreement on behalf of the Union. Paragraph 11 of the agreement provides:

"It is further agreed that the results of this election shall be accepted as

binding on both parties for a period of not less than one (1) year from date of this Agreement.

"In the event the Union wins the election the Employer agrees to bargain upon request, with the Union as the exclusive representative of all the employees in the above Unit in respect to rates of pay, wages, hours of work or other conditions of employment, and if any understanding is reached on such matters, embody such understanding, upon request, in a signed agreement; and in the event the Union loses the election it agrees to refrain from raising the question of representation for the time specified above."

After the Memorandum of Agreement was executed, arrangements were made to hold the election on September 6, 1956, as provided in paragraph 2 thereof. On the afternoon of September 4, 1956, plaintiff and Mr. Stone met with the employees of the hotel. Prior thereto, a notice signed "The Management" had been posted on the bulletin board, stating that the meeting would be held and urging all employees to be present. Apparently a majority of the employees attended this meeting, but the evidence did not show that all of the employees were there. Plaintiff and Mr. Stone each addressed the employees and some of the employees also spoke. Plaintiff informed those present that he had been approached by the Union to represent the employees and that he had signed an agreement for the holding of an election. He explained the agreement, pointed out that the vote would be by secret ballot, that each employee was to vote as he desired and he urged the employees to vote. He stated that if a majority of the employees favored the Union, he would try to negotiate a contract with the Union. He also pointed out some of the advantages and disadvantages of the Union and invited those present to express themselves if they so desired. At this meeting Mr. Stone had a copy of the Union's form of contract. He went over some but not all of the provisions of this contract briefly and com-

pared them with what was then being done at the hotel so far as working conditions and rates of pay were concerned. No official representatives of the Union were present at the meeting of September 4, but several employees of the hotel who were members of the Union were in attendance, which fact was known to plaintiff and to Mr. Stone.

On the evening of September 4, Mr. Rees attended a meeting at which there were present nine or ten persons, including Mr. Miramonte and some of the hotel employees. Mr. Miramonte reported concerning the meeting which had been held that afternoon between the plaintiff, his manager and the employees, and related what had been told to him by some of the Union employees who had attended the meeting. According to them, plaintiff and Mr. Stone had made anti-union remarks and had not correctly stated all of the facts. At that time Mr. Rees did not question any of the hotel employees who were in attendance at the afternoon meeting at the hotel, nor did he contact either plaintiff or Mr. Stone for the purpose of ascertaining the correctness of the report made by Mr. Miramonte. Based upon the information so received with respect to the afternoon meeting, Mr. Rees decided to protest the election and he also prepared a letter addressed to the hotel employees which was circulated the next morning, September 5. This letter stated, among other things, that Mr. Rees, as secretary of the Union, had been informed of the meeting of September 4, and he stated matters in argument for a vote favorable to the Union in the election to be held the next day. The letter closed by urging all employees to vote "Yes" at the forthcoming election.

On the morning of September 6, a few minutes before the time scheduled for the election, Mr. Rees and Mr. DeWolfe again met with plaintiff and Mr. Stone. Mr. DeWolfe stated that Mr. Rees had decided not to hold the election because he felt that plaintiff and Mr. Stone had had a captive audience in the afternoon meeting of September 4, and that Mr. Rees thought the

election would be unfavorable to the Union. Immediately prior to this meeting Mr. Rees and Mr. DeWolfe had met with Mr. Dase, plaintiff's designated representative at the election, for the purpose of inspecting the election facilities. Mr. Rees also stated, in the presence of Mr. Dase, that he did not think he wanted to proceed with the election; that he had heard about plaintiff's meeting with the employees; that he was not given the same opportunity to meet with them and the meeting was an unfair labor practice. Mr. DeWolfe informed plaintiff that there was no way to enforce the election in view of Mr. Rees's decision. Mr. DeWolfe asked plaintiff if he would agree to call off the election, which plaintiff refused to do, stating that he was ready to go ahead. Mr. Rees never again met or asked to meet with plaintiff, and on September 11, 1956, the picketing of the hotel began and continued to the time the injunction in this case was granted.

The trial court stated that the issues for its determination were: (1) Is the election agreement valid and enforceable? (2) If valid, was the Union excused from the performance thereof by reason of the acts of the plaintiff? (3) If valid and the performance thereof by defendants was not excused, will an injunction lie to prohibit the picketing? The court held that the election agreement was valid and enforceable, that the Union was not excused from the performance thereof by reason of the acts of plaintiff, and granted an injunction prohibiting picketing until such time as the Union complies with the provisions of the Memorandum of Agreement For Representation Election dated August 28, 1956. Defendants appealed from that judgment and raise two points on this appeal: (1) That plaintiff was guilty of material breach of contract so as to relieve defendants of any obligation to perform; (2) That the relief granted is too broad.

[1] Although the insufficiency of the evidence to support the decision of the trial court is not specifically urged by appellants, it is clear that their first point, in effect, challenges the sufficiency of that

portion of the evidence which prompted the court's conclusion that respondent had not been guilty of acts constituting a material breach of the contract so as to excuse appellants from performance. It is on this phase of the evidence that the major conflicts in the testimony appear and our duty therefore is to ascertain whether the record contains any substantial evidence to support the findings upon which the court's decree is based. As this court said in a recent case:

"While the question of the sufficiency of the evidence, as a matter of law, to support a verdict or finding may be presented to the appellate court for review, its duty stops when it has determined that there is some substantial supporting evidence." *Patterson v. Beauvell*, 155 Cal.App.2d 411, 318 P.2d 71, 74; 4 Cal.Jur.2d p. 482, Sec. 602.

[2] In the instant case, without reciting in detail all of the conflicting testimony, suffice it to say that there is much evidence of a substantial character which supports the finding of the trial court that respondent did not breach the contract materially. See *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 45 P.2d 183; *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 142, 134 P. 1157; *Overton v. Vita-Food Corporation*, 94 Cal.App.2d 367, 370, 210 P.2d 757.

The only remaining contention of appellants is that the relief granted is too broad in that the injunction prohibits all picketing by appellants at respondent's hotel until the Union has complied with the terms of the agreement of August 28, 1956. In this connection it is urged: (1) That the injunction must be limited to picketing for the purpose of recognition only; and (2) That the duration of the injunction is too broad and uncertain.

[3-5] The position taken by appellants that the picketing was for organizational purposes and to advertise substandard wages and working conditions at respondent's hotel was labeled a subterfuge by the

trial court. It found specifically that the picketing was being done for the purpose of attempting to gain exclusive recognition as the bargaining representative of respondent's employees and that finding is supported by substantial evidence. It is true, as contended by appellant, that where an unlawful demand may be divorced from concerted action otherwise lawful, it is permissible for the court to enjoin defendants from making such demand but not to prohibit the lawful activity. *Park & Tilford Import Corporation v. International Brotherhood of Teamsters*, 27 Cal.2d 599, 165 P.2d 891, 162 A.L.R. 1426. In the instant case both the picketing and the real objectives thereof are in violation of the agreement and for that reason are unlawful. It is well established that the right to picket for any purpose may be lawfully surrendered by a valid agreement. *California Labor Code sec. 1126*; *Charles H. Benton, Inc., v. Painters Local Union*, 45 Cal.2d 677, 682, 291 P.2d 13; *Lion Oil Co. v. Marsh*, 220 Ark. 678, 249 S.W.2d 569.

[6] The claim of appellants that the duration of the injunction is too broad and uncertain is not well taken. They argue that it is difficult, if not impossible, to determine whether picketing could have been resumed on September 6, 1957, or whether the prohibition continues until some period after the Union submits to an election. The clear, unequivocal language of the decree places responsibility for the duration thereof directly on appellants. It is unmistakably certain that the picketing is enjoined "until the matter of representation of plaintiff's employees * * * has been settled by an election in accordance with the procedure specified in the said agreement and until such time as the defendant Union has complied with the terms and conditions of the said agreement * * *." This language cannot possibly be construed to permit resumption of picketing on September 6, 1957, and we interpret it to mean exactly what it states.

Other contentions made by appellants in the trial court have not been raised on this

appeal and we assume that such have been abandoned.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



158 Cal.App.2d 1

Joseph TRAPANI and Eleanor Trapani,
Plaintiffs and Appellants,

v.

Ernest U. HOLZER and John Doe, Partners,
First Doe, Second Doe, First Doe Com-
pany and Second Doe Company, Defend-
ants and Respondents.

Civ. 17268.

District Court of Appeal, First District,
Division 2, California.

Feb. 25, 1958.

Rehearing Denied March 27, 1958.

Hearing Denied April 23, 1958.

Action for death of seven year old pedestrian who was struck by automobile which allegedly had veered off highway onto shoulder while tractor driver on other side of road was directing boy with respect to crossing highway. The Superior Court, County of Santa Clara, Edwin J. Owens, J., rendered judgment for automobile driver, and plaintiffs appealed. The District Court of Appeal, Kaufman, P. J., held that questions whether automobile driver in looking at tractor veered off highway onto shoulder and struck boy or whether boy moved onto highway in front of automobile and whether proximate cause of accident was negligence on part of automobile driver, boy, or tractor driver, or concurrent negligence of all were for jury.

Affirmed.

Dooling, J., dissented.

I. Trial ⇐260(8)

In action by parents for death of seven year old pedestrian who was struck by au-

tomobile which had been traveling on highway, wherein none of witnesses saw boy or automobile prior to accident, failure to give requested instructions on meaning and effect of indirect or circumstantial evidence was not prejudicial error where court fully instructed jury as to presumption of due care and its effect. West's Ann.Code Civ. Proc. § 377.

2. Automobiles ⇐245(8, 57, 64, 90)

In action by parents for death of seven year old pedestrian who was struck by automobile which allegedly veered off highway onto shoulder while tractor driver on other side of highway was directing boy with respect to crossing highway, questions whether automobile driver in looking at tractor veered off highway onto shoulder and struck boy or whether boy moved onto highway in front of automobile and whether proximate cause of accident was negligence on part of automobile driver, boy, or tractor driver, or concurrent negligence of all were for jury. West's Ann.Code Civ. Proc. § 377.

3. Appeal and Error ⇐930(2)

On appeal it must be presumed that jury was composed of intelligent people, that jury understood instructions given and correctly applied them to evidence.

4. Automobiles ⇐246(58)

In action by parents for death of seven year old pedestrian who was struck by automobile which allegedly had veered off highway onto shoulder, wherein automobile driver denied seeing boy prior to accident and denied veering off highway, refusal to instruct that if boy was in exercise of ordinary care, he had right to assume that others would perform their duty was not improper, especially where instruction did not include statement that an exception exists where it is apparent to one in exercise of ordinary care that another is not going to do his duty. West's Ann.Code Civ.Proc. § 377.

5. Trial ⇐252(8)

In action by parents for death of seven year old pedestrian who was struck by automobile which allegedly had veered off

highway onto shoulder, wherein automobile driver denied seeing boy prior to accident, refusal of instruction that in exercise of ordinary care a motorist must exercise greater caution than pedestrian was not improper, in absence of proof that presence or probable presence of pedestrian was known to driver. West's Ann.Code Civ. Proc. § 377.

6. Trial ⚡252(8)

In action by parents for death of seven year old pedestrian who was struck by automobile which allegedly had veered off highway onto shoulder, refusal to instruct jury as to duty of motorist to sound horn was not improper in absence of proof that presence or probable presence of pedestrian was known to motorist. West's Ann.Vehicle Code, § 671(b); West's Ann.Code Civ. Proc. § 377.

7. Trial ⚡252(8)

In action by parents for death of seven year old pedestrian who was struck by automobile which had been traveling on highway, instruction that ordinarily it is necessary to exercise greater caution for protection and safety of young child than for adult person, was properly refused in absence of evidence that automobile driver saw boy or should have reasonably anticipated presence of children at that particular place and time. West's Ann.Code Civ.Proc. § 377.

Louis Pasquinelli, Edward J. Niland, Boccardo, Blum, Lull & Niland, San Jose, for appellants.

Campbell, Custer, Warburton & Britton, Alfred B. Britton, Jr., San Jose, W. R. Dunn, Burlingame, for respondent.

KAUFMAN, Presiding Justice.

An automobile driven by the defendant Ernest Holzer collided with David Trapani, the almost seven year old son of the plaintiffs. David Trapani was killed. His parents, pursuant to Code of Civil Procedure, Section 377, brought this wrongful death action, alleging that the defendant negli-

gently struck and killed David who was standing still on the shoulder of the road. The defendant denied that he had been negligent, and alleged that the accident was unavoidable because the child apparently leaned or stepped into the path of his car and that the child and his parents were contributorily negligent.

The action was tried twice. On June 3, 1954 a verdict was returned in favor of the defendant but on July 29, 1954 a new trial was granted on the ground that the evidence was insufficient to sustain the verdict. At the retrial of January 27, 1955, the jury again returned a verdict in favor of the defendant. This appeal is taken from the judgment entered on that verdict on the ground of prejudicial error due to the trial court's refusal to give certain instructions requested by the plaintiffs.

The accident occurred on June 30, 1952, a clear sunny day, at about 5:40 p. m. on Story Road, near San Jose. On that day, due to his mother's illness, David wanted to spend the day with his older brother on the Cina ranch on Story Road. Mr. Trapani drove David to the Cina home and left him with Mrs. Cina, his eldest son's mother-in-law and his son's wife with the usual instructions, knowing they would take good care of him. He did not instruct them specifically not to let David cross Story Road. David had been carefully instructed by his parents to never cross the street unless he had first looked both ways and had someone to help him and David was a careful, obedient, intelligent boy. During the afternoon, Harold Cina, the sixteen year old brother-in-law of Mr. Trapani's eldest son was discing the orchard and gave David a few rides on the tractor. David then played in the back yard. At about 5:30 p. m. Harold started to drive the tractor to the mail box on Story Road and David wanted to ride with him.

Story Road is a two lane highway with twenty-four feet of pavement and a gravel and dirt shoulder about five feet wide on each side of the pavement and runs northeast to southwest. For the purpose of the trial, however, it was assumed that it ran

from east to west. The Cina ranch is located on the south side of Story Road west of the intersection of White Road and Story Road. About 1600–1800 feet west of that intersection, and 264 feet west of the intersection of McGinnis Avenue and Story Road, there is a driveway leading from the ranch to the south side of Story Road. Directly across from the east side of the driveway on the north shoulder of Story Road and about five feet from the edge of the pavement, there were two mail boxes about $4\frac{1}{2}$ feet in height.

Harold Cina drove the tractor to the driveway and stopped, facing west about two feet south of the south edge of the shoulder. David asked if he could go across the road to get the mail. Harold told him to wait until he had made sure it was clear and that he would call him when he thought it was clear to come back. After waiting until Harold said he could go, David crossed over to the mail boxes carrying his cap pistol in one hand and a plastic water pistol in the other. He put his guns down, climbed on the cement base in front of the mail box, took out the mail, picked up his guns and turned around. David then took two or three steps from the mail boxes toward the highway and was standing on the shoulder about one or two feet from the pavement, leaning forward and looking to the east.

At this time Harold was looking down the road and holding up his right hand calling David to stay. He testified that, keeping his right hand up, he looked west and observed some traffic at a distance and then as he turned to look east he saw a west bound car strike David with the right headlight and throw the boy six or seven feet in the air causing dust and debris to fly. Harold further testified that he thought the car was not going to stop as it kept going on, but that it finally stopped west of McGinnis Road and that the defendant ran back and said: "Oh, my God, what did I hit? I thought I hit a dog."

On cross-examination Harold stated that he did not know whether just before the impact David was standing still or moving.

According to one witness, David's body was found with the head facing the highway about three feet from the edge of the pavement and the feet in the orchard 96 feet west of the mail boxes and 8 feet north of the north edge of the roadway. One of David's boots was found 57 feet west of the mail boxes; the mail he had been carrying was found in the orchard at a point about 80 feet west of the mail boxes. There were also fragments of yellow plastic in the center of the roadway 40 feet from the mail boxes.

The defendant's car was a 1940 DeSoto Sedan driven by the defendant, who was 69 years old at the time of the accident. He stated that on June 30, 1952, he was on his way home from his laundry business along the customary route that he drove every day. He stated he didn't think that he ever traveled faster than 35–40 miles an hour as he knew the area was congested and that there were children in the area but not in the immediate vicinity. As he turned into Story Road from White Road and neared the mail boxes, his "attention was attracted by a young man across the road on a tractor about 300 yards away who kept waving his hands." He momentarily took his eyes off the road, but kept on driving. He further testified that he was not driving on the shoulder at any time; that when he had proceeded about two car lengths past the tractor he felt a jar and heard a thud and thought he had hit a dog. He was looking straight ahead but did not see anything flying through the air after the impact.

The defendant's car came to a stop on the west shoulder of McGinnis Road; the right front headlight and fender of his car were damaged; there were no skid marks, or tire marks on the paved portion of the highway from the Cina driveway to McGinnis Road. The defendant testified that he did not put on his brakes as he was driving so slowly. He further stated that there were shadows along the north side of Story Road up to the point of impact, and that he did not remember seeing any mail boxes. By the time the investigating

officer arrived, a few minutes after the accident, David's body had been taken to the hospital and was pronounced dead on arrival. The point of impact could not be determined.

The only other witness to the accident, Miss Rosalie Van Sickle, testified that on the day in question she had been riding her bicycle westward on the south shoulder of Story Road, but because the sun was in her eyes she had crossed over to the north shoulder which was shaded by the trees in the orchard. At the time of the accident she was riding on the north shoulder about 40 feet east of the mail boxes. There was nothing to impair her visibility and she could see clearly. She did not, however, see David or notice the defendant's car pass her although she knew that two or three cars had passed by. She only noticed a cloud of dust and something flying through the air. She then pushed her bicycle to the point where David's body lay, sent Harold for a blanket and heard the defendant say: "What have I done? I didn't see the boy. I was looking at the boy on the tractor. I thought it was going to cross the road."

Thus, as far as the key witnesses are concerned, no one saw David or the defendant's car prior to the accident. The evidence is therefore quite scant as to the vital facts and the solution must depend on inferences and presumptions. Under the evidence and reasonable inferences therefrom, there are three possibilities as to the proximate cause of the accident—negligence on the part of the defendant, negligence on the part of David or Harold, or the concurrent negligence of all. Under the circumstances, no one was negligent as a matter of law, so that the very close questions of negligence and contributory negligence were factual and were therefore for the jury, under proper instructions. The only contentions made on appeal are that the trial court's failure to give certain instructions requested by the plaintiffs were the inducing cause of the defense verdict.

[1,2] The first of these errors alleged by the plaintiffs is the trial court's failure

to give the requested preliminary instructions on the meaning and effect of indirect or circumstantial evidence. This was clearly error on the part of the trial court but we do not consider the error prejudicial in view of all the other instructions. The court fully instructed the jury as to the presumption of due care and its effect. Plaintiffs rely on *Arundell v. American Oil Fields Co.*, 31 Cal.App. 218, at page 231, 160 P. 159, 164 to argue that: "The law recognizes the force of indirect evidence which tends to establish such fact by proving another which, though not in itself conclusive, affords an inference or presumption of the existence of the fact in dispute." They ignore, however, the further statement in that case that "an inference must be founded upon fact legally proved." Here, it was for the jury to determine whether the key fact, whether the defendant in looking at the tractor veered off the highway or whether David moved in front of the defendant's car, had been proved to their satisfaction. The court here properly instructed them, albeit in non-technical language, both at the beginning of the trial as well as at the end.

[3] While instructions such as the one refused here when given have been approved, *Leming v. Oilfields Trucking Co.*, 44 Cal.2d 343, 282 P.2d 23, 51 A.L.R.2d 107, it is equally clear that their refusal is not prejudicial error. *Mortimer v. Martin*, 149 Cal.App.2d 495, 308 P.2d 840. On appeal it must be presumed that the jury was composed of intelligent people, that the jury understood the instructions given and correctly applied them to the evidence. *Zuckerman v. Underwriters at Lloyd's, London*, 42 Cal.2d 460, 267 P.2d 777; *La Gue v. Delgaard*, 138 Cal.App.2d 346, 291 P.2d 960; *Ward Land & Stock Co. v. Mapes*, 147 Cal. 747, 82 P. 426.

[4] Plaintiffs next contend that the trial court erred in refusing to instruct that if David was in the exercise of ordinary care he had a right to assume that others too would perform their duty under the law, relying on *Clark v. State of Cali-*

fornia, 99 Cal.App.2d 616, 222 P.2d 300 and Ribble v. Cook, 111 Cal.App.2d 903, 245 P.2d 593. In the Clark case it was held reversible error to refuse a similar instruction in a wrongful death action involving the death of a pedestrian hit by a bus, that, at dusk had only its parking lights on. In the Ribble case, which involved an intersection accident, the evidence showed that the defendant had come to a complete stop in the intersection at a place where the decedent could cross in front of her car and the decedent could assume that the defendant had surrendered her right of way. These cases do not appear to be comparable in the instant case. Furthermore, plaintiff's instruction did not include a portion of the instruction given in those cases, that an exception exists when it is apparent to one in the exercise of ordinary care that another is not going to do his duty. The court here properly submitted the question as to whether David exercised ordinary care and carefully pointed out the degree of care required of a child of his age.

[5] The third error alleged by plaintiffs is the trial court's refusal of their proffered instruction that in the exercise of ordinary care a motorist must exercise greater caution than the pedestrian. In only one of the cases cited by the plaintiffs, Dawson v. LaLanne, 22 Cal.App.2d 314, 70 P.2d 1002, was the refusal of this instruction the sole ground of reversal. In that case, however, the court had given an instruction that no greater degree of care was required of the defendant motorist than the plaintiff-pedestrian who was struck while crossing a highway. In this case, no such misleading instruction was given, and although no instructions were given concerning the same points, we think that it was not prejudicial error to refuse this instruction, as the instruction presupposes a situation where the presence or probable presence of the pedestrian is known to the motorist. This was not proven here.

[6] There is also no merit to plaintiff's further contention that the trial court erred in refusing to instruct the jury as to the

duties of motorists to be vigilant and sound their horn. The matter of vigilance was adequately covered. The cases of People v. Lett, 77 Cal.App.2d 917, 177 P.2d 47; Ducat v. Goldner, 77 Cal.App.2d 332, 175 P.2d 914 cited by the plaintiffs are inapplicable as the pedestrian was struck while in the crosswalk. As to the statute requiring a driver to blow his horn when necessary to insure safe operation, Vehicle Code, Section 671(b), paraphrased by the plaintiffs in one of the refused instructions, that statute further provides: "Such horn shall not otherwise be used." In the case of Freeland v. Jewel Tea Co., 118 Cal.App. 2d 764, 258 P.2d 1032 cited by the plaintiffs, the presence of the children was known to the driver.

[7] Plaintiff's final allegation of error is the trial court's refusal of the following instruction:

"Ordinarily, it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate ordinary behavior of children. The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, that they are often thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child may result."

In all of the cases relied upon by the plaintiffs, the driver knew of the presence of the child or children. The rule as most recently stated by our Supreme Court in Hilyar v. Union Ice Co., 45 Cal.2d 30, at page 36, 286 P.2d 21, 24, is:

"* * * if the evidence shows that a driver has knowledge of the presence of children he may be held to have been responsible although it appears that he did not see the injured child in time to prevent the injury."

The above quoted instruction was therefore properly refused as there was no evidence that the defendant saw David or should reasonably have anticipated the presence of children at that particular place and time.

Viewed as an entirety, the instructions given in the instant case present no prejudicial error and adequately cover the issues presented.

Judgment affirmed.

DRAPER, Justice.

I concur in the judgment. The giving of instructions defining indirect evidence and the weight to be given to it certainly would not be error. It may have been preferable procedure. But the question here is whether refusal to give them, if error, was prejudicial to plaintiffs.

Harold Cina was the only witness who testified that he saw David at the moment of impact. He testified that David was off the paved roadway, and on the unpaved shoulder, when he was struck. By inference, this is evidence that defendant's car was off the roadway when it struck David. Defendant did not see David, but testified that his car never swerved from the paved roadway. It requires one mental step to conclude that the car was therefore on the roadway at the moment of impact, but, even if this be direct evidence, defendant's testimony was but indirect evidence that David was on the roadway when struck. All the other evidence, including the testimony of Miss Van Sickle and the evidence of damage to the car and of location of the body, the boot, and the articles David was carrying, was indirect evidence on the issues of negligence and proximate cause. But I do not see that plaintiffs' requested instruction 25 (BAJI 22) would have aided the jury in so classifying that evidence. Able lawyers and judges, having long experience with the definitions of direct and indirect evidence, have differed as to the classification of specific items of evidence. I cannot conclude that the several code sections quoted in the proposed instruction, if read

to the jury here, would have identified indirect evidence sufficiently to give beneficial effect to plaintiffs' requested instruction 26 (portions of BAJI 25), stating that negligence and proximate cause may be proved by indirect evidence.

One item of indirect evidence was clearly defined to the jurors. They were instructed that David was presumed to have exercised due care, that this presumption is a form of evidence, to be weighed against any contrary evidence, and that the evidence, rather than conjecture or speculation, is required to rebut the presumption. This instruction was clear and direct. It placed upon defendant the burden of overcoming the presumption, a burden which required him to resort almost wholly to circumstantial evidence. If the somewhat stilted and confusing definition of indirect evidence could have had any effect, it seems that it would aid defendant in overcoming the well-defined presumption and the testimony of Cina, the only eyewitness. In my opinion, the refusal of these instructions was not prejudicial to plaintiffs.

DOOLING, Justice (dissenting).

I dissent.

This is a case in which a large part of the evidence was indirect or circumstantial. The court gave no instructions on the manner in which the jury should consider such evidence, its right to draw reasonable inferences therefrom or the weight to be given to such inferences when drawn by the jury. The plaintiff requested instructions on the subject which are conceded by my associates to state the law correctly, and which the trial court refused to give. This error appears to me to be so basic, and the prejudice from the failure to give such fundamental instructions to be so obvious that nothing advanced in either opinion can convince me otherwise than that the trial court not only committed error in this case but that the error was on such a fundamental subject that it must be held to be prejudicial.

It is basic in the jury system that the jury are the judges of the facts but that

they must be guided in determining the weight and effect to be given to the evidence by the rules of law given to them in the instructions of the court.

Section 2061, subdivision 1 of the Code of Civil Procedure requires the court to instruct the jury on all proper occasions: "That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence." Unless the jury is properly instructed on the manner in which they are required by the law to weigh the evidence and the effect to be given to it by them this basic instruction becomes meaningless and their "power of judging of the effect of the evidence" will become "arbitrary" and subject to be exercised without "legal discretion." The only control over arbitrary action by the jury in the exercise of an uncontrolled discretion is to be found in proper legal instructions given by the court which they are informed that it is their legal duty to follow.

The basic instructions on circumstantial evidence requested by plaintiffs and refused by the court read:

"25. Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

"A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

"An inference is a deduction which the reasoning of the jury draws from the

facts proved. It must be found on a fact or facts proved and be such a deduction from those facts 'as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.'"

"26. The law makes no distinction between direct and indirect evidence as to the degree of proof required to support a finding of fact. Negligence and proximate cause both may be proved by indirect evidence, if it carries the convincing force needed to constitute a preponderance of the evidence."

Proposed instruction 25 is taken almost word for word from the Code of Civil Procedure, sections 1831, 1832, 1957, 1958, 1959, 1961. Instruction 26 states a settled principle, that the law makes no distinction as to the weight to be given to direct and indirect evidence. "[C]ircumstantial evidence may outweigh, in convincing force, * * * direct evidence * * *" Scott v. Burke, 39 Cal.2d 388, 398, 247 P.2d 313, 319.

My associates agree that these instructions correctly state the law but they severally conclude that the error in refusing to give them was not prejudicial.

I shall, as briefly as is consistent with the development of my conviction that the error must be held prejudicial, outline my reasons for my complete disagreement with this conclusion.

The witness Cina testified that the decedent minor was on the shoulder two feet from the edge of the paved portion of the highway when he was struck by the automobile. The defendant testified just as positively that he never turned his car from the pavement on to the shoulder of the road before the accident occurred. The evidence was direct in both instances and in flat contradiction. The driver's testimony, if believed, was direct proof of the fact that his car was on the pavement when the impact occurred. Cina's testimony, if believed, was direct proof

that the boy was two feet from the edge of the pavement when he was struck. Both stories could not be true since if both were true the impact could not have occurred.

The jury was thus faced with a flat conflict in the only direct testimony and may well have concluded, weighing the one story against the other, that plaintiffs had not carried the burden of proof. In these circumstances the indirect evidence if given its proper weight by the jury might well have tipped the scales in plaintiffs' favor. I shall cite in this connection only the testimony of the witness Van Sickle. She testified that she did not see the impact but she did see an object flying through the air, which later proved to be the boy's body, and a cloud of dust. From this testimony of the cloud of dust the jury might reasonably have drawn an inference that the wheels of the automobile were on the dirt shoulder and not on the pavement. Whether this, or the other circumstantial evidence, was given its proper weight by the jury, or indeed whether it was given any weight at all, we can never know, for the simple reason that the court did not give the jury the rules of law by which they should be guided in considering the circumstantial evidence or the weight which they should accord to it.

We do know that many people entertain a strong suspicion of circumstantial evidence and feel that it is less dependable and should carry less weight than direct evidence. Some or all of the jurors may have entertained this belief.

The vice in this case, which no amount of rationalization can convince me is not prejudicial error, is that in a case in which the circumstantial evidence properly considered and given its legal weight might have tipped the scales the jurors were left to their own devices, without the legal guidance which it was appellant's undoubted right to have the court give to them, to treat the circumstantial evidence in whatever manner their own unguided whims and caprice might dictate and not

in the only manner in which the law expressly directs that they should treat it.

In my opinion the judgment should be reversed.

Hearing denied; CARTER, J., dissenting.



157 Cal.App.2d 746

Manuel ENOS, Frank F. Mattos, Lulza Mattos, Ivan L. Crawford, Madge Crawford and Estelle M. Crawford, Plaintiffs and Respondents,

v.

Monroe D. HARMON, Mary Harmon and County of Fresno, Defendants and Appellants.

Civ. 5616.

District Court of Appeal, Fourth District, California.

Feb. 20, 1958.

Action to quiet title to certain easements, for injunction and damages arising from a change by defendants in irrigating culvert pipe and ditch conveying waters under the highway of the defendant county and across the parcel of the land of other defendants. Judgment for the plaintiffs in the Superior Court of Fresno County, Edward L. Kellas, J., and the defendants appealed. The District Court of Appeal, Griffin, J., held that a portion of the injunction was too broad, that evidence justified the injunction and awards of damages, and that part of the controversy was probably moot.

Judgment affirmed as modified.

1. Injunction ☞

Injunction process ought never go beyond the necessities of the case and only to the extent required to preserve the rights of all parties.

2. Highways ⚡120(3)

Waters and Water Courses ⚡247(2)

In action for injunction and damages arising from a change by defendants in irrigating culvert pipe and ditch, conveying waters under the highway of the county and across a parcel of the defendants, requiring defendants to restore the ditch and culvert to its original size and location, and declaring that defendants had no right or title to the ditch and culvert and permanently enjoining them from thereafter interfering with the easement in any manner was improper as too extensive, since it related to the future improvement of public highways.

3. Highways ⚡120(3)

Waters and Water Courses ⚡247(1)

In action for injunction and damages from a change by defendants in an irrigating culvert pipe and ditch conveying waters under the highway of the county and across the parcel of the defendants' property, evidence supported judgment for plaintiffs.

4. Highways ⚡120(3)

Waters and Water Courses ⚡247(1)

In action for an injunction and damages arising from a change in irrigating culvert pipe and ditch conveying waters under highway of the county and across defendants' property, where previous installation was sufficient to irrigate land of plaintiffs and smaller installations were not, findings and judgment were sufficiently definite to describe course and to determine possible maximum previous water flow.

5. Eminent Domain ⚡300

In action for injunction and damages from a change in an irrigating culvert pipe and ditch conveying waters under highway of the county and across parcel of land of defendants, where court found that former culverts were not in a deteriorated condition and that culverts were removed by road authorities without consulting irrigation district and that plaintiff could not be adequately compensated in money for future damages from change, record did not establish that an inverse condemnation re-

sulted for which plaintiffs' only remedy was damages.

6. Highways ⚡120(4)

Waters and Water Courses ⚡247(1)

In action for damages arising from a change in an irrigating culvert pipe and ditch conveying waters under a highway of county and across parcel of defendants' property, awards of damages in amount of \$750 and \$300 respectively to property owners was authorized by evidence.

7. Appeal and Error ⚡219(2)

Where record did not reveal precise manner in which court arrived at amount of damages found due from a change by defendants in an irrigating culvert pipe and ditch and no request was made for specific findings on subject, defendants were not entitled to complain thereof on appeal.

8. Highways ⚡120(4)

Waters and Water Courses ⚡247(1)

In action for damages arising from a change by defendants of an irrigating culvert pipe and ditch, conveying water under highway of county and across lands of defendants, question whether defendants used reasonable efforts to minimize the damage was for trial court.

9. Highways ⚡120(3)

Waters and Water Courses ⚡247(2)

Where testimony showed that certain defendants complied with the terms of the injunction and reinstated the ditch on their land as it previously existed, such portion of the injunction was moot.

Leonard, Hanna & Brophy, San Francisco, for appellants Monroe D. Harmon and Mary Harmon.

Robert M. Wash, County Counsel, and Spencer Thomas, Jr., Asst. County Counsel, Fresno, for appellant County of Fresno.

Walch & Griswold, by Lyman D. Griswold, Hanford, for respondents.

GRIFFIN, Justice.

Plaintiffs and respondents brought this action against defendants and appellants to quiet title to certain easements, for injunction, and damages arising from a change, by defendants, in a certain irrigating culvert pipe and ditch, conveying waters under the highway of defendant County of Fresno and across a parcel of defendant Monroe D. Harmon and wife's property.

Plaintiffs Ivan L. Crawford and wife own and reside on 30 acres of farm land at the northwest corner of the intersection of Mt. Whitney and Walnut avenues in Fresno County. Plaintiff Estelle M. Crawford holds a life estate in said real property. Plaintiffs Frank F. Mattos and wife own and operate a farm containing 30 acres at the southwest corner of said intersection. It adjoins a 30-acre farm owned by plaintiff Manuel Enos. The land at the southeast corner of the intersection is owned by defendant Harmon and wife. North of the Crawford property lies a canal. Previous to January, 1953, from a headgate in this canal, ran a private open irrigation ditch in a general southwesterly direction across the Crawford property, under Mt. Whitney Avenue, through a 36-inch width corrugated iron pipe. It was about 24 feet long and located about eight inches below the surface of the highway with headwalls at each end protruding above the level of the roadway. A crossing of the water through it ran over the corner of defendant Harmon's land through a short open ditch to a 30-inch wide concrete pipe culvert running under Walnut Avenue, which was about 24 feet long and with like elevation and headgates. The irrigation water passing through this culvert then emptied into an open ditch running across the Mattos property to the Enos property.

There is evidence to the effect that defendants Harmon and the Fresno County Road Superintendent for that district agreed to and did, without notice to plaintiffs, change the pipe running under Mt. Whitney Avenue from a 36-inch to a 24-inch pipe, and from a 30-inch to a 24-inch pipeline under Walnut Avenue. They re-

set the headgates and pipes at a lower level. The open ditch on the Harmon property was destroyed and there was substituted a 24-inch concrete pipe about 36 feet or more in length and laid somewhat deeper so as to connect the two culverts to it. The Harmons then covered the pipes on their land with soil, and farmed that corner portion. They did not obtain water through this source.

The trial court found that plaintiffs possessed easements across said highway and property, as first indicated and in said dimensions, for the purpose of irrigation of their lands.

It appears from the testimony, although contradicted, that no difficulty previously ensued in reference to passage of the usual amount of water through said culverts and through the Harmon ditch to properly irrigate the Enos and Mattos properties, but after this reduction in size of these culverts and the installation of the pipe on the Harmon property the first head of water, when reaching the first culvert, started backing up in the ditch on the Crawford property, overflowed its banks, and flooded their property and around their home; that Crawford tried to repair the overflowing ditch without success and he then turned off the water at the headgate to prevent damage to his home and property; that a dispute then arose between the other plaintiffs and the Harmons about their inability to obtain sufficient water for irrigation, and no satisfactory arrangements were reached. This action was instituted in October, 1954.

Enos testified that since he started using the ditch in 1917, he previously had no trouble obtaining sufficient water to irrigate his ranch in 11 hours, but under the changed conditions the flow, when available, was so diminished it took him many hours longer; that he was compelled to buy additional pump water from a nearby neighbor, and was paying for it by the hour, but even so his vineyard crop failed because of lack of water due to his in-

ability to obtain it in sufficient quantity to irrigate the entire acreage; and that he was compelled to install his own pump.

Mattos testified he was not using the water the day it was shut off by Crawford but Enos was; that no water came down the ditch to his pump the next day nor within one month thereafter; that he was compelled to pump his own water for irrigation purposes, taking at least 100 hours to irrigate, and that he could previously irrigate with the ditch water much faster (18 hours); that since the installation of the 24-inch culvert pipes there was not enough force to the water to cause it to go down to the Enos property.

Defendants produced engineers who testified that formerly the culvert pipes were partially filled with sand and debris, which lessened the probable volume of water, and that the installation of the new culverts and pipe did not lessen the flow from that which previously existed; that there was sufficient flow to properly and adequately irrigate plaintiffs' property at all times; and that they suffered no damage by reason of the change.

The court found generally in favor of plaintiffs and against defendants' contention, and specifically found that the prior installation and ditch conveyed sufficient water for irrigation of the Enos and Mattos property; that such uninterrupted use continued in excess of five years and they acquired an easement accordingly; that defendants so changed the nature of said easements in the manner indicated to the detriment of plaintiffs; that although the Road Superintendent reported to the County that said work was done as an emergency, there was, in fact, no emergency of any kind; that the acts of defendants were arbitrary and capricious; that plaintiffs were, in a large degree, dependent on the water through this ditch to irrigate their farms, and accordingly a proportionate loss of crops resulted. It was found that Enos suffered damage in the sum of \$750, Mattos in the sum of \$300, and because

of the flooding of the Crawford property they were damaged in the sum of \$10. Judgment was entered against defendants accordingly. The decree quieting plaintiffs' title to an easement for ditch purposes, as theretofore existed, over the Harmon property, and to a 36-inch and 30-inch culvert under the said highways was entered. A mandatory injunction was issued compelling the defendants to restore said ditch and culvert to their original size and location. Permission was allowed to use all concrete pipe instead of corrugated. There was an additional decree that defendants have no right or title to said ditch and culverts and they were permanently enjoined from thereafter interfering with said easement in any manner.

[1,2] It appears to us that this latter decree was too extensive and somewhat beyond the power of the court to grant, particularly since it relates to the future improvement of the public highways. It should be and is therefore stricken from the decree. Injunction process ought never to go beyond the necessities of the case and only to the extent required to preserve the rights of all parties. *Anderson v. Souza*, 38 Cal.2d 825, 243 P.2d 497.

[3] Defendants' brief sets forth many claims as to why the judgment should be reversed. Mainly, it consists of the argument that the evidence and findings are insufficient to support a mandatory or a prohibitory injunction, or the judgment as entered. It appears to us from the record and testimony related, though conflicting, with the exception noted, that there was sufficient evidence to support the judgment and order. *Whalen v. Ruiz*, 40 Cal.2d 294, 302, 253 P.2d 457; *Allen v. San Jose Land & Water Co.*, 92 Cal. 138, 28 P. 215, 15 L.R.A. 93; *Montecito Valley Water Co. v. City of Santa Barbara*, 144 Cal. 578, 77 P. 1113.

[4] It is also argued that the court failed to definitely describe the nature and extent of the easement of water flow which plaintiffs had used and to which

they were entitled, and that it disregarded defendants' evidence on the subject, citing *Strong v. Baldwin*, 137 Cal. 432, 70 P. 288. It was definitely shown by the evidence that the previous installation, as indicated and described in the findings, was sufficient to irrigate plaintiffs' land within the time indicated, and that the smaller installations were not. There was sufficient definiteness in the findings and judgment to describe the course and to determine the possible maximum previous water flow. *Oliver v. Agasse*, 132 Cal. 297, 300, 64 P. 401; *Morris v. George*, 57 Cal.App.2d 665, 672, 135 P.2d 195.

Next, it is suggested that the injunction was unauthorized, and that plaintiffs' only remedy was an action for damages, since the evidence showed the old culverts constituted a traffic hazard and their removal and re-installation was a completed public improvement, citing *People v. Olsen*, 109 Cal.App. 523, 530, 293 P. 645; *Anderson v. Fay Improvement Co.*, 134 Cal.App.2d 738, 286 P.2d 513; and *Beals v. City of Los Angeles*, 23 Cal.2d 381, 144 P.2d 839.

[5] The court found, with sufficient evidentiary support, that the former culverts were not damaged or in a deteriorated condition and did not constitute a traffic hazard; that the culverts were removed by the road superintendent and road district supervisor without consulting the irrigation district or the engineering department of the county; that their claim that it was an emergency authorizing such action was untrue; that it was not in fact an emergency and was not for a public use but was done without proper authorization, arbitrarily and in conjunction with and at the request of the defendants Harmon.

It then found that plaintiffs could not be adequately compensated by money for future damages from said change in culverts. Under the circumstances it could not reasonably be said that an inverse condemnation resulted for which plaintiffs' only remedy was damages. *Gravelly Ford Canal Co. v. Pope & Talbot Land*

Co., 36 Cal.App. 556, 559, 178 P. 150; *Nickey v. Stearns Ranchos Co.*, 126 Cal. 150, 152, 58 P. 459. It was recognized in *Hillside Water Company v. City of Los Angeles*, 10 Cal.2d 677, 688, 76 P.2d 681, that under certain circumstances prohibitory relief is authorized. To the same effect is *Beals v. City of Los Angeles*, supra, 23 Cal.2d at page 388, 144 P.2d at page 843. The authorities relied upon by defendants are factually dissimilar.

[6] Attack is made on the award of damages to the Enoses and Mattoses claiming the evidence did not support damages in the amounts found, and that the findings do not disclose that the proper measure was applied as indicated in *Staub v. Muller*, 7 Cal.2d 221, 228, 60 P.2d 283; and 14 Cal.Jur.2d p. 801, sec. 166.

The court did find that by reason of the unauthorized change in the culverts and ditch these plaintiffs did suffer damage by reason of the restricted flow of water to their growing crops of alfalfa, vineyards and grape crops. The evidence does show that Enos paid certain bills in irrigating his own property when he was unable to obtain sufficient water from the ditch, and paid Mattos \$50 for use of his pump for 50 hours, plus taxes of \$60 to the irrigation district; that the gross yield from his vineyard, in 1954, was less than the normal yield in a specified amount, and that he employed extra help at 85¢ per hour for an undetermined time.

[7] As to Mattos, the general evidence is that his 30 acres were planted to alfalfa, oats and vineyards; that due to lack of ditch water in 1954 he had to operate his pump an average of 100 hours on three occasions, and figured his cost at \$1 per hour; that the reasonable rental value of his 24 acres of alfalfa and oats in 1954 with ditch water furnished was \$35 per acre, and without it \$25 per acre. It is true the record does not reveal the precise manner in which the court arrived at the amount of damages found due. No request was made for

specific findings on the subject. This would appear to be necessary. Staub v. Muller, supra, 7 Cal.2d 221, 60 P.2d 283.

[8,9] It affirmatively appears that the court fairly named the amount of the actual injury claimed to have been suffered. Although it was difficult to completely follow the measure used there was sufficient evidence to support it. The question whether defendants used reasonable efforts to minimize the damage was for the trial court to determine. The \$10 damage awarded to the Crawfords was supported by a sufficient showing. The closing testimony at the trial shows that defendants Harmon complied with the terms of the injunction and re-instated the ditch on their land as it previously existed. This portion of the injunction has probably become moot. Jennings v. Strathmore Public Utility District, 102 Cal.App.2d 548, 227 P.2d 838.

Judgment affirmed as modified. Plaintiffs to recover costs on appeal.

BARNARD, P. J., and MUSSELL, J., concur.



157 Cal.App.2d 782

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Robert H. CHOATE, Defendant and
Appellant.

Cr. 1334.

District Court of Appeal, Fourth District,
California.

Feb. 21, 1958.

Defendant was convicted of uttering and passing fraudulent checks and of uttering and delivering insufficient fund checks. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment, and defendant appealed. The

District Court of Appeal, Barnard, P. J., held that there was sufficient similarity to make the evidence of defendant's other check transactions admissible on question of defendant's intent.

Affirmed.

1. False Pretenses §49(3)

Forgery §44(3)

Evidence sustained conviction for uttering and passing fraudulent checks and for uttering and delivering insufficient fund checks. West's Ann.Pen.Code, §§ 476, 476a.

2. Criminal Law §371(3, 5)

In prosecution for uttering and passing fraudulent checks and for uttering and delivering insufficient fund checks, record disclosed sufficient similarity between other check transactions of defendant and his instant check transactions to make the evidence of the other transactions admissible on question of defendant's intent. West's Ann.Pen.Code, §§ 476, 476a.

3. Criminal Law §1169(11)

In prosecution for uttering and passing fraudulent checks and for uttering and delivering insufficient fund checks, any error in admitting evidence of defendant's other check transactions in that there may have been a failure to show defendant's knowledge of lack of sufficient funds in bank to cover such checks was not prejudicial in view of strong evidence of defendant's guilt. West's Ann.Pen.Code, §§ 476, 476a.

Phillip Crittenden, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The appellant was charged in two counts of an information with violations of section 476 of the Penal Code, and in a third count with violating section 476a of that code. In Count 1 he was charged with ut-

tering and passing a fictitious check on April 8, 1957, purporting to be signed by one Walter H. Scott, when he knew that there was no such person in existence and knew that this check was fictitious. In Count 2 he was in like manner charged with uttering and passing on April 9, 1957, another fictitious check which was purportedly signed by Walter H. Scott. In Count 3, he was charged with uttering and delivering on or about February 15, 1957, two checks drawn by one Eugene Montigo on a certain bank knowing that Montigo did not have sufficient funds in or credit with the said bank for the payment of said checks. A jury found him guilty on all three counts, and he has appealed from the judgment sentencing him to prison.

[1] The evidence is amply sufficient to sustain the conviction on all three counts. The appellant cashed all of the checks involved therein at stores or places of business, and in most instances received both merchandise and a balance in cash. He claimed to have sold to this man Scott a membership in two different country clubs and that he received the checks involved in the first two counts in payment therefor. There was evidence that he was not working for these clubs at the time in question, that he never turned over any such memberships to the clubs, and that no such Scott had ever lived in that area. His explanation of these transactions was far from satisfactory, and there was evidence fully justifying the inference that he knew that these checks were fictitious. With respect to Count 3 it appears that the appellant sold two articles to Montigo; that Montigo told him that he had no checking account in any bank; that Montigo signed the checks on appellant's statement and agreement that he would hold the checks for two or three months while he went on a trip to Texas, and that on his return he would return the checks to Montigo for the amounts named on their face; and that the appellant cashed one of these checks the same day he received it and the other on February 26, 1957.

[2] The appellant does not question the sufficiency of the evidence to sustain the jury's verdict, and the sole point raised on this appeal is that the court erred in admitting evidence concerning certain other checks cashed by the appellant, it being contended that since these acts or offenses had no relation to the acts with which the appellant was here charged such evidence was inadmissible. The evidence thus objected to related to a check for \$800 given by the appellant to a Robert Goodwin on December 23, 1955; to four checks given to the appellant by one Heide in March, 1956; to three checks given to the appellant by one Hancock in May, 1956; and to a check given by the appellant to University Motors on May 11, 1957. The evidence with respect to the latter check came in by way of rebuttal. All of these checks were issued or cashed by the appellant and payment on all of them was refused because of insufficient funds when they were presented to the respective banks. Evidence with respect to these checks was received for the purpose of showing intent or the use of a common scheme or design embracing both such acts and the acts with which the appellant was here charged.

The Goodwin check was given in part payment for goods previously sold to the appellant by Goodwin. When Goodwin told the appellant that the bank had refused to honor the check the appellant told him to redeposit it. The check was redeposited but the bank again refused to honor it, and Goodwin never received any payment on the check. The appellant testified that when he gave the check he had sufficient money in the bank to pay it; that there was sufficient money there for several days after he delivered the check "and probably until December 23"; and that his business was attached on January 12 and he was forced into bankruptcy. It is argued that this check transaction is in no way similar to the transactions with which the appellant was charged because he had money in the bank up to the time he withdrew it; because he and not a fictitious person signed

the check; because he issued the check for a past debt and not to obtain ready money; and because this check was drawn on a different bank than the ones involved in the charges here made. It is further argued that it was not shown that he had a criminal intent in the Goodwin transaction. No such dissimilarity appears as would make the evidence as to this check inadmissible and the evidence, including the fact that Goodwin was told to redeposit the check after the appellant knew that it was not good, would justify an inference adverse to the appellant with respect to his intent.

[3] With respect to the Heide and Hancock checks it is argued that these acts were not similar to the acts involved in the charges here made and therefore had no logical tendency to prove any element of the acts charged. With respect to all of these checks the appellant received the checks from other persons, cashed them, and they were subsequently dishonored. A sufficient similarity appears. It is further argued in connection with these checks that there was no evidence showing that the appellant knew or should have known that Heide or Hancock did not have sufficient funds in the banks to cover these checks. While the evidence was not complete in this regard, the appellant had cashed these seven checks within a period of two months at various places of business and had not presented any of these checks at the bank on which it was drawn or at any other bank. The general circumstances were very similar to those in the other acts or offenses where it was shown that he did know that there was not sufficient funds in the banks to cover the checks he had passed. In *People v. Hutchings*, 56 Cal.App. 397, 205 P. 480, it was pointed out that the claimed failure to show such knowledge could not properly have been passed upon by the trial court until the evidence of the other offenses was all in, and that in such a situation the court would have no opportunity to pass upon the point unless a motion to strike was made giving the court an opportunity to instruct the jury to disregard that evidence. Here, no

objection was made other than a motion to strike which was made solely on the ground that the evidence of these other checks was irrelevant. The attention of the court was in no way called to the fact that the evidence was incomplete in not showing that the appellant knew that there was insufficient funds in the banks to cover these checks. Assuming that any error appears in this connection it cannot be held, in view of the strong evidence of appellant's guilt with respect to the acts here charged, that any such error was sufficiently prejudicial to justify a reversal.

With respect to the University Motors check it appears that the appellant bought a truck from University Motors, turning over an old car worth \$25 and giving the company a check for the balance of the down payment which he signed "Richard Choate", this being the name of his eight-year old son. There was no such account in the bank and the check was not paid. The appellant had represented himself as being Richard Choate during this transaction, and when he was informed that the check had been dishonored the appellant said that the truck had been stolen from him and he could not return it. It is argued that this transaction was not similar to the crimes with which he was charged; that he had given the salesman information that if followed up would have led to disclosing his identity; that both parties believed that the check was intended merely as a note; and that this evidence would not tend to prove that appellant knew that the Walter H. Scott checks were not good, or that Eugene Montigo did not have sufficient funds in the bank. While this transaction was not similar in all respects to the acts with which the appellant was charged there was sufficient similarity in many respects to make the evidence admissible on the question of intent, and it is not even claimed, with respect to this transaction, that the appellant did not know that this check would not be honored at the bank. While there was some conflict in the evidence in regard to this transaction, this

merely presented a question of fact for the jury.

In view of the strong evidence of appellant's guilt in connection with the offenses charged we find no reversible error in the record, and we are far from convinced that any miscarriage of justice has occurred.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



157 Cal.App.2d 786

**Dorothy NEWHALL, Plaintiff and
Respondent,**

v.

**George A. NEWHALL, Defendant and
Appellant.**
Civ. 17387.

District Court of Appeal, First District,
Division 1, California.

Feb. 24, 1958.

Rehearing Denied March 26, 1958.

Hearing Denied April 23, 1958.

Suit by wife for divorce wherein the parties negotiated a property settlement agreement which was ratified and confirmed by the final decree. The husband subsequently moved for a modification thereof. The Superior Court, City and County of San Francisco, Fred B. Wood, J., held that the agreement constituted an integrated settlement agreement not subject to modification because of change in husband's financial condition; that the wife was not entitled to costs and attorney's fees as concerned the husband's motion to reduce payments for her support but was entitled to such, as respects that portion of the proceeding which pertained to the children of the parties.

Judgment in accordance with the opinion.

1. Divorce **245(1)**

A property settlement agreement in a divorce action is "integrated" if the parties have agreed that the provisions relating to division of property and relating to support constitutes reciprocal consideration and it is immaterial whether the marital property is divided equally, whether amount thereof is small and whether the agreement calls for payments for support or alimony. West's Ann.Civ.Code, § 139.

See publication Words and Phrases, for other judicial constructions and definitions of "Integrated Agreement".

2. Divorce **245(1)**

A support order based on an integrated agreement may be modified if the parties so provide, but absent such a provision, it cannot be modified.

3. Divorce **245(1)**

Property settlement agreement entered between parties to divorce action by its terms disclosed an integrated and severable property settlement agreement not subject to modification because of changes in the husband's financial condition where provisions disclosed that a division of property was involved.

4. Divorce **245(1)**

A property settlement agreement between parties to a divorce action to constitute an integrated agreement not subject to modification does not require that there be an actual division of the property as such since they may relinquish claims which either potentially has against the other. West's Ann.Civ.Code, § 139.

5. Divorce **245(1), 246**

The statute recasting the powers to modify orders for support and maintenance, does not manifest intent to confer upon the courts at any time power to revoke or modify a judgment making an allowance to a spouse, whether predicated upon an integrated agreement or not. West's Ann.Civ.Code, § 139.

6. Divorce **245(1)**

Fact that interlocutory and final decrees in divorce action spelled out in terms

of property settlement custody of children and husband's obligation of support but did not spell out all other obligations of the parties and simply decreed that the property settlement agreement be ratified and approved did not indicate that the integrated property settlement agreement should be subject to modification because of change of financial conditions in the husband. West's Ann.Civ.Code, § 139.

7. Divorce ⇨245(1), 303(1), 309

Where agreement between spouses to divorce action required husband to pay wife \$5,000 annually as his share of the support of the children and provided for joint custody "subject to any future order of any court having jurisdiction of the subject matter" quoted words recognized power of the court to approve agreement itself; continuing jurisdiction to modify the custody provisions and the power to alter the child support provisions upward only unless incident to a change of custody but included no power to modify any other terms of the agreement. West's Ann. Civ.Code, § 139.

See publication Words and Phrases, for other judicial constructions and definitions of "Subject to Any Future Order of Any Court Having Jurisdiction of Subject Matter".

8. Divorce ⇨245(1)

Fact that in agreement between spouses to divorce action child support and wife support payments were expressed separately and not merged in a single specified amount per month was immaterial where if they were so merged and the decree was silent as to allocation the trial court could determine the allocation in a subsequent proceeding.

9. Divorce ⇨189, 221

Court was unauthorized to award to wife costs and attorney's fees in proceedings upon the husband's motion for modification of the final divorce decree where wife's execution of property settlement agreement operated as a waiver of any right to receive such an award. West's Ann.Civ.Code, § 137.3.

Cal.Rep. 321-322 P.2d—23

10. Divorce ⇨309

A wife in resisting reduction of payments for support of children in divorce action acts as a representative of the children whose rights cannot be adversely affected by the agreement of the parents nor can the state's interest and concern for their welfare be adversely affected by the provisions of any such agreement. West's Ann.Civ.Code, § 137.3.

11. Divorce ⇨186, 189, 221, 287

On application of husband for modification of final divorce decree respecting property settlement the court had jurisdiction to award attorney's fees and costs in respect to that portion of the proceeding which pertained to the children of the parties but where the order making the award was general in terms and not limited to such aspect, it should be modified. West's Ann.Civ.Code, § 137.3.

Charles F. Jonas, San Francisco, Dinkelspiel & Dinkelspiel, Richard C. Dinkelspiel, San Francisco, for appellant.

Young, Rabinowitz & Chouteau, San Francisco, for respondent.

FRED B. WOOD, Justice.

In 1951 plaintiff filed a suit for divorce. The interlocutory decree was rendered October 31, 1952, and the final decree November 3, 1953. Meanwhile, the parties negotiated and executed a property settlement agreement dated October 23, 1952. The interlocutory decree ordered and adjudged "that the Property Settlement Agreement between plaintiff and defendant, executed by said parties on October 23, 1952, be and the same is hereby ratified, confirmed and approved, and each of the parties is hereby ordered to do and perform each and every obligation on his or her part required to be performed under said agreement." The final decree ratified, confirmed and approved the agreement in identical terms.

Each decree "further ordered, adjudged and decreed that, pursuant to said Property

Settlement Agreement, defendant be and he is hereby ordered and directed as follows:

"(1) To pay to plaintiff the sum of Five Thousand (\$5,000) Dollars annually, in twelve (12) equal installments, as his share of the support and maintenance of each of said minor children until his or her majority.

"(2) To pay according to its terms, the present indebtedness evidenced by a certain promissory note in favor of Pacific Mutual Life Insurance Company, having a present principal balance of Eleven Thousand Four Hundred Fifty (\$11,450.00) Dollars,¹ and secured by a deed of trust covering the property owned by the plaintiff and commonly known and designated as 2438 Filbert Street, San Francisco, California.

"(3) To pay to plaintiff, for her support and maintenance the sum of Twenty-two Thousand (\$22,000.00) Dollars annually in twelve (12) equal installments, provided that said payments shall cease in the event of the death of plaintiff or of defendant, or in the event of the remarriage of plaintiff; provided, further, that if defendant dies within ten (10) years from October 23, 1952, plaintiff shall continue to receive said payments until October 23, 1962, unless she dies or remarries prior thereto."

Later, the defendant moved for an order modifying the final decree in the following respects: (1) to reduce the annual payment for the support of each child from \$5,000 to \$1,800 annually; (2) to reduce the payment for the support of the plaintiff from \$22,000 to \$9,000 annually. He predicated his motion upon allegedly changed conditions.²

The trial court, after a hearing, denied this motion by an order which recited that the court had "no authority to modify the property settlement agreement and interlocutory and final judgments of divorce."

The order of denial further recited that the court so acted "without passing upon the merits of the motion * * * for modification" and awarded plaintiff costs and attorney fees. Defendant has appealed.

The agreement in question bears all the earmarks of an integrated, inseverable property settlement agreement. The parties expressly declared that they mutually desired "that a full and final adjustment of all their property rights be had" and agreed that except as therein specified each party is released from all obligations and liabilities resulting from future acts of the other; each released the other from all liabilities or obligations thereafter incurred by the other and from all claims of either upon the other for support as wife or husband or otherwise "it being understood that this instrument is intended to settle the rights of the parties hereto in all respects"; all property hereafter acquired by either shall be his or her sole and separate property; each has an immediate right to dispose of or bequeath his or her interest in all property belonging to him or her; each waives all right to the estate of the other at death, including the right of administration, family allowance and inheritance under any will; the wife accepts the provisions hereof "in full satisfaction of her right to the community property * * * and in full satisfaction of her right to alimony, support and maintenance." They agreed there "is no community property" but that the wife is entitled to the household furniture and furnishings belonging to either of them (except certain items described in a certain list), a Cadillac and a jeep, certain moneys for her attorney fees and costs and for the services of an accountant employed by her. Certain real properties are characterized as belonging to the wife. He agrees to pay the encumbrance on one of these properties as it becomes due. He agrees to pay all the community debts listed in a certain sched-

1. This item was \$14,000 in the interlocutory decree; \$11,450 in the final.

2. He claims a diminishing income from \$231,000 in 1950 to \$59,000 in 1954, con-

pled with expenditures of \$175,699 in 1954, the difference between the last two amounts representing a reduction in net worth; and estimated further losses, and reduction of assets, in 1955.

ule. She agrees to quitclaim to him any interest she may have as joint tenant or tenant in common with him in any real property.

In the 13th paragraph of this instrument he agrees to pay to her "for her support and maintenance the sum of * * * \$22,000.00 * * * per year, payable in equal monthly installments," such payments to close upon the death of either or upon her remarriage, except that if he dies within ten years she shall continue to receive the payments for the balance of such ten-year period unless she dies or remarries during said period.

The husband's promise to make these payments to the wife was an integral, inseparable part of the property settlement agreement. When "ratified, confirmed and approved" by the interlocutory and final decrees, each of which decreed that "pursuant to said Property Settlement Agreement," defendant is ordered and directed to pay plaintiff the sum of \$22,000 annually (using the very words of the 13th paragraph of the agreement except for the substitution of "defendant" for "husband" and "plaintiff" for "wife"), this obligation to pay \$22,000 annually became fixed and is not subject to modification except by consent of the parties, the plaintiff and the defendant herein.

[1] This agreement (and these "support" payments) meet the test expressed in *Plumer v. Plumer*, 48 Cal.2d 820, 313 P.2d 549:

"An agreement is integrated if the parties have agreed that the provisions relating to division of property and the provisions relating to support constitute reciprocal consideration. The support provisions are then necessarily part and parcel of a division of property. Such an agreement would be destroyed by subsequent modification of a support order based thereon, without the consent of the parties. *Dexter v. Dexter*, supra, 42 Cal.2d [36], at pages 41-42, 265 P.2d [873], at page 876; *Messenger v. Messenger*, supra, 46 Cal.2d

[619], at pages 626, 627-628, 297 P.2d [988], at page 992; *Herda v. Herda*, 48 Cal.2d 228, 231-232, 308 P.2d 705. It is immaterial whether or not the marital property is divided equally. *Dexter v. Dexter*, supra, 42 Cal.2d at page 43, 265 P.2d at page 877; *Messenger v. Messenger*, supra, 46 Cal.2d at pages 627-628, 297 P.2d at pages 992-993. It is immaterial that the amount of the marital property is small. *Herda v. Herda*, supra, 48 Cal.2d at page 232, 308 P.2d at page 707. It is likewise immaterial that the agreement calls for payments for 'support' or 'alimony.' *Messenger v. Messenger*, supra, 46 Cal.2d at pages 624-625, 297 P.2d at pages 990, 991 and cases there cited.

[2] "A support order based upon an integrated agreement may be modified if the parties so provide. *Flynn v. Flynn*, 42 Cal.2d 55, 61, 265 P.2d 865. Absent such a provision, it cannot. An agreement providing that the purpose of the parties is to reach a final settlement of their rights and duties with respect to both property and support, that they intend each provision to be in consideration for each of the other provisions, and that they waive all rights arising out of the marital relationship except those expressly set out in the agreement, will be deemed conclusive evidence that the parties intended an integrated agreement. *Messenger v. Messenger*, supra, 46 Cal.2d at page 628, 297 P.2d at page 993; *Anderson v. Mart*, 47 Cal.2d 274, 279, 303 P.2d 539; *Herda v. Herda*, supra, 48 Cal.2d at page 232, 308 P.2d at page 707. Even absent one or more of the foregoing provisions, there may be other proof that the parties intended an integrated agreement. *Dexter v. Dexter*, supra, 42 Cal. at page 41, 265 P.2d at page 876. Thus, the parties may be uncertain as to the value or legal ownership of property. They may be uncertain which of them is entitled to a divorce and on what grounds

and therefore uncertain as to their legal rights with respect to support and the division of property. An agreement for a specified division of property and specified support payments settling such uncertainties is integrated in the absence of convincing proof that the parties intended it to be severable. See *Dexter v. Dexter*, supra, 42 Cal.2d at page 43, 265 P.2d at page 877; *Messenger v. Messenger*, supra, 46 Cal.2d at pages 627-628, 297 P.2d at pages 992, 993." 48 Cal.2d at pages 824-825, 313 P.2d at page 552.

[3] Defendant says our case does not meet this test because no property was divided. We are not convinced. The following provisions of the agreement are consistent with the concept that this agreement marks the culmination of a division of their properties: "Husband and wife *acknowledge* that there *is no* community property"; the wife "*now* owns as her separate property" a certain parcel of realty; the husband "heretofore has conveyed to wife and wife *now* owns as her separate property" a certain other parcel. (Emphasis added.) This view that a division of property was involved receives support and emphasis from the clause whereby she "agrees to quitclaim to" him "any and all interest which she may now have" as "joint tenant or tenant in common with" him in any real property.

[4] Moreover, the Supreme Court did not say in the *Plumer* case that there must be an actual division of property as such, to constitute an integrated, inseverable agreement. The parties may be uncertain as to the legal ownership of property. They may relinquish claims which either potentially has against the other. In *Lane v. Bradley*, 124 Cal.App.2d 661, 666, 268 P.2d 1092, 1095, " * * * a showing that there was no community property did not exclude the possibility that the payments might be part of an integrated bargain so as to prevent them from having the character of alimony only." See also *Ettlinger v. Ettlinger*, 3 Cal.2d 172, 44 P.2d 540.

Defendant further claims that changes effected in section 139 of the Civil Code in 1951 remove the basis for the line of decisions which culminated in *Plumer v. Plumer*, supra, 48 Cal.2d 820, 313 P.2d 549. He invokes *Hilton v. McNitt*, 49 Cal.2d 79, 315 P.2d 1. The *Hilton* case holds, merely, that the last sentence of section 139, Civil Code, as amended in 1951, applies to a property settlement agreement whether it be integrated and inseverable or not. Accordingly, monthly payments for support and maintenance of one party by the other terminate upon the death of the obligor or remarriage of the obligee *unless* the parties otherwise agree in writing. That, obviously, is a mere rule of interpretation of the intent of the parties, not a legislative mandate that they agree upon a particular result. It has no bearing upon the facts of our case.

[5] Defendant argues by analogy that if the last sentence of the 1951 amendment of section 139 applies to an integrated property settlement agreement then it must follow that the next to the last sentence of that section as amended in 1951 likewise applies and confers upon the courts the power at any time to revoke or modify a judgment making an allowance, whether or not predicated upon an integrated agreement. We derive no such legislative intent therefrom. That was a mere recasting of the power to modify (previously expressed in these words: "the Court may, from time to time, modify its orders in these respects") in adjustment to the changes being made in the forepart of the section, enlarging its scope to embrace the duty of a wife to support the husband in addition to his obligation to support her.

Significantly, our Supreme Court in *Plumer v. Plumer*, supra, 48 Cal.2d 820, 313 P.2d 549, discussing a post-1951 agreement, indicated no awareness of any 1951 legislative intent to subject all integrated property settlement agreements to judicial modification "at any time."

[6] We attach no particular significance to the fact that the interlocutory and

final decrees spelled out (in the very terms of the agreement) the custody of the children, the husband's support obligations, and his promise to pay off the encumbrance on the wife's realty, but did not similarly spell out all other obligations of the parties, covering the latter simply by decreeing that the property settlement agreement "be and the same is hereby ratified, confirmed and approved, and each of the parties is hereby ordered to do and perform each and every obligation on his or her part required to be performed under said agreement." In this respect this decree seems to have followed the form used in *Herda v. Herda*, 48 Cal.2d 228, 308 P.2d 705, and *Messenger v. Messenger*, 46 Cal.2d 619, 297 P.2d 988, in each of which no power to modify was found. The same result obtained in *Dexter v. Dexter*, 42 Cal.2d 36, 265 P.2d 873, 879, where the decree "approved" the agreement and ordered certain payments to be made "pursuant to the terms."

[7] The principles we have been discussing apply also to the defendant's promise to pay to plaintiff "\$5,000.00 * * * annually * * * as his share of the support and maintenance of each child until his or her majority." (Emphasis added.) They agreed that the care, custody and control of their two minor children "shall be awarded jointly to wife and husband, with physical custody in wife," subject to the right of the husband to visit and take the children at reasonable times. Both of these provisions (custody and support of the children) were prefaced by the words: "subject to any future order of any court having jurisdiction of the subject matter of the following, it is agreed: * * *." But for this clause it would be clear that the requirement for the \$5,000 annual payments could not be modified downward though it could be modified upward upon a showing of an appropriate change in circumstances (*Puckett v. Puckett*, 21 Cal.2d 833, 843, 136 P.2d 1) unless incident to a change in the custody of the children.

The words "subject to any future order of any court having jurisdiction of the subject matter of the following" (custody and

support of the children) recognized the power of the court to approve the agreement itself, the continuing jurisdiction of the court to modify the custody provisions, and the power to alter the child support provisions, upward only unless incident to a change of custody. That is all that the quoted words reasonably mean. They include no words of grant, no words conferring or reserving power to modify any of the terms of the agreement. The quoted words mean "subject to" whatever power a court of competent jurisdiction may in its own right have (not derived from this agreement) to modify these child custody and support provisions of this integrated, inseverable property settlement agreement.

This reasoning finds support in *Anderson v. Mart*, 47 Cal.2d 274, 303 P.2d 539. The parties in their agreement declared that they recognized that "they can control the custody of the minor child of the parties hereto only to the extent that their agreement coincides with the order which any Court of competent jurisdiction may make for the best interest of said child. Subject to such recognized premise of law, the parties hereto agree that the Wife shall have the care, custody and control of the minor child, with reasonable right of visitation vested in Husband." 47 Cal. 2d at page 279, 303 P.2d at page 542. They then provided: "'Subject to approval by any Court of competent jurisdiction, Husband agrees to pay to Wife the sum of Sixty (\$60) Dollars per month as and for the support and maintenance of Wife and the minor child * * *'" 47 Cal.2d at page 279, 303 P.2d at page 542. Of this, the court said: "The contention that the provision that the payments were to be subject to the approval of the court establishes that they were alimony is likewise without merit. Thus the parties had expressly recognized that any agreement affecting the interests of their child was subject to the approval of the court, and since the monthly payments were to be made for the support of both plaintiff and the child, it was appropriate that a provision for court approval should be included. The fact that

the parties recognized that they could not by their agreement control the court's power to make orders for the support of their child in no way conflicts with their clearly expressed intention that as between themselves their agreement should be final and conclusive." 47 Cal.2d at pages 280-281, 303 P.2d at page 543.

[8] We attach no significance to the fact that here the child support and the wife support payments are expressed separately, not merged in a single specified amount per month. If they were so merged and the decree were silent as to allocation, the trial court could determine the allocation in subsequent proceedings. *Anderson v. Mart*, supra, 47 Cal.2d 274, 283-284, 303 P.2d 539.

Defendant invokes a number of cases which we do not find applicable. In *Street-er v. Streeter*, 67 Cal.App.2d 138, 153 P.2d 441, the court allowed modification of child support payments because the implied finding of the court below that the award was for the maintenance of the child and not a part of the property settlement agreement was supported by the evidence. In *Bias v. Bias*, 142 Cal.App.2d 344, 348, 298 P.2d 102, a revision of the child's support payments downward was affirmed because the appellant had not presented a record from which a determination that the trial judge erroneously interpreted the agreement could be made. In *Shepard v. Shepard*, 116 Cal.App. 2d 594, 254 P.2d 120, and in *Scarlett v. Scarlett*, 151 Cal.App.2d 237, 311 P.2d 188, the fact that the payments for child support were separately stated was a feature that weighed with the court in determining that the parties did not intend to make the child support provisions as integral, non-severable part of the property settlement agreement. However appropriate that may have been in respect to those particular agreements, we do not find that reasoning applicable to the agreement before us, in the light of the Supreme Court decisions we have cited and rely upon.

There remains a question concerning the validity of an award to plaintiff of costs and attorney fees in the proceedings had

upon defendant's motion for modification of the final decree.

In an action for divorce or for the custody, support, maintenance or education of children, the court may order the husband or wife, father or mother, "to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees * * * In respect to services rendered or costs incurred after the entry of judgment, the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein * * *". Civ.Code, § 137.3.

[9] Clearly, the court had authority to make the questioned award unless plaintiff's execution of the property settlement agreement operated as a waiver and relinquishment of any right she might otherwise have to receive such an award. It did so operate as concerns defendant's motion to reduce the payments for plaintiff's support, and plaintiff's resistance to that motion. *Grolla v. Grolla*, 151 Cal.App.2d 253, 311 P.2d 547.

[10] However, his motion to reduce the payments for support of the children, and her resistance thereto, are in a different category. In that regard, she acts as a representative of the children, whose rights can not be adversely affected by agreement of the parents; nor can the state's interest and concern for the welfare and maintenance of the children be adversely affected by the provisions of any such agreement. *Allen v. Allen*, 138 Cal.App.2d 706, 710-711, 292 P.2d 581.

[11] We conclude that the court had jurisdiction to award attorney fees and costs in respect to that portion of the proceeding which pertained to the children. But the order making the award was general in terms, not limited to this aspect of the case. It should be appropriately modified.

That portion of the order which denied defendant's motion to modify the final decree is affirmed. That portion which award-

ed plaintiff attorney fees, costs and expenses is reversed with directions that further proceedings may be had for determination of the question what attorney fees, costs and expenses, if any, should be awarded plaintiff in respect to the litigation of defendant's motion to reduce the amount of the payments for the support of the children. Plaintiff-respondent will recover her costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.



157 Cal.App.2d 811

Robert D. PATERSON, Plaintiff and Respondent,

v.

The BOARD OF TRUSTEES OF The MONTECITO UNION SCHOOL DISTRICT et al., Defendants and Appellants.

Civ. 22206.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1958.

Hearing Denied April 23, 1958.

Action for reformation of school building construction contract. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., rendered judgment for plaintiff, and the defendants appealed. The District Court of Appeal, Richards, J. pro tem., held that where school board complied with bidding statute and awarded school building construction contract to lowest bidder, board could not enter into new and different contract with contractor for same work at increased price, and that result could not be accomplished on any theory of estoppel arising out of contractor's proceeding with performance of work in reliance upon representation of board's architect that board would correct contract price on completion of work so that con-

tractor would suffer no loss as result of his mistake in computing his low bid.

Reversed with directions.

1. Reformation of Instruments ⇨17(1)

Where contractor and school board suspected that contractor had erred in computing his low bid for school building construction contract and contractor checked his figures and found no mistake and contract was signed at the bid price and shortly thereafter and before commencement of work the contractor discovered his mistake and advised the architect but the board never agreed to any other price, the contractor was not entitled to reformation of contract.

2. Reformation of Instruments ⇨6

It is a presupposition to the granting of reformation that there was a valid agreement between the parties and that the instrument which they executed failed to correctly express such agreement.

3. Estoppel ⇨62(6)

Where school board complied with bidding statute and awarded school building construction contract to lowest bidder, board could not enter into new and different contract with contractor for same work at increased price, and that result could not be accomplished on any theory of estoppel arising out of contractor's proceeding with performance of work in reliance upon representation of board's architect that board would correct contract price on completion of work so that contractor would suffer no loss as result of his mistake in computing his low bid. West's Ann.Education Code, § 18051.

4. Schools and School Districts ⇨80(2)

Under bidding statute, school board must award to lowest bidder a contract involving expenditure exceeding \$1,000. West's Ann.Education Code, § 18051.

5. Schools and School Districts ⇨55

A board of school trustees is an administrative agency created by statute and invested only with powers expressly conferred by Legislature and cannot exceed

the powers granted to board. West's Ann. Education Code, § 18051.

6. Schools and School Districts ⇐80(2)

School building construction contractor waived any right to rescind his bid before acceptance by voluntarily entering into contract.

Vern B. Thomas, Dist. Atty., and John G. Barnes, Jr., Deputy Dist. Atty., Santa Barbara, for appellants.

Cornwall & Westwick and John A. Westwick, Santa Barbara, for respondent.

Edmund G. Brown, Atty. Gen., and Richard H. Perry, Deputy Atty. Gen., amici curiae on behalf of appellants.

RICHARDS, Justice pro tem.

Plaintiff brought this action against defendant, The Board of Trustees of the Montecito Union School District (hereinafter referred to as "Board of Trustees") and the individual members thereof to reform a school building construction contract, after full performance by plaintiff and defendants, to recover for a deficiency in the bid and contract price resulting from plaintiff's clerical error in making his cost computations. Plaintiff had judgment and defendants appeal.

The facts are simple and without substantial conflict. The Board of Trustees employed Chester Carjola, a licensed architect, to prepare plans and specifications for a new school building at Montecito, California. Plaintiff, a licensed contractor, in response to an advertisement for bids on the building, prepared and submitted a total bid of \$144,800. In computing his bid, plaintiff used a work sheet on which he entered the figure of \$12,000 for the plumbing subcontract in one column, but upon extending this figure to the totals column he entered the figure of \$1,200, which latter figure was used in computing his total bid, thus causing his bid to be \$10,800 less than if he had extended the figure of \$12,000 into the totals column. When the bids were opened before the Board of Trustees, plaintiff was the low bidder, the next high-

er bid being \$158,370, the other bids ranging upward to \$177,758. The discrepancy between the plaintiff's bid and the other bids led the plaintiff and the Board of Trustees to suspect at that time that the plaintiff had made some error. Plaintiff immediately checked his figures but found no error and the following morning advised the architect that no mistake had been found and that he, the plaintiff, was ready to sign the contract at the bid price, which he did on March 2, 1954, no error in his computations having been discovered at that time. When the contract was signed both the plaintiff and the Board of Trustees still suspected that there was some mistake in plaintiff's bid but neither knew what the mistake was or the amount thereof. Shortly thereafter and before commencement of the work, plaintiff discovered his mistake and immediately advised the architect that the mistake had been discovered, the amount of the mistake and how it had occurred. The architect advised plaintiff that the matter would be called to the attention of the Board of Trustees in an effort to obtain relief for plaintiff from his mistake. Plaintiff himself did not communicate with the Board of Trustees as to the discovery of his mistake or the amount thereof. A few days later and still prior to the commencement of the work, the architect advised plaintiff that the matter had been taken up with the Board of Trustees and, as found by the court, "that defendants were favorably inclined toward correcting said contract price to relieve plaintiff from said mistake, so that plaintiff should not be damaged thereby" and the architect further advised plaintiff that he should proceed with performance and that, upon completion of the work, the defendants would see to it that the plaintiff suffered no loss as a result of his mistake. In reliance upon this advice from the architect, plaintiff commenced and completed performance under the contract and was paid the contract price. The court found substantially in accordance with the foregoing statement of facts and additionally found that the architect "was the agent

of defendants in connection with the construction work * * * and in connection with the negotiation of the contract therefor" and that the defendants desire "if legally possible, to pay plaintiff the sum of \$10,800", the difference between his actual and intended bid price. The court concluded that "defendants are estopped to refuse payment to plaintiff of the sum of \$10,800"; that plaintiff is entitled to judgment reforming the contract so as to increase the amount to cover the mistake of \$10,800 and that the plaintiff is entitled to judgment against the defendants for \$10,800 with interest and costs. Judgment was entered accordingly.

As principal grounds for reversal, defendants contend: (1) that the court erred in granting reformation of the building contract, and (2) that the court erred in concluding that the defendants were estopped from denying payment of \$10,800 to the plaintiff.

[1,2] In the absence of estoppel, it is manifest that the pleadings, the evidence and the findings will not support the conclusion and judgment for reformation of the contract between plaintiff and defendants. It is a presupposition to the granting of reformation that there was a valid agreement made between the parties which the instrument they executed failed to express correctly. In the case at bar there is neither allegation nor proof that either the plaintiff or the defendants knew, before or at the time the contract was executed, the amount of plaintiff's mistake or how it was made. Nor is it alleged or established that the defendants ever agreed to any price other than the price set forth in the contract. The most that was established was that the plaintiff and the defendants each suspected some mistake. Notwithstanding such suspicion, the only common intention between the parties at the time of contracting was that the plaintiff agreed to perform the work and the defendants agreed to pay therefor the amount as set forth in the contract.

In *Lemoge Electric v. County of San Mateo*, 46 Cal.2d 659, 297 P.2d 638, it ap-

pears that the plaintiff submitted the low bid of \$172,421 for electrical work to be done on a county hospital job. The cost of certain materials amounting to \$10,452 was inadvertently listed by the plaintiff as \$104.-52. The mistake was discovered before the acceptance of the bid, but the county refused to permit an adjustment in the bid to compensate for the error. Instead of seeking rescission, the plaintiff entered into a contract at the terms specified in the bid and after performance of the contract sought reformation. In affirming a judgment sustaining a general demurrer without leave to amend, the court said, beginning at page 663 of 46 Cal.2d, at page 640 of 297 P.2d: "The purpose of reformation is to correct a written instrument in order to effectuate a common intention of both parties which was incorrectly reduced to writing. *Bailard v. Marden*, 36 Cal.2d 703, 708, 227 P.2d 10. In order for plaintiff to obtain this relief there must have been an understanding between the parties on all essential terms, otherwise there would be no standard to which the writing could be reformed. *Bailard v. Marden*, 36 Cal.2d 703, 708, 227 P.2d 10; *McConnell v. Pickering Lbr. Corp.*, 9 Cir., 217 F.2d 44, 48-49; see 5 *Williston on Contracts* (Rev.Ed.1937), § 1548, p. 4339; *Rest., Contracts*, § 504, com. b; 45 *Am.Jur.* 586-587, 609-610. Section 3399 of the Civil Code incorporates this principle by providing that, under specified conditions, a written contract which does not truly express 'the intention of the parties' may be revised so as to set forth 'that intention.' As pointed out in *Bailard v. Marden*, supra, this language refers to a single intention which is entertained by both parties. 36 Cal.2d at page 708, 227 P.2d 10.

"Reformation may be had for a mutual mistake or for the mistake of one party which the other knew or suspected, but in either situation the purpose of the remedy is to make the written contract truly express the intention of the parties. Where the failure of the written contract to express the intention of the parties is due to the inadvertence of both of them, the mistake is mutual and the contract may be

revised on the application of the party aggrieved. See e. g. *Mills v. Schulba*, 95 Cal.App.2d 559, 213 P.2d 408. When only one party to the contract is mistaken as to its provisions and his mistake is known or suspected by the other, the contract may be reformed to express a single intention entertained by both parties. *Stevens v. Holman*, 112 Cal. 345, 44 P. 670, 53 Am.St. Rep. 216; *Higgins v. Parsons*, 65 Cal. 280, 3 P. 881; *Eagle Indem. Co. v. Industrial Acc. Comm.*, 92 Cal.App.2d 222, 206 P.2d 877; see *Hanlon v. Western Loan & Bldg. Co.*, 46 Cal.App.2d 580, 116 P.2d 465. Although a court of equity may revise a written instrument to make it conform to the real agreement, it has no power to make a new contract for the parties, whether the mistake be mutual or unilateral. *Bailard v. Marden*, 36 Cal.2d 703, 708, 227 P.2d 10; *Burt v. Los Angeles Olive Growers Ass'n*, 175 Cal. 668, 674-675, 166 P. 993; 5 *Williston on Contracts* (Rev. Ed., 1937), § 1549, pp. 4344-4345; *Rest., Contracts*, § 504, com. c; 45 *Am.Jur.* 587-588. As we have seen it is not alleged that defendant ever agreed to pay plaintiff an amount greater than the sum designated in the bid, and the complaint therefore does not state facts entitling plaintiff to reformation." In the case just cited although both parties knew the amount of the error and thus the amount of the bid, had an error not been made, yet reformation was denied for the reason that there was no agreement to pay the plaintiff therein any amount other than the bid price. In the case before us, not only was there no agreement between the parties to pay plaintiff any amount other than his bid price, but neither party had in mind any price other than the amount of plaintiff's bid when the contract was executed. There was no mutual understanding of a definite price which had been incorrectly set forth in the contract. Hence, unless defendants are estopped to deny reformation of the contract, it is clear that the plaintiff is not entitled thereto and his reply brief virtually so concedes.

[3-5] The crucial question in this appeal involves the application of the doctrine

of estoppel against a public body in connection with bidding statutes for public work. Predicated upon the finding that upon discovery of the plaintiff's mistake after the contract was signed, the plaintiff proceeded with performance of the work in reliance upon the representation of the architect that defendants were favorably inclined toward correcting the contract price and upon completion of the work defendants "would see to it that plaintiff suffered no loss as a result of said mistake", the trial court concluded as a matter of law that the defendant Board of Trustees was estopped from refusing to make payment to the plaintiff of an amount over and above the bid and contract price.

The only authority of a board of school trustees to let contracts involving an expenditure for more than \$1,000 is found in Education Code, § 18051, which provides: "The governing board of any school district shall let any contracts involving an expenditure of more than one thousand dollars (\$1,000) for work to be done or for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. * * *" Although the section does not specifically state that the contracts covered thereby shall be let to the lowest responsible bidder at the bid price, such a meaning is obvious, for otherwise the section would be meaningless. In the instant case there was no contention that the plaintiff submitted any bid other than the bid accepted by the Board of Trustees and which resulted in the contract between the parties. Having awarded the contract to the plaintiff at his bid price, any other contract, promise or agreement with the plaintiff to pay more than his bid and contract price would be in violation of section 18051 and hence in excess of the power of the Board of Trustees. Neither in said section nor elsewhere is there any statutory authority permitting the Board of Trustees to modify a contract which has been let in the event of the discovery of an error in the bid upon which the contract was award-

ed. A board of school trustees is an administrative agency created by statute and invested only with the powers expressly conferred by the Legislature (*Grigsby v. King*, 202 Cal. 299, 304, 260 P. 789) and cannot exceed the powers granted to them. *Pasadena School Dist. v. City of Pasadena*, 166 Cal. 7, 11, 134 P. 985, 47 L.R.A., N.S., 892. "When an individual enters into a contract he is a free agent and may determine for himself whether he will continue therewith or stand the damages for a breach thereof, or he may by agreement with the other party modify or abrogate the same. After a performance in full or in part, he may pay the other party merely what he is entitled to, or may pay him more by way of extra compensation or as a gratuity. When, however, the state empowers an officer or board to enter into a contract on its behalf, whereby it is to have certain rights and liabilities, and the officer or board has entered into such contract, no officer or board may thereafter act or speak for the state in the matter of such contract, either for the enforcement or termination thereof, unless expressly or impliedly authorized by the state so to do. By the execution of such an authorized contract the state acquires certain legal rights and incurs certain liabilities which are fixed and ascertained, or ascertainable. Thereafter no one can either increase or diminish the rights of the state or increase or reduce its liabilities thereunder unless he has been vested with authority so to do by express grant or clear implication." *California Highway Comm. v. Riley*, 192 Cal. 97, 107-108, 218 P. 579, 584. It is manifest, therefore, in the case at bar, that having complied with section 18051 and having awarded the contract to the plaintiff upon his bid price, the Board of Trustees would have been powerless to enter into a new and different contract with the plaintiff for the same work at an increased price. A fortiori the Court was without authority to abrogate the bidding statute and make a new contract between the parties which the defendants were powerless to do. In other words, the court may not by the application of the doc-

trine of estoppel judicially create and enforce an illegal contract.

The application of the doctrine of estoppel to public bodies is well summarized in *County of San Diego v. California Water & Telephone Co.*, 30 Cal.2d 817, beginning at page 825, 186 P.2d 124, at page 130, 175 A.L.R. 747: "It is true that in some 'exceptional cases,' or situations where 'justice and right require it,' a governmental body may be bound by estoppel. *Farrell v. County of Placer*, 23 Cal.2d 624, 627, 628, 145 P.2d 570, 571, 153 A.L.R. 323; *City of Los Angeles v. Cohn*, 101 Cal. 373, 376-378, 35 P. 1002; *Times-Mirror Co. v. Superior Court*, 3 Cal.2d 309, 44 P.2d 547; *McGee v. City of Los Angeles*, 6 Cal.2d 390, 394, 57 P.2d 925; *City of Los Angeles v. County of Los Angeles*, 9 Cal.2d 624, 72 P. 2d 138, 113 A.L.R. 370. However, as a corollary of the general rule that contracts wholly beyond the powers of a municipality are void, the California decisions have held that estoppel to deny their invalidity may not be invoked against a governmental body and, further, that estoppel may not be invoked where the procedure specified in a statute, such as the mode of contracting, is the measure of the power to act. *Miller v. McKinnon*, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570, and cases there cited; see *Farrell v. County of Placer*, 23 Cal.2d 624, 630, 631, 145 P.2d 570, 153 A.L.R. 323. It is sometimes difficult to determine which of these rules is applicable in a particular case. It is clear, however, that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public. See *Miller v. McKinnon*, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570, and cases cited therein; *Pan American Petroleum & Transport Co. v. United States*, 273 U.S. 456, 505, 506, 47 S. Ct. 416, 71 L.Ed. 734; *American Surety Co. of New York v. United States*, 10 Cir., 112 F.2d 903, 906. In the *American Surety Company* case the court stated that the government could not be estopped so as to 'frustrate the purpose of its laws or thwart

its public policy.' 112 F.2d at page 906. In 3 McQuillin, Municipal Corporations [2d Ed., 1943], § 1266, it is said that various statutory procedures or steps exist to protect citizens and taxpayers from ill-considered contracts or those showing favoritism and that if recovery is allowed for property or services on the ground of estoppel or implied contract, 'then it follows as the night the day that the statute or charter provision can always be evaded and set at naught.' The author adds that the rule denying indirect enforcement of such void contracts harmonizes with our governmental system, appears to be supported by reason, and is not unjust, because the other party is charged with notice of the law."

Here we are directly concerned with strong considerations of public policy. "The competitive bidding requirement is founded upon a salutary public policy declared by the legislature to protect the taxpayers from fraud, corruption, and carelessness on the part of public officials and the waste and dissipation of public funds." *Miller v. McKinnon*, 20 Cal.2d 83, 88, 124 P.2d 34, 37, 140 A.L.R. 570. The Legislature, for the protection of the public, has limited the power of a board of school trustees to award a contract to the lowest responsible bidder. To hold that a subsequent promise by a board of trustees to pay more than the contract price may be enforced would result in a complete disregard of the salutary provisions of the bidding statute and would afford a method by which a board of trustees and persons dealing with them could evade the law. Application of estoppel under these circumstances would be tantamount to specific enforcement of a void promise and contrary to both the policy and letter of the law "[C]ontracts wholly beyond the power of a municipality are void. They cannot be ratified; no estoppel to deny their validity can be invoked against the municipality; and ordinarily no recovery in quasi contract can be had for work performed under them. It is also settled that the mode of contracting as prescribed by the

municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable." *Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348, 353, 291 P. 839, 71 A.L.R. 161. See, also, *Miller v. McKinnon*, supra, 20 Cal.2d at page 88, 124 P.2d at page 37; *Reams v. Cooley*, 171 Cal. 150, 152 P. 293; *Zottman v. City and County of San Francisco*, 20 Cal. 96.

[6] Plaintiff has assiduously reviewed the law of estoppel as applied against public or governmental bodies and frankly concedes that many of the earlier cases, which apply this doctrine to public bodies in much the same manner as to private individuals, have been overruled by *Miller v. McKinnon*, supra, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570. No authority has been cited or found in which a public body has been held to be estopped from denying payment over and above the contract price under circumstances similar to those here shown. Plaintiff places great reliance upon *M. F. Kemper Const. Co. v. City of Los Angeles*, 37 Cal.2d 696, 235 P.2d 7 and similar cases, which hold that a bidder on public works may be relieved by rescission from a mistake in bid where the public body has actual notice of such mistake before acceptance of the bid. In *Kemper*, the City had notice of the amount of the error before it attempted to accept the bid, whereas, in the case at bar, the most that can be said is that the Board of Trustees suspected an error in an unknown amount. Even assuming that plaintiff here may have rescinded his bid before acceptance, he waived that right by voluntarily entering into the contract and we can see no basis for transmuting a waived right into an obligation created by estoppel.

For the reasons stated, we conclude that the findings of fact do not support the conclusions of law that the defendants are estopped from refusing payment to plaintiff of \$10,800 and that plaintiff is entitled to payment of said sum, and therefore the Court erred in rendering judgment accordingly. A retrial of the issues of fact is unnecessary; hence the judgment is reversed, with directions to vacate the con-

clusions of law and judgment, to make new conclusions of law consistent with this opinion, and to enter judgment in favor of defendants with costs.

FOX, P. J., and ASHBURN, J., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.



157 Cal.App.2d 759

Harry E. HAZELWERDT, Plaintiff
and Appellant,
v.

INDUSTRIAL INDEMNITY EXCHANGE,
an Inter-Insurance exchange, Homer Pheasant, John Doe I, II, and III, Defendants,
Industrial Indemnity Exchange, an Inter-Insurance exchange, Respondent.

Civ. 22605.

District Court of Appeal, Second District,
Division 2, California.

Feb. 21, 1958.

Hearing Denied April 16, 1958.

Action to recover damages from compensation insurance carrier because of its conduct in connection with physician allegedly employed by compensation insurance carrier to provide treatment required for plaintiff who had sustained compensable injury. The Superior Court of Los Angeles County, Aubrey N. Irwin, J., entered a judgment for defendant upon the sustaining of a demurrer to the second amended complaint without leave to amend, and the plaintiff appealed. The District Court of Appeal, Fox, P. J., held that where complaint alleged that insurance carrier conspired with physician "to mitigate and lessen plaintiff's true physical and mental condition", the allegations of conspiracy did not take the case outside the exclusive jurisdiction of the Industrial Accident Commission and constitute an independent cause of action which plaintiff could maintain against insurance carrier.

Affirmed.

1. Workmen's Compensation ⇨1178

Where employee is injured in industrial accident, and employee seeks recovery for aggravation by alleged negligence of attending physician from employer or from his insurance carrier, Industrial Accident Commission has exclusive jurisdiction to determine claim against employer or his carrier. West's Ann.Labor Code, § 3201 et seq.

2. Workmen's Compensation ⇨11

The workmen's compensation act substitutes a new system of rights and obligations for the common law rules governing liability of employers for injuries to their employees, and purpose of the act is to furnish a complete system of workmen's compensation. West's Ann.Labor Code, § 3201 et seq.

3. Workmen's Compensation ⇨2124

Where complaint seeking to recover from compensation insurance carrier for damages arising from alleged malpractice of physician in treating compensable injury alleged that insurance carrier conspired with physician "to mitigate and lessen plaintiff's true physical and mental condition", facts alleged brought case within provision of compensation act, and plaintiff had no independent cause of action against insurance carrier based upon physician's alleged malpractice on basis of respondeat superior. West's Ann.Labor Code, §§ 3201 et seq., 3850, 3852, 4600, 4604, 5300.

4. Workmen's Compensation ⇨2124

Where complaint seeking to recover from compensation insurance carrier for damages arising from alleged malpractice of physician in treating compensable injury alleged that insurance carrier conspired with physician "to mitigate and lessen plaintiff's true physical and mental condition", allegation of conspiracy did not take case outside exclusive jurisdiction of Industrial Accident Commission and constitute an independent cause of action which plaintiff might maintain against insurance carrier. West's Ann.Labor Code, §§ 3201 et seq., 3850, 3852, 4600, 4604, 5300.

5. Conspiracy ¶6

In action for civil conspiracy, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action.

David C. Marcus, Los Angeles, for appellant.

Herlihy & Herlihy, Los Angeles, for respondent.

FOX, Presiding Justice.

Plaintiff has appealed from a judgment for defendant¹ upon the sustaining of a demurrer to the second amended complaint without leave to amend.

On January 2, 1945, plaintiff sustained an injury arising out of and occurring in the course of his employment by Sylva & Hill Construction Company. Defendant is the insurance carrier for that concern. In November, 1950, the Industrial Accident Commission found that plaintiff's injury had resulted in a permanent disability of 100% and ordered that defendant furnish to plaintiff "medical, surgical and hospital treatment as may reasonably be needed during the remainder of his life to cure and relieve [him] from the effects" of his injury. Subsequently, the Commission has made supplemental orders directing defendant to provide specific treatment for plaintiff, finding that defendant was not required to pay certain bills incurred by plaintiff as self-procured medical expenses, and holding that plaintiff did not need a certain type of treatment. The defendant was ordered to furnish plaintiff with certain psychiatric treatment in June, 1951; these orders are still in effect.

In the present action plaintiff seeks damages from defendant because of its conduct in connection with Dr. Homer Pheasant,² the physician allegedly employed by defendant to provide the treatment required for plaintiff. It is alleged that de-

fendant insurance carrier conspired with Pheasant "to mitigate and lessen plaintiff's true physical and mental condition"; that Dr. Pheasant, acting in the course of his employment by defendant, negligently failed to diagnose and recommend further surgery to fuse the spinal vertebrae of plaintiff in order to relieve him from the effects of pain emanating from plaintiff's spine; that Pheasant negligently reported to defendant that plaintiff's condition did not require hospitalization or further medical care; that in furtherance of the conspiracy defendant refused to furnish plaintiff with any medical, hospital, surgical and psychiatric treatment, thereby compelling plaintiff to employ the services of private physicians; that defendant advised these private physicians that plaintiff was malingering and that his condition was such that defendant would not be responsible for the bills, thereby causing the private doctors to withdraw from the case; that as a result of above acts plaintiff has undergone an incomplete fusion of the vertebrae and an involvement of the nerve roots, and has suffered great physical pain and nervous shock. Plaintiff asserts that he has had seven operations on his spine and back and is now bed-ridden.

[1,2] Plaintiff's initial contention is that the complaint states a cause of action against defendant for the negligence of Dr. Pheasant on the basis of respondeat superior. Defendant admits that it "would be liable in workmen's compensation benefits for any increase in the [plaintiff's] disability by reason of the alleged malpractice, or for any injuries sustained in the course of the alleged malpractice, and would also be liable for medical treatment for the cure or relief of any such increase or new injuries." However, defendant contends that its liability would be governed by workmen's compensation law and that the Industrial Accident Commission has exclusive jurisdiction over the case; plaintiff does not have an independent

1. Other defendants were named in the complaint but this appeal involves only defendant insurance carrier.

2. Dr. Pheasant was one of the defendants named in the complaint.

cause of action against the insurance carrier for the alleged malpractice of the attending physician. Defendant's position is the correct one. "[I]t is clear that, where an employee is injured in an industrial accident, * * * and the employee seeks recovery for * * * the aggravation from his employer or from his insurance carrier, the Industrial Accident Commission has exclusive jurisdiction to determine this claim against the employer or his carrier." *Duprey v. Shane*, 39 Cal.2d 781, 790, 249 P.2d 8, 13; see, also, *Smith v. Coleman*, 46 Cal.App. 2d 507, 513, 116 P.2d 133. In *Fitzpatrick v. Fidelity & Casualty Co.*, 7 Cal.2d 230, 60 P.2d 276, our Supreme Court pointed out that the Workmen's Compensation Act substitutes a new system of rights and obligations for the common law rules governing the liability of employers for injuries to their employees, and the purpose of the Act is to furnish a *complete* system of workmen's compensation. The court went on to state (7 Cal.2d at pages 233-234, 60 P.2d at page 278):

"In other words, where the recovery for an injury sustained by or the death of an employee comes within the provisions of the Workmen's Compensation Act, the Industrial Accident Commission has exclusive jurisdiction and the superior court may not entertain an action for damages against the employer or his insurance carrier; the latter being subrogated to all the rights and duties of the employer.

"In the development of our system of workmen's compensation, it has become settled, as already indicated, that an employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury, whether the doctor was furnished by the employer, his insurance carrier, or was selected by the employee * * *.

"* * * [W]e are of the view that any aggravation or increase of the injury growing out of such examination would be compensable under the act * * * and may not constitute the basis of an action for damages against the employer or his insurance carrier."

[3] The facts alleged in the complaint clearly bring this case within the provisions of the Workmen's Compensation Act, and plaintiff may seek relief before the Industrial Accident Commission. He has no independent cause of action against defendant based upon the physician's alleged malpractice. *Fitzpatrick v. Fidelity & Casualty Co.*, *supra*.

[4, 5] Plaintiff's second contention is that the allegations of conspiracy take the case outside the exclusive jurisdiction of the Industrial Accident Commission and constitute an independent cause of action which he may maintain against defendant insurance carrier. Again defendant argues that plaintiff's sole remedy is before the Industrial Accident Commission, and no independent cause of action exists. Both sides agree that the conspiracy question is one of first impression in California. We have concluded that plaintiff does not have an independent cause of action against defendant insurance carrier for conspiracy, and that any relief which plaintiff might seek is within the exclusive jurisdiction of the Industrial Accident Commission. In effect plaintiff's complaint asserts that defendant failed to provide him with certain medical and surgical treatment which he reasonably needed and which defendant was required to furnish pursuant to the mandate of the Industrial Accident Commission. The allegations of conspiracy do not alter the nature of defendant's alleged acts and omissions.³ Whether or not a conspiracy existed, the wrong of which plaintiff complains is the defendant's failure to provide him with the required care.

3. In an action for civil conspiracy it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the

cause of action. *Schaefer v. Berinstein*, 140 Cal.App.2d 278, 293, 295 P.2d 113.

Defendant's obligation to furnish such care was established by the Industrial Accident Commission pursuant to workmen's compensation law, and defendant's responsibility for failing to meet that obligation should also be determined before that tribunal. In other words, the duty which defendant is alleged to have breached emanated from the Workmen's Compensation Act and became fixed by the order of the Industrial Accident Commission, and that forum should have the exclusive jurisdiction to determine the consequences of such breach.

The provisions of the Workmen's Compensation Act support our conclusion. Labor Code, section 4600 establishes the liability of the employer or insurer for neglecting or refusing to provide the employee with the required treatment. Section 4604 provides that controversies between employer (or insurance carrier) and employee shall be determined by the Industrial Accident Commission. And section 5300 provides: "All the following proceedings shall be instituted before the commission and not elsewhere * * * (b) for the enforcement against the employer or an insurer of any liability for compensation imposed upon him by this division in favor of the injured employee. * * *". These sections make it clear that the Industrial Accident Commission has jurisdiction to determine defendant's liability for injuries resulting to plaintiff because of its alleged wrongful acts and omissions in relation to the treatment which it was required to provide. Since the Commission has that jurisdiction, plaintiff is not entitled to maintain an independent action against defendant for those same injuries.

Plaintiff fallaciously relies upon Labor Code, section 3852, which provides in part that: "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer." Section 3850 specifically provides that "employer" includes insurer.

Plaintiff has called our attention to the line of cases which have permitted an employee injured in an industrial accident to recover damages in a civil suit against the attending physician whose negligence has aggravated the original injury. He argues from these cases that the physician and the insurance carrier should be treated identically in light of his allegations that they acted in concert. He concludes that defendant stands in the shoes of the doctor because of the conspiracy, and that he should therefore be permitted to maintain this action against defendant. But plaintiff overlooks the fact that the Industrial Accident Commission has no jurisdiction over his claim against the doctor. Labor Code, sec. 3852; *Duprey v. Shane*, supra, 39 Cal.2d 790-791, 249 P.2d 8; *Smith v. Coleman*, 46 Cal.App.2d 507, 513, 116 P.2d 133. This is one of the reasons for permitting an independent action against the doctor for malpractice. The employer's insurance carrier is held responsible in workmen's compensation for the negligence of the doctor since that negligence is one of the foreseeable consequences of the original industrial injury. *Heaton v. Kerlan*, 27 Cal.2d 716, 720, 166 P.2d 857. Under the schedule of compensation the employee is entitled to recover for the extent of his disability based upon the ultimate result of the accident. The total liability of the insurer is determined before the Industrial Accident Commission because it has jurisdiction over such insurer as well as over the employee's claim. It is therefore unnecessary and improper to permit the maintenance of an independent civil action for damages against the insurance carrier.

None of the cases cited by plaintiff are in point. One, however, should be considered. In *Duprey v. Shane*, supra [39 Cal.2d 790, 249 P.2d 17], it was held that an employee injured in an industrial accident could maintain a civil action for damages against the doctor whose negligent treatment aggravated the injury, even though the doctor who treated the employee was in fact his employer. Although the case

seems to permit a civil action against one who is subject to the exclusive jurisdiction of the Industrial Accident Commission based upon the employee's claim for compensation, the court makes it clear that such civil action is permitted against the defendant not because of his position as employer but solely because of his "entirely separate capacity and relationship to the injured person." The court recognized the dual legal personality which the defendant bore in relation to the employee and based its decision upon that dual relationship. The court reasoned that the actions of the employer-doctor made him a "person other than the employer" within the meaning of Labor Code, section 3852. In the case at bar it cannot be said that defendant insurance carrier took on a dual personality merely because it allegedly conspired with the attending doctor to deprive plaintiff of the care to which he was entitled. Regardless of any conspiracy, defendant's alleged failure to act would constitute refusal or neglect to provide medical treatment within the meaning of Labor Code, section 4600 and, in view of plaintiff's award of lifelong medical, hospital and surgical treatment, defendant would be liable for the reasonable expenses incurred by plaintiff in providing treatment. Defendant does not become a "person other than the employer" merely by conspiring with a third party to do something the liability for which is already covered by workmen's compensation law. The language of the court in *Lamoreaux v. San Diego etc. Ry. Co.*, 48 Cal.2d 617, 311 P.2d 1, indicates a concurrence in this view, although the discussion dealt with joint liability for negligence which causes the initial injury rather than for conspiracy which results in aggravation of the original injury. The court there stated (48 Cal.2d at pages 624-625, 311 P.2d at page 5): "The liability of an insured employer to an employee who is injured during the course of his employment is fundamentally different from that of a third person whose negligent conduct, jointly with that of the employer, resulted in the injury. The third person, of course,

is liable under general rules of tort law, as applied by a court. An insured employer, however, is not liable for an industrial injury to his employees under general tort principles but only by virtue of the workmen's compensation provisions of the Labor Code, and he is subject to proceedings before the Industrial Accident Commission but not to suit in court for the injury. [Citations.] The workmen's compensation statutes in this connection contained no exception that would lead to a different result on the ground that the employer had acted jointly with a third party." It is thus apparent that the holding in the *Duprey* case has no application to the case at bar.

The judgment is affirmed.

ASHBURN, J., and KINCAID, J. pro tem., concur.



Merril J. BROWN, Orpha L. Brown, and
Walter E. Roth, Plaintiffs and
Appellants,

v.

TERRA BELLA IRRIGATION DISTRICT,
a body corporate and politic, Defendant
and Respondent.*

Civ. 5627.

District Court of Appeal, Fourth District,
California.

Feb. 20, 1958.

Rehearing Denied March 11, 1958.

Hearing Granted April 16, 1958.

Action to quiet title to oil, gas and mineral rights in land between grantor's assignees and grantee. The Superior Court, Tulare County, W. G. Machetanz, J., rendered judgment for grantee and assignees appealed. The District Court of Appeal, Barnard, P. J., held that where reservation in deed was void and reservation was not

* Opinion vacated 330 P.2d 775.

intended to be an exception, no separate estate with respect to oil, gas and mineral rights was created by reservation clause or retained by grantor.

Affirmed.

1. Mines and Minerals ⚡55(1)

Oil rights may be separated from title to surface of land and thus become a separate estate in real property.

2. Deeds ⚡138

A grantor by reservation in deed takes back right which would otherwise pass under grant, whereas by an exception grantor retains title to part of property described as granted as though that part were not included in deed at all.

3. Mines and Minerals ⚡55(4)

Intention of parties at time of execution of deed, which contains clause purporting to reserve oil rights, is controlling factor in determining whether a reservation or exception was intended, and such intention must be determined from entire instrument rather than from purported reservation clause alone, and entire circumstances should be considered, including reasonableness of holding that an exception was intended.

4. Perpetuities ⚡4(4)

Where deed reserved from conveyance all oil, gas and minerals in property conveyed for 25 years from delivery of deed and as long thereafter as oil, gas or minerals should be produced in paying quantities, reservation was integral part of provision for future vesting, violated rule of perpetuities, and was void as to both grantor and grantee, and neither acquired any additional rights under such provision.

5. Mines and Minerals ⚡55(8)

In action to quiet title to oil, gas and mineral rights in land between assignees of grantor and grantee, evidence sustained implied finding that void reservation of oil, gas, and mineral rights was not intended to be an exception.

6. Mines and Minerals ⚡55(4)

Where void reservation of oil, gas and mineral rights in deed was not intended to be an exception, no separate estate with respect to oil rights was created by void reservation clause or retained by grantor.

7. Deeds ⚡143

Intention of parties to deed with respect to reservation of interest by grantor is to be determined from instrument as a whole and not alone from language used in reservation clause.

8. Mines and Minerals ⚡55(4)

Where deed contained clause reserving oil, gas and mineral rights but stated that, subject to reservations grantor conveyed all real property together with tenements, hereditaments, and appurtenances and reversions, remainders, rents, issues and profits thereof, deed conveyed full title subject to reservation, and it was not intended that reservation, which was void, was to be an exception.

9. Escrows ⚡13

Where grantor entered into agreement whereby oil, gas and minerals were to be reserved for 25 years from date of deed, but his deed provided for period of 25 years from final delivery of deed, deed was placed in escrow and was delivered seven years later upon grantee's performance of terms of contract, grantor and his assigns were not entitled to take advantage of grantor's noncompliance with his agreement and extend reservation period.

Mack, Bianco, King & Eyherabide, Bakersfield, for appellants.

Maddox, Abercrombie, Kloster & Jacobus, Visalia, for respondent.

BARNARD, Presiding Justice.

The plaintiffs appeal from an adverse judgment in an action for declaratory relief and to quiet their title to certain oil, gas and mineral rights. The defendant filed a cross-complaint seeking to quiet its title to the land involved as against any right, title or interest claimed by the plain-

tiffs. The matter was submitted to the court on an agreed statement of facts, and this appeal is submitted on an agreed statement.

On December 16, 1925, Edward F. Halbert and the defendant irrigation district entered into a contract by which Halbert agreed to sell to the defendant about 240 acres of land for \$25,000, payable in certain yearly instalments. The agreement provided that the seller "expressly reserves from this agreement for the period herein specified, and from the said real property all oil and gas and all minerals in or underlying the said real property", together with the right in himself and his assigns to drill for and produce oil, gas and minerals on and under said land, and to remove the same and to maintain and operate all necessary facilities for that purpose; that "said reservations aforesaid as to oil, gas and minerals shall continue for the period of Twenty-five years from the date of this agreement, and as long thereafter as oil or gas shall be produced from said real property in paying quantities"; and that any oil operations of the seller should be carried on so as to interfere as little as reasonably possible with the buyer's water operations.

The agreement further provided that upon full payment of said purchase price the seller would convey to the buyer all of said real property free and clear of all liens, claims and encumbrances "reserving however from said conveyance all oil, gas and minerals in said real property together with the right to develop and remove the same as aforesaid", and furnish a certificate of title; and that a deed should immediately be executed by the seller and placed in escrow with the First National Bank at Porterville, with instructions to deliver it to the buyer upon its full performance of the terms of the contract. This contract was recorded on January 14, 1926.

A deed to the defendant was also executed by Halbert and placed in escrow on December 16, 1925. Payment in full having been made the deed was handed to a

title company on January 12, 1932, and was recorded on January 16, 1932. This deed, after the clause granting all of the described property to the defendant district, contained a reservation of the oil, gas and minerals in the language used in the contract, as above quoted and described, except that it was there stated that this reservation should continue for 25 years from the date of the actual delivery of the deed to the irrigation district and as long thereafter as oil, gas or minerals shall be produced in paying quantities. Thereafter, the deed contains this provision "Subject to the reservations and conditions aforesaid, the party of the first part hereby grants, bargains, sells and conveys all of said real property aforesaid, to the party of the second part, together with the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof."

In addition to the above facts it was stipulated at the trial that this deed was signed and acknowledged by Halbert on December 16, 1925 and placed in escrow as provided in the agreement; that the deed was delivered to the Tulare County Abstract Company on January 12, 1932, with instructions to record it when a policy of title insurance could be issued; that at no time subsequent to December 16, 1925, was this deed ever delivered to Halbert or his assigns or to these plaintiffs; that no oil, gas or minerals have ever been produced upon this property; and that on October 25, 1955, Edward F. Halbert executed and delivered to these plaintiffs a quitclaim deed. This quitclaim deed describes the property quitclaimed as all the oil or gas "in and under, or that may be produced from" the real property here involved; and further provides that it is made subject to all of the terms, covenants and conditions of the deed from Halbert to the defendant district which was recorded on January 16, 1932. The court found in accordance with the stipulated facts and, as conclusions of law, found that the plain-

tiffs have no right, title or interest in and to said oil, gas or minerals; that the defendant is the owner and entitled to the possession of all of said real property; and that the defendant is entitled to a judgment quieting its title as against the plaintiffs. A judgment to that effect was entered.

The appellants contend that this reservation of the oil, gas and minerals under this land created a future contingent interest which was to vest at a time beyond lives in being and 21 years, and was thus void under the rule against perpetuities. It is argued that the 25-year period provided for presented the possibility of suspending the vesting of the title to the oil interest for a period beyond lives in being and 21 years, with a further suspension if oil was still being produced; that since this provision in the contract and deed was void, title to the oil interest did not pass to the grantee but remained in the grantor; that the court erred in entering a judgment that the respondent was the owner of such oil, gas and minerals; and that the case of *Victory Oil Co. v. Hancock Oil Co.*, 125 Cal.App.2d 222, 270 P.2d 604, 606 is conclusive of the issues involved in this case. The respondent contends that the rule against perpetuities is not applicable here; that the rule should not be so extended as to cover a commercial transaction of this nature, particularly as affecting an interest owned by a public corporation; that the reasons for the rule are not properly applicable to this situation and no authorities can be found holding the rule to be applicable to a future interest transferred to the government or a public subdivision thereof; that its interest in the subsurface rights is not subject to the rule against perpetuities because that interest is coupled with and merges into a fee title which is exempt from the rule; that even if it received no vested interest in the subsurface rights through the effect of the void and ineffective reservation provision in the deed, that interest remained in or reverted to the grantor and he effectively conveyed that

interest to the grantee district, by his deed, leaving nothing which he could thereafter convey to the appellants by a subsequent quitclaim deed; and that the appellants took their quitclaim deed with full knowledge of the rights of the district as revealed by its recorded deed.

The case of *Victory Oil Co. v. Hancock Oil Co.* involved somewhat different facts and is not controlling here. That case involved the continuing validity of a lease under which oil had been produced for many years and royalties had been paid to and accepted by the parties on both sides of the controversy. There, the grantor had deeded a parcel of land to the grantee "excepting therefrom and reserving to the grantors" the oil interest in question. Among other things, the trial court had found that the conveyance was intended to be an exception rather than a reservation, and the main question decided seems to have been whether oil was still being produced from the land, within the meaning of the deed, since the only well which was still producing was bottomed outside of the leasehold.

[1-3] It is well settled that title to such oil rights may be separated from title to the surface of the land and thus become a separate estate in real property which is recognized in our law. Such a separate estate had not been created prior to the sale of this land to the defendant and such an estate exists, if at all, only by virtue of the reservation clause here in question. Assuming, under the statements appearing in the *Victory Oil Co.* case, that the reservation clause here in question was void because it violated the rule against perpetuities it does not necessarily follow that the trial court erred in decreeing that this defendant is now the owner of such prospective oil rights as may exist. As pointed out in 15 Cal.Jur.2d Sec. 182 et seq. under Deeds, a grantor by a reservation in a deed takes back a right which would otherwise pass under the grant, such as an easement or a *profit à prendre*, where-

as by an exception the grantor retains title to a part of the property described as granted as though that part were not included in the deed at all. It is also well settled that the intention of the parties at the time is the controlling factor, that such intention is to be determined from the entire instrument rather than from the questioned clause alone, and that the entire circumstances should be considered including the reasonableness of holding that an exception was intended.

[4-6] The reservation in the deed here in question, being an integral part of the provision for future vesting, was void as to both grantor and grantee and neither acquired any additional rights under that provision. The real question here is whether this void provision constituted a reservation or an exception, with the resulting effect recognized by our law. In other words, whether this separate estate in the oil rights was totally excluded from the operation of the deed or not. This was a question of fact for the trial court, and its implied finding to the effect that this was not an exception is supported by the undisputed facts. An intention to totally exclude this estate in real property from the effect and operation of the deed does not clearly appear. While the fact that no words indicating a total exception were here used is not in itself controlling this is significant with respect to the intention of the parties. Where a grantor reserves the oil rights for all time, without any other words of limitation, an intention to except such oil rights from the conveyance would naturally appear. Instead of using such language the grantor here merely attempted to reserve in himself a limited right with respect to that estate in real property, and the attempted reservation was not only temporary and indefinite but it was also void. It appears from the language used in the reservation clause itself that the intention was that if the oil rights were not used by the grantor within a certain time they were to go to the grantee, and that even if oil was produced for a time and production

then ceased the remaining oil rights were to go to the grantee. While this attempt to delay the vesting of the title of this particular estate was void, it discloses that the parties did not intend to exclude this estate entirely from the deed and the conveyance of this property. It cannot be said, as a matter of law, that these oil rights were entirely excluded from the conveyance of this land, and the implied finding to the contrary is sufficiently sustained by the evidence. Under these circumstances no separate estate with respect to these oil rights was created by the void reservation clause and retained by the grantor.

[7,8] The intention of the parties is to be determined from the instrument as a whole and not alone from the language used in the questioned clause, and the other language of the deed here gives strong support to the court's conclusion and judgment. In this deed the grantor first states that he does thereby "grant, bargain and sell" to the grantee and its successors and assigns forever, all of this real property as particularly described. Thereafter, the deed contains the reservation clause above quoted. Finally, the deed states that "subject to the reservations and conditions aforesaid" the grantor grants, bargains and conveys all of said real property to the grantee, together with the tenements, hereditaments and appurtenances appertaining thereto and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. The deed thereby conveys to the grantee a full title to the real property and all estates therein subject only to the reservations, which were void and ineffective for any purpose. Whether the invalidity of the reservation clause resulted in a reversion to the grantor or merely left a remainder in him, he conveyed whatever title he had. The grantor thus conveyed his entire interest in the land subject only to an attempted reservation for a limited time, which was void. The valid portion of the deed very specifically included and conveyed full title

to the land and to every estate therein. Even if this void reservation had been valid and effective the deed would still have conveyed some interest in the oil rights, subject only to a temporary and limited reservation in the grantor. Even in that event, the grantor would not have been entitled to use or to transfer an unlimited right to attempt to discover oil at any time he might desire to do so in future years. The language of the deed, as well as the language of the reservation clauses, supports the conclusion reached by the trial court.

[9] Not only should this be held to be the legal effect of the conveyance here made but all of the equities of the situation are in favor of such a result. Assuming that the reservation clauses in the contract and deed were void, it seems clear that the parties did not intend to exclude from the effect and operation of the deed the entire oil rights, as a separate estate, carrying with it the right to drill for and remove oil from the land at any time in the future. No oil was produced for more than 25 years from the date of the deed as agreed upon, and had not been produced for more than 30 years at the time of the trial. The original grantor did not comply with his agreement whereby the deed was to provide for a reservation period of 25 years from the date of the deed, but instead provided for a period of 25 years from the final delivery of the deed. The grantor, and his assigns, should not be entitled to take advantage of his wrong. The plaintiff's claim to have thereafter acquired a continuing and unlimited right to drill for oil on this land at any time in the future, irrespective of any resulting interference with the respondent's use of the property for the purpose for which it was acquired, rather clearly appears to be contrary to the intention of the parties at the time the original contract and deed were executed.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

157 Cal.App.2d 695

ICE-KIST PACKING COMPANY, a copartnership, consisting of A. Sbrana and Julius Nucel, Plaintiff and Respondent,

v.

J. F. SLOAN CO., Defendant and Appellant.
No. 17561.

District Court of Appeal, First District,
Division 1, California.

Feb. 20, 1958.

Action for damages to crops from negligent application of fertilizer. The Superior Court of Monterey County, Hugh B. Donovan, J., granted a new trial on issue of damages alone after verdict for plaintiff, and defendant appealed. The District Court of Appeal, Bray, J., held that verdict awarding only the amount of certain costs incurred by plaintiff must have been a compromise verdict on issue of liability and hence grant of new trial to plaintiff on issue of damages alone was an abuse of discretion.

Reversed with directions.

1. New Trial ⇐163(1)

Where notice of intention to move for new trial sought new trial upon issue of damages alone and in the alternative on all issues on ground of insufficiency of evidence, minute order granting the new trial was sufficient under statute requiring order granting new trial on ground of insufficiency of evidence to so specify, though order merely stated "the court grants the motion." West's Ann.Code Civ.Proc. § 657.

2. New Trial ⇐163(1)

The statute requiring order granting new trial on ground of insufficiency of evidence to so specify should not be given a technical construction. West's Ann.Code Civ.Proc. § 657.

3. Appeal and Error ⇐867(2)

Where order granting new trial on issue of damages alone sufficiently showed that it was granted on ground of insufficiency of evidence, reviewing court must

review evidence on issue of liability as well as issue of damages in determining whether trial court abused its discretion.

4. New Trial ☞9

In action for damages to crops from negligent application of fertilizer, wherein defendant did not cross-examine on subject of damages and undisputed evidence showed damage of \$5696.78, verdict awarding only \$649.35, which was the amount of certain costs incurred by plaintiff, must have been a compromise verdict on issue of liability and hence grant of new trial to plaintiff on issue of damages alone was an abuse of discretion.

5. New Trial ☞9

A limited new trial should not be granted where substantial justice requires that new trial, if granted at all, should cover all issues.

Hoge, Fenton & Jones, Monterey, for appellant.

Noland, Hamerly & Etienne, Salinas, for respondent.

BRAY, Justice.

Plaintiff obtained a jury verdict of \$649.35 damages. Upon its motion the court granted a new trial on damages alone. Defendant appeals.

Questions presented.

1. Is the order granting new trial on the issue of damages alone void?

2. Did the trial court abuse its discretion in granting a limited new trial? Corollary to this is defendant's contention that there was no evidence of its being negligent and that there was clear proof of its alleged defenses—contributory negligence and assumption of risk.

1. Order.

The notice of intention to move for new trial sought a new trial upon the issue of damages alone, and, in the alternative, on all issues upon the ground of "insufficiency of the evidence to justify the verdict and that said verdict is against law in that said verdict * * * awarded damages which

were grossly inadequate and in complete variance with the evidence presented and completely contrary to all the evidence." By its own language the notice restricted the ground upon which the new trial was sought to insufficiency of evidence, as it appears that the only respect in which it was claimed that the verdict was against law was because of insufficiency of evidence. Moreover, it has been held that the ground "against law" does not include insufficiency of the evidence. See *Bakurjian v. Pugh*, 4 Cal.App.2d 450, 453-454, 41 P.2d 175. That case also holds that the only ground upon which a new trial for inadequacy of damages may be granted is insufficiency of the evidence. *Id.*, 4 Cal.App. 2d at page 454, 41 P.2d at page 177; see also *Peri v. Culley*, 119 Cal.App. 117, 119, 6 P.2d 86; *Harper v. Superior Air Parts, Inc.*, 124 Cal.App.2d 91, 268 P.2d 115; *Legg v. Mutual Benefit Health & Accident of Omaha*, 136 Cal.App.2d 887, 289 P.2d 550, 290 P.2d 87.

The minute order granting the new trial merely states "the Court grants the motion." Section 657, Code of Civil Procedure, provides that when a new trial is granted on the ground of insufficiency of evidence "the order shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground."

[1,2] No such order was filed. However, in view of the broad interpretation heretofore given this section by the courts, the purpose of the requirement that the ground be stated, the fact that here only one ground was specified in the motion and that that one ground was the only ground upon which the motion could have been granted, we deem that there was a sufficient compliance with the section. *Dempsey v. Market Street R. Co.*, 23 Cal.2d 110, 142 P.2d 929, held that although the section seems to require the filing of a written order filed with the clerk the requirement of the section is met and no written order required if the minute order specifies the

ground. The case stated that the section was to stop the practice theretofore existing by appellate courts of assuming that insufficiency of the evidence was the ground of the order granting the new trial where the order did not so state, and to require that it definitely appear that the new trial was granted on that ground, if it was. In *Cox v. Tyrone Power Enterprises*, 49 Cal. App.2d 383, 121 P.2d 829, 834, the minute order gave the ground as "inadequate damages." Here again it was contended that there had to be a formal order and that "inadequate damages" was not "insufficiency of the evidence." In holding that there was a sufficient compliance with section 657, the court gave the history of the amendments to the section, and stated that the purpose of the section as amended was not only that given in the *Dempsey* case, but by enacting a time limit, to stop the practice of trial courts after the matter was on appeal of filing nunc pro tunc orders giving insufficiency of the evidence as a ground of the granting of the new trial. In the concurring opinion Mr. Justice Shinn stated (49 Cal.App.2d at page 400, 121 P.2d at page 839): "I am unable to see that the provision of section 657, Code of Civil Procedure, which requires that an order granting a new trial upon the ground of insufficiency of the evidence shall so state, has any application to an order granting such a motion which has been noticed and presented upon that ground alone. * * *

The uncertainty that had theretofore existed arose from the failure to state in orders granting new trials whether insufficiency of the evidence was one of the grounds or the sole ground for the order. Of course there never was any uncertainty in situations in which insufficiency of the evidence was specified in the notice of intention as the sole ground of the motion, which is the one before us. The order and the notice of intention must be read together." That a technical construction of the section is not to be given is shown by the many cases in which a strict compliance with the section was not required. Many of these are set forth in *Piru Citrus Ass'n v. Williams*,

95 Cal.App.2d 911, 915, 214 P.2d 426. These included orders granting new trial "on the ground of excessive damages," "upon all the grounds stated in the notice of intention," an order providing that a new trial be granted "as to all issues made by" the cross-complaint and the answer thereto," an order stating that if the defendant consented to an increase of the verdict and judgment from \$150 to \$1,200, the motion for new trial would be denied, otherwise granted; an order granting new trial "on all issues"; on the ground that the verdict was against the admissions of a party; upon the ground that the court had erred in denying motions for judgment of nonsuit; upon "the ground alone of plaintiff's contributory negligence."

As stated in the *Cox* case, *supra*, 49 Cal. App.2d at pages 401-402, 121 P.2d at page 839, the fact that in amending section 657 "it was not essential that corrective legislation be provided for those cases where no uncertainty existed does not necessarily limit the scope of the amendments but it does aid materially in ascertaining what the purpose and intention of the legislature were in amending the section. Where one construction of a statute will attribute to the legislature reasonable and purposeful motives and another will lead to absurd and unjust consequences which the legislature could not have reasonably or fairly intended to bring about, it is our duty to adopt the first construction if we can do so without exercising the forbidden legislative function. If we should hold that the amendments were intended to apply to the facts before us, where the sole ground of the motion was insufficiency of the evidence (laying aside for the moment the holding of the main opinion that the record shows full compliance), we would have to say that notwithstanding the indisputable fact that the motion was granted upon the sole ground of insufficiency of the evidence, it will be conclusively presumed that it was not. We would then have to reverse the order, not because of any uncertainty or deficiency of the record to speak the truth, but because we would have decided that

the legislature, through ignorance or indifference, had imposed upon the courts a wholly superfluous formality of procedure which not only bordered upon the absurd, but served no purpose, accomplished no improvement over established practices, either by the correction of existing evils or otherwise, substituted fiction for fact in the courts' records, multiplied instead of reducing the opportunities for clerical errors, and without reason or necessity unjustly deprived a litigant of a substantial right."

Since the amendment in 1939 to section 657 there have been a number of cases holding that the failure to specify that the order is made upon the ground of insufficiency of evidence, precludes the appellate court from considering that ground upon appeal from the order granting new trial. However, as above pointed out, there are exceptions to that holding. Moreover, we have failed to find in any of those cases upholding the general rule, that the motion for new trial was based only upon the ground of insufficiency of evidence.

It would be absurd, illogical and unjust to interpret section 657, which the cases hold was intended primarily to place a limit upon the time when the trial court could file an order nunc pro tunc, as meaning that where a motion for a new trial is based upon only one ground and that ground is the only one upon which the court could have acted, the order granting the motion is void.

[3] Under the circumstances here, the order considered with the motion sufficiently shows that it was granted on the ground of insufficiency of the evidence. Therefore, in determining whether the court abused its discretion in granting the new trial on the limited issue of damages alone, it becomes our duty to review the evidence, not only with respect to the issue of damages but also to the issue of liability. See *Bakurjian v. Pugh*, supra, 4 Cal.App.2d 450, 454, 41 P.2d 175; *Harper v. Superior Air Parts, Inc.*, supra, 124 Cal.App.2d 91, 92, 268 P.2d 115.

2. Abuse of Discretion.

[4] At the trial there was practically no issue as to the extent and value of the damage. Defendant conceded that 14.22 acres of lettuce were damaged. The undisputed evidence showed the loss to be \$397.98 per acre or \$5659.28 for the 14.22 acres. Additionally there was a stipulated cost of \$37.50 for surveying shown by plaintiff to be necessitated to mitigate damages. Total damage, \$5696.78. Defendant in its closing brief points out that at the trial it did not cross-examine on the subject of damages, and that there was no dispute of the amount of damages claimed by plaintiff. In view of that fact, defendant contends the verdict was a compromise one on the issues of liability. We see no escape from that conclusion.

The complaint charged defendant with negligently handling and applying fertilizer to plaintiff's land so as to burn and damage 14.22 acres of growing lettuce. For at least 6 years defendant had supplied the fertilizer needs of plaintiff on its ranch properties and undertook to do so in 1954. The particular portion of the ranch on which defendant in April broadcast cyanimid was designated Ranch 5, Patch 5, where broccoli had been harvested recently. Adjoining it were Patches 6 and 7, planted to lettuce. These were the areas damaged by the cyanimid broadcast on Patch 5. Under the arrangement customarily followed between defendant and plaintiff and other ranchers dealing with defendant, the latter undertook to fertilize the particular rancher's fields in a manner which defendant felt to be for the best interests of the rancher. The customary process of soil preparation for a lettuce crop following the harvesting of a crop such as broccoli in the Salinas Valley area (where plaintiff's ranch is located) was, first, to knock down by a beater the remainder of the old broccoli plants. The field is then disked, turning under the remaining foliage of the broccoli plants. These operations are performed by the rancher. Then defendant makes two applications of fertilizer, the first one, 500 pounds per acre of single sulphur phosphate, and the second 400

pounds per acre of cyanimid. Thereafter the rancher takes over, disks, chisels and lists up the field, shapes the beds and plants the new crop.

Plaintiff prepared the soil for application of the fertilizer. About the 26th of April defendant commenced the broadcast of cyanimid. It took three or four days and was completed about the 30th. Plaintiff's vice president testified that on the 30th it was very windy and he had remarked that he hoped his men had finished plaintiff's job that day on account of the terrific winds. Approximately three or four days thereafter damage was noticed to the lettuce growing at the boundary of Patches 6 and 7 adjacent to Patch 5 where the cyanimid had been broadcast. The damage was heaviest nearest to Patch 5. The equipment used in spreading the cyanimid was a tractor pulling a hopper into which the cyanimid was placed in powdered form and from which it was spread to the soil. The hopper was approximately 120 inches long, 12 to 14 inches wide at the top, 5 to 7 inches wide at the bottom, 12 to 14 inches above the ground, and 30 to 35 inches from the ground to the top of the hopper. The openings in the bottom of the hopper were diamond-shaped holes approximately 1 inch wide at the center. Agitators assisted the powder in going through the hopper and out the holes. There was no cover on the hopper. Two employees of defendant performed the work, applying 400 pounds of cyanimid to the acre. Cyanimid can be obtained in two forms, powdered and granulated. Powdered was approximately \$10 cheaper per ton than granulated.

Joseph Shoemaker, Senior Inspector of Economic Poisons and Fertilizers of the California Department of Agriculture, testified that the powdered form of cyanimid is generally used for defoliation while the granular form is used for application through a broadcaster as a fertilizer because the granular material is considered to be dust free. There is a possibility of drift from the dust of the powdered form if it is operating in the wind. He further

testified that if cyanimid is broadcast it was the custom for the rancher to follow behind the applicator and disk the material under.

Thompson, plaintiff's ranch superintendent, testified that according to the ranch records and his own knowledge disking started the next day after the spreading started and that they disked up as far as the spreader had gone. They were disking to catch up with the spreader and would stop when they caught up. Disking was only done in the morning and the field was practically all disked at the time he discovered some burning of the lettuce. He then testified that the disking was completed the same day that the cyanimid was broadcast. In his deposition Thompson stated that he could not recall whether or not disking was carried on at the same time the broadcasting was going on, nor how long after the latter was completed disking first started, although he estimated that the disking was done sometime within a week thereafter. He further testified that he discovered damage to the lettuce some three or four days after the broadcasting was completed and that such discovery was three or four days before the disking was done, but it could have been after the disking. After his attention was called to these statements in his deposition he stated definitely that the disking started the day after the broadcasting started. The diskers would permit defendant's men to get approximately one acre ahead of them. Broadcasting took more time than disking. They would not disk in the afternoon because of wind.

The ranch records show that on April 26 no disking was done; on April 27 chisel work 6½ hours, disking 3½ hours; April 28, chiseling 20 hours; April 29, chiseling 20 hours, disking 5 hours; April 30, listing 10 hours; May 1, bed shaping 16 hours; May 2, none. Starting with May 3, planting commenced.

Plaintiff's tractor foreman testified that they started disking the day after defendant started broadcasting the cyanimid. He stated that they could disk 50 acres in a 12

hour day. They followed right behind the fertilizing equipment. He could not recall if they worked consecutive days, although they followed the fertilizing equipment each day that the latter worked, and there was no time when there was broadcasting that they were not also disking. He then testified that he had no precise recollection of what disking was done that April. He was basing his testimony on the routine usually followed.

Sbrana, one of plaintiff's partners, after testifying that in his opinion the damage to the lettuce was due to cyanimid, testified to talking with Rose. The latter admitted to him that the damage to the lettuce was caused by cyanimid drifting over and stated "that it would be taken care of." At the trial Rose denied making any statement indicating that the damage was due to any fault of defendant. They met later and determined the extent of the damage.

Rose testified that on all plaintiff's ranch that year defendant used about 100 tons of powdered cyanimid, about 420 50-pound bags being used on the area in question here. In the general area of plaintiff's ranch defendant used 300 to 400 tons of it. In referring to the fact that powdered cyanimid was \$10 per ton cheaper than granulated, he stated that the policy between plaintiff and defendant was that defendant took care of plaintiff to the best of its ability and "to be as right as possible as we can with them from a cost standpoint."

This is a peculiar case and noted more for what is not proved than what is. Proved is the fact that some three or four days after defendant finished broadcasting cyanimid, 14.22 acres of lettuce in the adjoining fields was burned, and that the burning was caused by cyanimid. There was no proof as to how the broadcasting was actually done other than that it was customary to use a broadcaster of the dimensions hereinbefore set forth and that such a broadcaster was used. There is no proof of negligence other than the fact of injury itself. This is not a *res ipsa loquitur* case, and the burden of showing defendant's negligence is on plaintiff. There

is no evidence as to wind conditions other than Rose's statement that the wind was blowing terribly on April 30 but it is impossible to tell from the evidence as to whether there was any broadcasting that day. A defendant's witness testified that disking was not usually done in the afternoon because of wind. There was evidence that there was no lid on the broadcasting hopper but no evidence as to whether that fact was important. The Department of Agriculture inspector testified that powdered cyanimid was customarily used for defoliation and granular for fertilization, but his experience was mainly in use of cyanimid as an insecticide. Against his testimony was that of defendant's vice president to the effect that powdered cyanimid was used that year to a large extent in the area. There was testimony as to the use of cyanimid in previous years but unfortunately whether it was the powdered or the granular form was not stated.

The admission of fault was denied. The evidence established that disking must necessarily follow the broadcasting rather closely. The evidence on whether or not it did is delightfully uncertain. The oral testimony on the subject is not too clear and is based mainly upon general routine rather than actual recollection of the witnesses. Plaintiff's records indicate that the disking did not follow very closely. The records show that between April 26 and April 30, the time when apparently the broadcasting was done, although there was a statement by defendant's vice president that it could have started earlier, the only disking was 3½ hours on the 27th and 5 hours on the 29th. However, although the evidence shows that disking customarily followed broadcasting there is no evidence as to the effect of failure to disk immediately.

The jury retired at 2:25 and returned to the courtroom at 2:43 for the re-reading of the court's instructions on their preliminary duties, that is, that they should first determine if defendant was negligent, then if plaintiff was negligent or assumed the

risk. At 4:18 the jury returned with an 11 to 1 verdict.

[5] The evidence here would support a verdict in favor of plaintiff or one in favor of defendant. The fact that, in view of the uncertainty of the evidence the jury disregarded the conceded amount of damage as to which there was no contradiction or issue, can only be explained on the ground that the jury did not agree on the issues of liability or alleged defenses, and that the verdict was a compromise one. Under the evidence plaintiff was either entitled to a verdict of \$5696.78 or nothing. Because of that situation the trial court abused its discretion in granting a new trial on damages alone. As we said in *Bencich v. Market Street R. Co.*, 20 Cal.App.2d 518, 529, 67 P.2d 398, 403, "A limited new trial should not be granted, where substantial justice requires that a new trial, if granted at all, should cover all the issues." See also *Donnatin v. Union Hardware & Metal Co.*, 38 Cal.App. 8, 12, 175 P. 26, 177 P. 845. It cannot be said as a matter of law that defendant was guilty of negligence or that plaintiff was not guilty of contributory negligence or did not assume the risk. Applicable here is the quotation in the *Bencich* case, 20 Cal.App.2d at page 529, 67 P. 2d at page 403 from the *Donnatin* case: "that in order to reach an agreement the verdict was the result of unwarranted concessions of convictions made by each of two opposing factions of the jury, one of which conscientiously believed that defendant should prevail in the action, and the other equally conscientious in the opinion that plaintiff should recover damages commensurate with the injuries sustained. It is apparent, we think, that those jurors entertaining the opinion that defendant was not guilty of the negligence charged' (or, in our case, the additional issue that plaintiff was guilty of contributory negligence), 'nevertheless agreed to surrender their views in consideration of other jurors consenting to the trifling award made. * * * It would work a grave injustice upon defendant to force it to a new trial of the issue as to damages only, with the issue as to

liability, upon which no verdict other than in name had been rendered, forever closed against any inquiry.'"

Had there been an agreement among the jurors on defendant's liability and the defenses raised by defendant it is obvious that the verdict was completely unjust to plaintiff in the matter of damages. The conclusion is inevitable that the jurors compromised the amount of damages in order to get a verdict on the other questions in the case. Even though the trial court believed, as it evidently did, that the evidence justified a verdict in favor of plaintiff on all matters except the amount of damages, defendant is entitled to have a jury properly and fairly determine the questions in the case before the court may exercise its judgment on those questions. Here, undoubtedly, the jury did not so act.

Plaintiff suggests that a possible explanation of the amount awarded by the jury is this: An accounting card introduced in evidence showed that the cost of harvesting and packing the lettuce which was used from the damaged portion of the lettuce field was \$611.85. This sum added to the stipulated surveying cost of \$37.50 equals \$649.35, the amount of the verdict. In view of the very precise instructions given on the measure of damages and the difficulty of determining on what theory the jury could have arrived at the measure of damages it apparently applied, it cannot be said that this is evidence that the jury fully agreed upon the issue of liability. A theory more consistent with the facts is that the jury in compromising the verdict decided to award what might be called out-of-pocket expenses paid on the damaged portion of the crop. Applicable here is the following from *Bencich v. Market Street R. Co.*, supra, 20 Cal.App.2d 518, 529-530, 67 P.2d at page 404: "In view of this uncertainty and the fact that clearly something other than the evidence on the question of damages must have actuated the jury, or some of them in arriving at such a low verdict, substantial justice requires that (as said in the *Donnatin* case, supra, 38 Cal.App. 8, at page 11, 175 P. 26, 27, 177

P. 845), ‘* * * what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of “splitting it up” between different judges and different juries.’”

The order appealed from is reversed with directions to the trial court to grant plaintiff’s motion for new trial without limitation and to retry the case on all issues.*

PETERS, P. J., and FRED B. WOOD, J., concur.



157 Cal.App.2d 772

Hazel T. PONZI, Plaintiff, Cross-Defendant and Appellant,

v.

Aldo F. PONZI, Defendant, Cross-Complainant and Respondent.

Civ. 5707.

District Court of Appeal, Fourth District,
California.

Feb. 21, 1958.

Wife’s separate maintenance action. From a judgment of the Superior Court of Riverside County, S. Thomas Bucciarelli, J., pro tem., plaintiff appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that when plaintiff married defendant in Arizona she had not yet secured her final decree of divorce from another who was then living.

Affirmed.

1. Marriage ⇨50(1)

In wife’s action for separate maintenance, evidence sustained finding that when plaintiff married defendant in Arizona she

had not yet secured her final decree of divorce from another who was then living. West’s Ann.Civ.Code, § 61.

2. Divorce ⇨172

Divorce decree did not establish validity of parties’ marriage as against third person who was not party to action and had no right to be heard therein.

3. Action ⇨66

California law would govern presumptions and inferences to be drawn from evidence in separate maintenance action brought there.

4. Marriage ⇨40(4)

Where plaintiff knew when she married defendant that her marriage to him was invalid because of her pre-existing marriage to another, relationship was adulterous, and would, for purposes of her separate maintenance action, be presumed to have so continued.

5. Marriage ⇨50(1)

In wife’s action for separate maintenance, evidence sustained finding that no common law-marriage status existed between parties.

6. Husband and Wife ⇨281

In wife’s action for separate maintenance, evidence would sustain finding that property settlement agreement was null and void, against record policy, and lacking in consideration.

7. Appeal and Error ⇨854(6), 933(1), 977(5)

All presumptions are in favor of trial court’s order denying motion for new trial, and appellate court will not interfere with action unless a manifest and unmistakable abuse of discretion is shown; and order will be affirmed if it may be sustained on any ground.

Hennigan, Ryneal & Nixen, Riverside, for appellant.

Thompson & Colegate and Harry M. Dougherty, Riverside, for respondent.

* Plaintiff moved for a new trial on the issues of damages alone, or, in the alternative, on all issues.

MUSSELL, Justice.

In the first cause of action herein, for separate maintenance, it was alleged that the parties were married in the city of Quartzsite, Arizona, on February 26, 1950; in the second cause of action that they were married during the month of May, 1951, by common law in Tulsa, Oklahoma; and in the third cause of action that they were married by common law in May and June, 1951, in the state of Texas. Inability of plaintiff to support herself was alleged in each cause of action and attorney's fees, costs and an allowance for support were sought. It was further alleged that the parties entered into an agreement on April 16, 1954, wherein defendant agreed to pay certain encumbrances on plaintiff's property, amounting to approximately \$5,950.

Defendant filed an answer in which he admitted entering into a marriage ceremony with plaintiff on February 26, 1950, but alleged that the marriage was null and void for the reason that plaintiff was then married to one Joseph Andrew Carmine. Defendant denied that common law marriages were effected in Oklahoma or Texas, as alleged in the complaint. He also filed a cross-complaint in which he stated a cause of action for divorce, alleging that the parties entered into a marriage ceremony in Quartzsite, Arizona, on February 26, 1950, and in a second cause of action he realleged the said Arizona marriage but further alleged that at said time plaintiff Hazel T. Ponzi was married to Joseph Andrew Carmine and that said marriage was in full force and effect and undissolved by decree of divorce, or otherwise. It was further alleged that the parties had acquired since marriage certain property in Sun Valley, California. In the prayer the cross-complainant asked for a divorce or, in the alternative, for an annulment, and that the Sun Valley property be divided equally between the parties.

The trial court found that at the time of the marriage ceremony in Arizona Hazel T. Ponzi was still married to Joseph Andrew Carmine, who was then alive, and

that her marriage to him had not been dissolved by decree of divorce, annulment, death, or otherwise; that Hazel T. Ponzi owns as her separate property certain real property known as 12125 Jerome Street, Sun Valley, California; that on or about April 16, 1954, the parties hereto entered into an agreement under which the defendant and cross-complainant promised to discharge certain encumbrances on the said real property; that the sole purported consideration on the part of the plaintiff for the said agreement was her promise not to contest a divorce action to be brought by the defendant and cross-complainant, and that the agreement was therefore against public policy lacking in legal consideration and null and void; that no common law marriage was entered into between the parties in the state of Oklahoma or in the state of Texas; that on or about April 2, 1944, Hazel Ponzi, under the name of Hazel T. Beuschel, entered into a marriage with Joseph Andrew Carmine, also known as Joe Carmine Occhogross, in the state of Texas and that said marriage was not dissolved by a final decree of divorce until August 16, 1950; that at the time cross-complainant participated in said marriage ceremony with Hazel Ponzi, he did so without any knowledge that the cross-defendant was then and there a married woman, being married to Joseph Andrew Carmine, and as such, was not free to marry the cross-complainant.

The court concluded that the marriage ceremony in Quartzsite on February 26, 1950, was of no force and effect and null and void for the reason that Hazel Ponzi was at that time married to Joseph Andrew Carmine, who was then and there alive and that said marriage had not been dissolved by divorce, annulment, death, or otherwise; that the agreement entered into on the 16th day of April, 1954, is invalid, null and void and of no force and effect for the reason that the said agreement was against public policy and lacking in legal consideration; that no common law marriage status existed between the parties; and that the plaintiff, Hazel T. Ponzi, is not entitled to any of

the relief prayed for in her first amended complaint. Judgment was entered in accordance with these findings and conclusions and plaintiff, Hazel Ponzi, appeals therefrom.

A marriage license was issued to appellant and respondent in Arizona on February 26, 1950, and they entered into a marriage ceremony on that date. Appellant testified that she married Joseph Carmine in Texas on April 2, 1944; that she knew him in 1943 and knew that he had applied for a divorce. A certified copy of a final judgment of divorce between Carmine Occhogross and Josephine Occhogross, entered by the Superior Court of Los Angeles county on April 5, 1944, was introduced in evidence without objection. The final decree contains the recital that the interlocutory decree therein had been entered on March 29, 1943. In this connection plaintiff testified that Carmine Occhogross named in that document was the same person she married on April 2, 1944. On August 12, 1949, an interlocutory decree of divorce was entered in an action by Hazel T. Carmine (appellant herein) against Joseph Andrew Carmine and a final decree of divorce in that action was filed and entered on August 16, 1950. In this connection appellant testified that when she procured her divorce from Joseph Carmine, she acquired from him, under property settlement agreement, certain property in Sun Valley, California.

Respondent, Aldo F. Ponzi, testified that he met appellant in 1949; that he had never been married before; that appellant told him she had been previously married to Joseph Carmine and that she had divorced him; that at the time of the marriage ceremony in Arizona, he did not know that appellant had not procured her final decree of divorce from Joseph Carmine; that he (Ponzi) had no knowledge of the invalidity of his marriage to appellant until he discussed his domestic problems with an attorney in January or February, 1954.

At the time appellant filed the separate maintenance action herein respondent was a sergeant in the Air Force, having been called back into service a short time after

entering into the Arizona marriage ceremony with appellant. He testified that after meeting appellant they discussed marriage on several occasions; that they decided to drive to Quartzsite, Arizona, to enter into a marriage ceremony; that in May or June, 1951, after being recalled into military service, he was transferred to an air field in Texas; that during this time appellant went to Oklahoma and visited with her mother and sister for a short period, an apartment was rented, and he visited appellant on several week ends. Respondent further testified that he had no intention of establishing his residence in either Oklahoma or Texas; that he intended to maintain his residence at the Sun Valley property, which was the property owned by appellant and in which they resided; that their furniture was kept at that address and also his civilian clothes and personal belongings; that when he entered the Air Force he was living at 12125 Jerome Street (the Sun Valley property); that he went to Texas and Oklahoma because he was transferred there but that he had no intention of creating a legal residence in either of said states; that when appellant left Texas, she returned to California and to the Sun Valley property.

[1] The record conclusively shows that when appellant married the respondent in Quartzsite, Arizona, she had not secured her final decree of divorce from Joseph Andrew Carmine and that he was then living. Under these circumstances, the marriage of appellant and respondent in Arizona was invalid (Civil Code, Sec. 61.), and the trial court's finding to that effect is amply supported by the evidence.

[2] Appellant contends that her marriage to respondent was valid, claiming that her marriage to Joseph Andrew Carmine was void and that she was therefore a single person with full capacity to marry the respondent. In support of this contention she relies upon her testimony that Carmine had been previously married to Josephine Occhogross and further relies upon a final decree of divorce between Carmine and Josephine Carmine entered on April 5, 1944.

However, no marriage certificate was produced showing Carmine and Josephine were married and appellant testified that she did not know Josephine and had never met her. It is apparent that appellant's statement that Josephine and Carmine were married was based upon statements made to her by Carmine and not from actual knowledge. The final decree of divorce between Carmine and Josephine, entered April 5, 1944, only determined that the parties were thereafter free to remarry as far as their relations to each other were concerned. It did not establish validity of their marriage against respondent herein, who was not a party in that action and had no right to be heard therein. *Rediker v. Rediker*, 35 Cal.2d 796, 801-803, 221 P.2d 1, 20 A.L.R.2d 1152. The record shows that appellant filed a divorce action against Carmine in February or March, 1947; that she secured an interlocutory decree in that action on August 12, 1949, and a final decree therein on August 16, 1950. It also appears that she acquired the Sun Valley property from Carmine under a property settlement agreement. The trial court's finding that the marriage of appellant and Joseph Carmine was not dissolved by final decree of divorce until August 16, 1950, is supported by the record.

Appellant contends that two common law marriages were established and proved, one in Oklahoma in May, 1951, and the other in Texas in the months of May and June, 1951. We cannot agree with this argument. There was substantial evidence that the respondent herein, during the months of May and June, 1951, retained his home at the Sun Valley property in California; that he had no intention of establishing his residence in Oklahoma or Texas and went to those states because he was transferred there in military service; that he had no knowledge of the invalidity of his marriage to appellant until he discussed his domestic problems with an attorney in January or February, 1954. It is apparent that appellant knew when she married respondent herein that her marriage to him was invalid and that until she obtained her final

decree, she was living in a meretricious relationship with respondent.

[3,4] The California law governs the presumptions and inferences to be drawn from the evidence herein (*In re Estate of Winder*, 98 Cal.App.2d 78, 84, 219 P.2d 18), and the adulterous relationship of the parties was presumptively continued after August 16, 1950. *Burger v. Burger*, 136 Cal.App.2d 360, 363, 288 P.2d 926. In 55 C.J.S. Marriage § 36, pp. 882-883, it is said that

*"Where the relationship was meretricious at its inception, it will be presumed so to continue, in the absence of evidence to the contrary, and in such case the removal of the disability will be ineffectual to create an informal or common-law marriage, unless a new contract is entered into, and this is particularly true where the parties do not know of the removal of the impediment; * * *."*

It does not appear from the evidence that the appellant and respondent entered into a new contract or agreement to remarry after the Arizona marriage. While the evidence shows that they lived together as husband and wife, they maintained their residence in California, and there was no discussion between them indicating that they intended to remarry in Texas or Oklahoma or in any other state in which respondent might be temporarily stationed by reason of his military service.

In *Re Estate of McKanna*, 106 Cal.App.2d 126, 133, 234 P.2d 673, the court said that the law of Texas was that where the contract of marriage is invalid under the law of the state in which it is made, the status of the parties thereto will be regarded as being meretricious and that that status will follow them during any stay in Texas, unless there is a new agreement of marriage made in Texas, followed by cohabitation and a public holding out, or unless they become domiciled in that state.

In *Burdine v. Burdine*, 206 Okl. 170, 242 P.2d 148, the Supreme Court of Oklahoma

held that since the parties had entered into what would have been a valid common law marriage except for the fact that defendant was already married to another and since after such impediment was removed by divorce, the parties evidenced an intent to be husband and wife, their conduct and consenting minds validated the common law marriage. However, in *Burger v. Burger*, supra, the parties, after entering into a void marriage in Yuma, lived together in Oklahoma and the court held that their living together in Oklahoma where a common law marriage is recognized did not confer upon them the sanctity of marriage; that if they lived together for a year in an adulterous relationship, (until the final decree of divorce was obtained) the same relationship was presumptively continued thereafter.

[5] The question of whether the appellant and respondent were married by common law marriage in Oklahoma and Texas was a question of fact for the determination of the trial court, and under the circumstances shown, we cannot say there was no substantial evidence to support its determination of this question.

Appellant contends that the court erred in refusing to order the property settlement agreement between the parties carried out, solely upon the conception that it was against public policy. The evidence shows in this connection that the parties had discussed divorce proceedings on several occasions; that in April, 1954, the appellant telephoned to respondent and requested that he come to the home in Sun Valley and discuss financial arrangements; that the parties then discussed their financial problems and it was agreed that respondent would pay certain obligations in consideration of which appellant would not contest any divorce action. The following day the parties went to the office of appellant's attorney, where a letter was prepared and which was signed by respondent, and is in part as follows:

Cal.Rep. 321-322 P.2d-25

"April 16, 1954.

"Hazel P. Ponzi,
"San Fernando, California.
"Dear Hazel:

"You can use this letter as an Agreement on my part, inasmuch as you are not going to contest my contemplated divorce, that I, in turn, agree to pay the encumbrance against the property commonly known as 12125 Jerome Street, Sun Valley, California, * * * (description of property) as said encumbrance becomes due. This encumbrance is in the form of a note secured by deed of trust on said property by the San Fernando Valley Savings & Loan Association in the approximate sum of \$4,600.00. Also, if you encumber this said property any further for my benefit and/or your benefit and if I consent to said further borrowing I hereby agree to pay the new encumbrance as well as the old encumbrance as it becomes due.

"I again reiterate to make these payments as they become due and my failure to do so is necessary for you to bring legal action against me for said failure, I hereby agree to pay all reasonable attorney's fees and court costs for said action."

[6] The trial court found that this agreement was null and void, against public policy, and lacking in legal consideration. This finding is supported by the record. In *Beard v. Beard*, 65 Cal. 354, 4 P. 229, plaintiff transferred real and personal property to defendant in consideration of her executing to him four notes, securing the payment of the same by a mortgage, abandoning her defense in an action of divorce then pending between them, and doing nothing to resist, or prevent, or delay him in obtaining a decree of divorce therein. It was held that the agreement of the wife with respect to the divorce proceedings was a fraud upon the court and, as it constituted an essential and inseparable part of the consideration, the entire transaction became

tainted by fraud and no action would lie to enforce the payment of the notes.

In *Hill v. Hill*, 23 Cal.2d 82, 87, 142 P.2d 417, 419, the court said:

"Agreements not to defend or to abandon a defense in a divorce action, to destroy or conceal evidence in proceedings for divorce, and to procure or furnish testimony of certain facts which will successfully support or defeat a divorce action, or which provide that payment to the party procuring evidence to be used in such an action is contingent upon the result of the action have been held void as parts of collusive arrangements to facilitate divorce." (Citing many cases, including *Beard v. Beard*, supra.)

In *Brown v. Brown*, 8 Cal.App.2d 364, 367, 47 P.2d 352, 353, it is said that

"Where a husband and wife agree that a divorce shall be obtained by one or the other, and adjust their affairs in contemplation of a divorce by entering into a settlement conditioned thereon, of their property rights and make promises of an executory nature pertaining thereto, and such facts are established in a subsequent action on the contract, they have no right to receive the aid of the court in the enforcement of their agreement, which the law condemns as a violation of the policy of the state."

We find no prejudicial error in the trial court's refusal to enforce the agreement involved.

[7] The clerk's transcript herein shows that a motion for a new trial was made and that at the hearing thereon a judgment of annulment in an action between Hazel T. Carmine and Joseph Carmine was considered by the trial court. The motion was denied. However, the grounds for the denial were not stated. It is apparent that the respondent was not a party to the annulment action and that the judgment therein was entered on November 9, 1955, and that prior thereto appellant had secured a final judgment of divorce from said Joseph

Carmine. All presumptions are in favor of the trial court's order in denying the motion for a new trial and an appellate court will not interfere with its action unless a manifest and unmistakable abuse of discretion is shown and the order will be affirmed if it may be sustained on any ground. *Mazotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, 169, 153 P.2d 338. We have examined the affidavits and the files used on the motion for a new trial and find no abuse of discretion in the order made.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



157 Cal.App.2d 724

**PASADENA HUDSON, Inc., Plaintiff and
Appellant,**

v.

**Angelo MAGGIORA, Rose Maggiora, Harry
M. Redoglia and Elizabeth J. Redoglia,
Defendants and Respondents.**

Civ. 22372.

District Court of Appeal, Second District,
Division 2, California.

Feb. 20, 1958.

As Modified March 6, 1958.

Rehearing Denied March 12, 1958.

Hearing Denied April 30, 1958.

Tenant's action for declaration of rights of parties under lease. The Superior Court of Los Angeles County, John Gee Clark, J., rendered judgment deemed adverse by plaintiff, and plaintiff appealed. The District Court of Appeal, Fox, P. J., held that tenant which had breached lease agreement would not be entitled to an immediate judicial determination every time landlords, who had re-let premises, made deduction from security deposit, and ordinarily would have to await final accounting at end of lease term before having propriety of deductions determined; but held

that since issue as to reasonableness of deduction by landlords for attorneys' fees paid as result of tenant's breach had been raised, the trial court should have determined that issue.

Reversed with directions.

1. Declaratory Judgment ☞186, 366

Tenant which had breached lease agreement would not be entitled to an immediate judicial determination every time landlords, who had re-let premises, made deduction from security deposit, and would ordinarily have to await final accounting at end of lease term before having propriety of deductions determined; but where issue as to reasonableness of deduction by landlords for attorneys' fees paid as result of tenant's breach was raised in tenant's action for declaration of rights of parties under lease, trial court should have determined that issue.

2. Landlord and Tenant ☞204

Under lease providing for re-letting of premises for remainder of term in event of tenant's breach and entitling landlords to deduct any rental deficiency from security deposit, tenant would have no right to receive any rental under re-letting, even if landlords received more thereunder than they were receiving under original lease.

3. Landlord and Tenant ☞184(2)

Where lease specifically provided that landlords could, in event of default by tenant, apply any or all of security deposit toward payment of any loss occasioned by default and re-letting of premises, tenant would not be entitled to interest upon that portion of deposit used to cure its own default, but would be entitled to be credited, upon final accounting between parties, with interest on balance of security deposit each year after proper deductions had been made.

FOX, Presiding Justice.

In 1952 plaintiff leased certain property in Pasadena from defendants for a term of ten years at an annual rental of approximately \$14,500. Plaintiff agreed in addition to reimburse defendants for the city and county real property taxes on the premises paid during the term of the lease. A deposit of \$11,000 was paid by plaintiff to defendants as security for its performance of its obligations under the lease; defendants agreed to credit plaintiff with interest on this deposit at the rate of 5% per annum. One year and three months after signing the lease plaintiff vacated the premises and ceased paying rent. Defendants gave plaintiff written notice, as required by the lease, of the breach thereof arising from the failure to pay rent due. Plaintiff then advised defendants in writing that it was unable to comply with the lease and expressly requested that defendants attempt to relet for its benefit. Defendants responded with a written notice to plaintiff that they elected to keep the lease in full force and to relet for plaintiff's benefit; they stated further that they would hold plaintiff for any resulting loss or damages, as provided in the lease.

One month thereafter defendants relet the premises to Meadow Gold Dairies for a term of ten years. The proposed lease was approved by plaintiff prior to its execution. The annual rent under this lease is \$16,800; however, defendants are required to pay the annual taxes on the land up to a maximum of \$2,881.87. Based upon 1954 and 1955, the net result is that the total yearly rental received under the new lease is less than that designated in the lease with plaintiff; the deficiency has been about \$500 per year.

At the end of 1954 defendants submitted an accounting to plaintiff in which the latter was credited with interest on the security deposit after deducting taxes and other items that defendants had paid. At the end of 1955 defendants again submitted an annual accounting to plaintiff. In this accounting defendants subtracted from the security deposit (1) the amounts which

Roland Maxwell, Paul H. Marston and Richard W. Olson, Pasadena, for appellant.

Littlejohn & Callister and E. Talbot Callister, Los Angeles, for respondents.

they had paid their attorneys for legal services resulting from plaintiff's breach, and (2) the rental losses they had sustained (taking into account the taxes which were paid by defendants). They then tendered to plaintiff the sum of \$387.61, representing the annual interest on the balance, which tender was refused by plaintiff.

Thereafter plaintiff instituted this action for declaratory relief, praying that the rights of the parties under the lease be determined. The trial court held: that the lease executed by plaintiff and defendants was in full force; that defendants are entitled to retain the money deposited with them by plaintiff as security until the expiration of the lease; that plaintiff wrongfully breached the lease; that defendants are entitled, as provided in the lease, to deduct from the security deposit damages and expenses incurred as a result of plaintiff's breach; that plaintiff is not entitled to collect the rent from Meadow Gold Dairies; and that at the expiration of the lease plaintiff is entitled to an accounting from defendants as to the security deposit, and is entitled to any money remaining after deduction of damages and expenses incurred by defendants. Moreover, although the court found that defendants incurred and paid legal expenses and attorneys' fees in the sum of \$785 as a result of plaintiff's breach, the court refused to find whether or not the fees were reasonable.

Plaintiff has appealed from the judgment on these grounds: (1) that the court erred in refusing to adjudicate the propriety of the deductions made by defendants from the security deposit; (2) that the court erred in holding that plaintiff is not entitled to any portion of the rents collected under the Meadow Gold lease; and (3) that the court erred in failing to adjudicate defendants' obligation to pay interest.

It should be noted at the outset that neither side questions defendants' right under the lease to take possession of the premises after plaintiff's default and relet them for plaintiff's benefit, thereby keeping the lease in effect. See *Phillips-Hollman, Inc. v. Peerless Stages, Inc.*, 210 Cal. 253, 291 P.

178; *Dickinson v. Electric Corp.*, 10 Cal. App.2d 207, 51 P.2d 205. The only questions involved on this appeal concern the present obligations of the parties under the lease between them.

[1] Plaintiff's first contention relates to the trial court's refusal to determine the reasonableness of the deduction for attorneys' fees. This issue was raised in the pleadings and was squarely before the court. The court found that attorneys' fees in the sum of \$785 were incurred by defendants as a proximate result of plaintiff's breach. The court further found that defendants were entitled to deduct *reasonable* fees so incurred. But the court left the reasonableness of the fees incurred to be determined at the time of the final accounting when the lease terminates in 1962. It is clear that the trial court could easily have decided the reasonableness of the attorneys' fees at the same time it was passing upon the other questions relating thereto, and thus could have disposed of that factual problem in its entirety while witnesses were available and the facts were freshly in mind. No good purpose will be served by leaving that determination to be made several years hence. Witnesses who are available now and familiar with the facts may not be available then. In light of the changing economic conditions, it will no doubt be more difficult in 1962 to determine what was a reasonable fee for legal services rendered in 1954 than it would have been at the time of trial in 1956 or even now. Thus the practical aspects of the problem emphasize the importance of its early determination. We conclude, therefore, that the trial court should have determined the amount of *reasonable* attorneys' fees incurred by defendants as a result of plaintiff's breach. This will not, however, require a new trial on all issues because the other questions before the trial court were fully adjudicated.

Our position on the question of attorneys' fees does not mean that plaintiff is entitled to an immediate judicial determination every time defendants make a deduction from the security deposit. Plaintiff may

question the propriety of future deductions at the time of the final accounting. Here the questions of attorneys' fees and the reasonableness thereof were before the court in this suit for declaratory relief; their determination at the time of trial was not only a simple matter but also a part of the relief prayed for.

[2] Plaintiff's second contention is that it should be permitted each month to collect the rent under the Meadow Gold lease to the extent it exceeds the amount which plaintiff is required to pay under its lease with defendants. Plaintiff argues that defendants are receiving more each month under the Meadow Gold lease than they received under plaintiff's lease except in the months when defendants are required to pay the taxes on the property. This contention is entirely lacking in merit. It is obvious that defendants' obligation to pay the taxes under the Meadow Gold lease should be prorated over the rental periods (i.e., monthly) for the full taxing period (i.e., annually) in order to determine whether any deficiency exists between the rent received under the Meadow Gold lease and the rent due under plaintiff's lease. Upon such an analysis it appears that there is a deficiency of more than \$40 per month or approximately \$500 per year under the new lease. There is nothing in the lease between plaintiff and defendants that would support the contention that plaintiff is entitled to receive any rent under the new lease which defendants contracted on plaintiff's behalf. In fact, the inference is to the contrary. It is expressly provided that upon plaintiff's breach defendants may relet the premises for the remainder of the term and plaintiff agrees to pay any rental deficiency. It is further provided that defendants may recover such deficiency by deducting the amount thereof from the balance of the security deposit which they hold. It is clear from these provisions that defendants have the right both to collect all rent under the Meadow Gold lease entered into because of plaintiff's default and to deduct any deficiency under the new lease from the security deposit. Plaintiff

has no right to receive any rental under the new lease.

[3] Plaintiff's final complaint is that the trial court failed to make a proper determination as to defendants' obligation to pay interest on the security deposit. For purposes of clarification the trial court should have stated the formula for computing interest on the security deposit, but the formula is not what plaintiff suggests. Plaintiff argues that it is entitled to a credit each year of 5% of \$11,000, the total amount of the security deposit. This argument is without merit. The sole purpose of the deposit was to give defendants some security for plaintiff's performance of the covenants in the lease. The lease specifically provides that in the event of default by plaintiff, defendants may apply any or all of the security deposit toward the payment of any damages occasioned by the default and any deficiency in the reletting of the premises. Once part of the deposit has been used for such purposes, plaintiff is no longer entitled to receive that portion of the deposit upon termination of the lease since it has been used for plaintiff's benefit. It follows that plaintiff is likewise not entitled to be credited with interest upon that portion of the deposit which has been used to cure its own default. To hold otherwise would permit plaintiff to profit from its own wrong. Plaintiff is entitled only to be credited with 5% interest on the balance of the security deposit each year after the proper deductions have been made, and the judgment should so state.

The judgment herein is correct so far as it goes. It is, however, deficient in two respects: (1) The court should have determined the reasonable value of the legal services occasioned by plaintiff's default; and (2) the court should have stated the formula to be used in computing interest on the security deposit.

The cause is remanded with directions to the trial court to make a finding as to the reasonable value of the legal services rendered to defendants as a result of plaintiff's default, and to enter a new judgment not inconsistent with the views herein ex-

pressed. The total costs on appeal shall be divided equally between the plaintiff and the defendants.

ASHBURN, J., and KINCAID, J. pro tem., concur.



157 Cal.App.2d 838

Eleanor P. JOHNSON, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, City of Los Angeles, a Municipal Corporation, Respondents.

Civ. 22781.

District Court of Appeal, Second District,
Division 2, California.

Feb. 24, 1958.

Hearing Denied April 23, 1958.

Proceeding to review an order of the Industrial Accident Commission denying claimant compensation. The District Court of Appeal, Fox, J., held that in view of fact that contracting of polio was not a natural incident of claimant's work as a recreational director, claimant's disability therefrom was not due to an occupational disease, and limitation period on her claim ran from time of exposure, and in view of fact that claimant's application for benefits was not filed until more than one year after date of exposure, it was barred by statute of limitations.

Order affirmed.

1. Workmen's Compensation ⚡549

Where a workmen's compensation claimant contracted polio during the course of her employment, as a recreational director, in view of fact that contracting polio was not a natural incident and concomitant of claimant's work, but rather, exposure occurred fortuitously and only incidentally during course of the employment, claimant

did not suffer disability due to an "occupational disease" within meaning of Workmen's Compensation Act. West's Ann. Labor Code, § 5412.

See publication Words and Phrases, for other judicial constructions and definitions of "Occupational Disease".

2. Workmen's Compensation ⚡1280

In view of fact that contracting polio was not a natural incident of workmen's compensation claimant's work as a recreational director, claimant's disability was not due to an occupational disease, and limitation period on her claim ran from time of exposure, and in view of fact that claimant's application for benefits was not filed until more than one year after date of exposure, it was barred by statute of limitations. West's Ann. Labor Code, § 5411.

Fizzolio & Fizzolio, North Hollywood, and Carl Q. Christol, Los Angeles, for petitioner.

Everett A. Corten, San Francisco, and Edward A. Sarkisian, Los Angeles, for respondent Industrial Accident Commission.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Edwin F. Shinn, Deputy City Atty., Herbert Hargrave, Jr., Deputy City Atty., Los Angeles, for respondent City of Los Angeles.

FOX, Presiding Justice.

In her petition for writ of review petitioner seeks to have annulled the order of the Industrial Accident Commission denying her application for compensation on the ground that it was barred by the statute of limitations.

Petitioner was a recreational director in the employ of the city of Los Angeles. In the course of her employment petitioner, on July 21, 1955, drove some 12 girls in a station wagon to the beach for an outing. Marsha Wolpin was one of them. The group left about midmorning and returned around 3:00 o'clock in the afternoon. The outing included a picnic lunch, at which food was passed back and forth. Although

Marsha participated normally in the activities of the outing, she later complained to her mother of "having been cold and uncomfortable all day." This was the last date that petitioner had any contact with her. On July 31, 1955, Marsha was hospitalized for polio. On July 28, petitioner took a group of approximately 20 girls on an over-night camping trip. The next morning she woke up with a "very sore throat and chills." She continued to work to and including August 3rd. She consulted a doctor on August 8th and on August 13 she entered the General Hospital, at which time she was informed she had polio. Her doctor expressed the opinion that her polio "was due to her employment." It was around the Christmas season, 1955, that petitioner advised the city of her claim that her illness was industrially incurred. Her husband, however, had told one of her supervisors of his claim early in September.

On August 2, 1956, petitioner filed her application for compensation benefits, alleging that "while conducting children's recreational activities" she had contracted polio. By amendment to her petition she alleged the date of injury was July 21, 1955.

The precise question in this matter is whether the statute of limitations, which is one year from "the date of injury" (Labor Code, § 5405(a)), had run on petitioner's claim when she filed her application with the commission for benefits under the Workmen's Compensation Act. This, in turn, depends on whether or not her illness was an occupational disease. If it was an occupational disease her claim was filed in time, since the last day petitioner worked was August 3, 1955, and her claim was filed August 2, 1956.¹ If, however, her illness was not an occupational disease "[t]he date of injury * * * is that date during the employment on which occurred the alleged incident or exposure, for the con-

sequences of which compensation is claimed." Labor Code, § 5411. The exposure to Marsha, which was the only exposure shown in the course of her employment to one having polio, was on July 21, 1955. Since her application for compensation was not filed until August 2, 1956, it would be barred under section 5405, if her illness was a non-occupational disease.

The Labor Code does not define "occupational disease." In *Associated Indemnity Corp. v. Industrial Acc. Comm.*, 124 Cal. App. 378, at page 381, 12 P.2d 1075, 1076, the court stated, that: "An occupational disease, such as that which is before us in the present proceeding [silicosis], is one in which the cumulative effect of the continual absorption of small quantities of deleterious substance from the environment of the employment ultimately results in manifest pathology; any one exposure to the deleterious substance is inconsequential in itself, but the accumulation of repeated absorptions is the factor which brings about the disease." See to the same effect *Marsh v. Industrial Acc. Comm.*, 217 Cal. 338, 343-344, 18 P.2d 933, 86 A.L.R. 563; and *Argonaut v. Industrial Acc. Comm.*, 21 Cal. App.2d 492, 497-498, 70 P.2d 216. In *Herman v. Republic Aviation Corp.*, 298 N.Y. 285, 82 N.E.2d 785, 786, the court pointed out: "An ailment does not become an occupational disease simply because it is contracted on the employer's premises. It must be one which is commonly regarded as natural to, inhering in, an incident and concomitant of, the work in question." In a later New York case, *Champion v. W. & L. E. Gurley*, 299 N.Y. 406, 87 N.E.2d 430, 431, the court further defined an occupational disease by stating that it is one which results from the nature of employment, and by "nature" is meant "conditions to which all employees of a class are subject and which produce the disease as a natural incident of a particular occupation as distin-

1. Labor Code, § 5412, reads: "The date of injury in cases of occupational disease is that date upon which the employee first suffered disability therefrom and ei-

321 P.2d—54½

ther knew, or in the exercise of reasonable diligence should have known, that said disability was caused by his present or prior employment."

guished from and exceeding the hazard and risks of ordinary employment * * *."

[1] It is clear that contracting polio is not a natural incident and concomitant of petitioner's work as a recreational director. Rather, the exposure occurred fortuitously and only incidentally during the course of petitioner's employment. Hence it cannot be said in the circumstances of this case that petitioner had an occupational disease.

[2] When an employee's disability is not due to an occupational disease the Legislature has laid down the rule that the limitations period starts to run from the time of the exposure. Labor Code, § 5411. The exposure here was admittedly on July 21, 1955. Petitioner's application for benefits under the act not having been filed until August 2, 1956, was clearly barred by the one-year statute of limitations.

Petitioner argues that if Labor Code section 5411 applies in this case then the date of last exposure should be the crucial date and that such date could be considered her last day of work, viz., August 3. She asserts that "it is probable that the increased aggravation of work after the beach picnic increased her susceptibility to disease and caused the disease to become active. In any event, certainly, employment was a contributing cause." She concludes that "it is conceivable that she continued to be exposed by the nature of her employment * * *." Petitioner is attempting to bring her case within the doctrine of *Fireman's Fund Indemnity Co. v. Industrial Acc. Comm.*, 39 Cal.2d 831, 250 P.2d 148, where it was held that when the disability is the result of one continuous cumulative injury the statute of limitations for filing a claim for compensation commences to run from the time of the last exposure. Petitioner tortures both logic and the evidence in her case in attempting to fit it into the principle of the *Fireman's Fund* case, *supra*. The exposure of petitioner here was a single incident. In *Fireman's Fund* the victim was under repeated

strain and tension that produced a cumulative effect. Petitioner was with Marsha on July 21st. She was not in her company thereafter. Obviously, the exposure was on that date. The period between July 21 and August 3 simply represents the time required for the incubation and development of the disease.

Although petitioner did not know until she was hospitalized on August 13 that she had been exposed to polio and had contracted the disease, she apparently learned from her doctor soon thereafter that her illness was industrially caused for her husband so claimed in a telephone conversation with one of her supervisors early in September. She too represented to the city around the Christmas season, 1955, that her polio was due to an exposure while she was employed by it. Thus it is clear that petitioner had between approximately seven and ten months in which to file her application with the Industrial Accident Commission for benefits because of this misfortune. It therefore cannot be said that she did not have a reasonable time within which to file her claim prior to the expiration of one year from the date of her exposure. She was thus not prejudiced by the fact that she did not learn of the existence of her injury until some weeks after it had occurred, i. e., after the exposure. Actually, petitioner's difficulty is due to her misconception of the nature of her disability, viz., that her polio attack was an occupational disease rather than an industrial injury. Hence she figured the one-year limitation within which to file her application for compensation from the time of her disability rather than from the date of her exposure. In this she was clearly in error.

The order is affirmed.

ASHBURN, J., and KINCAID, J. pro tem., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

157 Cal.App.2d 722

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Robert Bills LEWIS, Defendant and
Appellant.

Cr. 6112.

District Court of Appeal, Second District,
Division 1, California.

Feb. 20, 1958.

Proceeding by defendant on motion denominated as a motion to annul, vacate, and set aside judgment. The Superior Court, Los Angeles County, denied order and petitioner appealed. Petitioner moved to abandon appeal for limited purpose. The District Court of Appeal held that fact order recited that petition was one for writ of error coram nobis did not deprive petitioner of that remedy since motion to annul, vacate and set aside a judgment is in the nature of an application for writ of error coram nobis.

Motion denied.

1. Criminal Law §997(I)

Motion to vacate judgment in criminal case is a proceeding in the nature of an application for writ of error coram nobis.

2. Criminal Law §997(II)

Where defendant filed motion denominated as a motion to annul, vacate and set aside judgment and ground stated made motion equivalent of proceeding in nature of writ of error coram nobis, fact that trial court in entering order denying motion denominated petition as a petition for writ of error coram nobis could not deprive petitioner of that remedy, since motion had to be treated as the equivalent of a proceeding in the nature of a writ of error coram nobis.

Robert Bills Lewis, in pro. per.

No appearance for respondent.

PER CURIAM.

Appellant was convicted in the Superior Court in and for the County of Los Angeles of the crimes of burglary of the first degree and assault with a deadly weapon. Four prior felony convictions charged against him were found to be true. On May 7, 1957, appellant was sentenced to State Prison. Thereafter, on August 22, 1957, he filed in the Superior Court of Los Angeles County a document denominated "Motion to Annul, Vacate and Set Aside Judgment". On August 28, 1957, the court entered its order as follows: "Petition for Writ of Error Coram Nobis is denied". From such order appellant filed his appeal to this court.

On January 31, 1958, appellant filed in this court his "Motion for abandonment of appeal for limited purpose."

In support of such motion appellant asserts "that his motion to annul, vacate and set aside judgment was not intended to be a petition for a writ of Error Coram Nobis, and that by the trial judge entitling it to be a petition for a writ of Error Coram Nobis, deprives him of that remedy, when in fact, the motion as presented, did not fulfill those requirements as prescribed by statute and law for the filing of the petition for a writ of Error Coram Nobis."

Appellant then states that he "now wishes to abandon the appeal so that he may file a properly executed petition for a writ of Error Coram Nobis under the requirements of law and rules thereon; or, in the alternative, that an order issue allowing the appeal to stand as an appeal from a denial of a motion to annul, vacate and set aside the judgment rather than an appeal from the denial of a petition for a writ of Error Coram Nobis."

[1,2] This contention that his application to the court below was mistakenly treated as a petition for writ of error coram nobis appellant is in error because in this state a motion such as appellant herein made in the superior court to vacate a judgment in a criminal case is a proceeding in the nature of an application for a writ of error coram nobis (People v.

Jones, 155 Cal.App.2d 149, 317 P.2d 108). The grounds stated by appellant in his motion to the superior court and from the denial of which he now appeals make such motion the equivalent of a proceeding in the nature of a writ of error *coram nobis*.

The motion of appellant to abandon his appeal "for limited purpose" is therefore denied.



157 Cal.App.2d 803

Lillian R. WHYATT, Plaintiff and Appellant,

v.

Katherine E. KUKURA, Defendant and Respondent.

Civ. 22642.

District Court of Appeal, Second District,
Division 1, California.

Feb. 24, 1958.

Action for personal injuries sustained in an automobile accident. The Superior Court of Los Angeles County, Frank C. Charvat, J., entered judgment on the verdict in the amount of \$750 for plaintiff who appealed on ground of gross inadequacy of damages awarded. The District Court of Appeal, Herndon, J. pro tem., held that under evidence verdict was not so grossly inadequate as to entitle plaintiff to new trial.

Affirmed.

1. Appeal and Error ◯110, 870(6)

An order denying a motion for a new trial is nonappealable but is reviewable upon an appeal from the judgment. West's Ann.Code Civ.Proc. § 956.

2. Appeal and Error ◯979(3)

New Trial ◯70

A motion for a new trial on ground of insufficiency of evidence to justify the

verdict appeals peculiarly to discretion of trial court whose order refusing a new trial will not be disturbed on appeal in absence of a clear showing of an abuse of discretion.

3. Damages ◯185(3)

In action for personal injuries sustained in automobile accident wherein plaintiff claimed special damages in excess of \$1,000, evidence that plaintiff had history of physical disability dating back to some six years preceding accident requiring her to enter hospital and undergo extensive medical treatment and expense, was sufficient to sustain determination of jury that plaintiff's physical disability and various expenses incurred were chargeable very largely to pre-existing causes.

4. Damages ◯130(4)

\$750 verdict for sprain of neck and low back with pre-existing osteoarthritis of cervical spine with peptic ulcer and high blood pressure was not so grossly inadequate as to entitle plaintiff to new trial.

Block, Toler, Bulloch & Biggerstaff,
Lloyd A. Bulloch, Compton, for appellant.

Spray, Gould & Bowers, Frank J. Breslin, Jr., Los Angeles, for respondent.

HERNDON, Justice pro tem.

Plaintiff was given judgment upon a jury verdict in the amount of \$750, in an action seeking recovery of damages for personal injuries sustained in an automobile collision. As stated in her opening brief: "Plaintiff appeals from the judgment entered on jury verdict and from denial of her motion for a new trial upon the following grounds: Insufficiency of the evidence to justify the verdict in that damages awarded plaintiff for personal injuries in the automobile accident were grossly inadequate to compensate her for the special and general damages she suffered; error, as a matter of law consisting of abuse of discretion of the trial court in failure to grant plaintiff's motion for a new trial."

[1,2] The order denying a motion for a new trial is non-appealable (Taylor v. Hawkinson, 47 Cal.2d 893, 306 P.2d 797), but is reviewable upon an appeal from the judgment (Code Civ.Proc. § 956; Hughes v. De Mund, 195 Cal. 242, 247, 233 P. 94). It is well settled that a motion for a new trial on the ground of insufficiency of the evidence to justify the verdict appeals peculiarly to the discretion of the trial court, and its order refusing a new trial will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. Bencich v. Market St. Ry. Co., 20 Cal. App.2d 518, 520, 67 P.2d 398; Lambert v. Kamp, 101 Cal.App. 388, 392, 281 P. 690; Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 11, 175 P. 26, 177 P. 845.

A very brief summary of a portion of the evidence will suffice to demonstrate its sufficiency to support the verdict and judgment. The automobile in which plaintiff was riding was struck from the rear by defendant's vehicle. The resultant injuries to which plaintiff testified were of the so-called "whiplash" type. Dr. Wood, the specialist in orthopedic surgery to whom plaintiff was referred by her physician, made a diagnosis "of sprain of the neck and low back with pre-existing osteoarthritis of the cervical spine, with a history of peptic ulcer and high blood pressure."

The accident occurred on October 25, 1954. The plaintiff testified that she had been under the care of a Doctor Kidd for seven years prior to this date for high blood pressure and bleeding ulcer. Some two months before the accident she had been confined to a hospital with a bleeding ulcer, and for several weeks before her hospitalization she had serious symptoms of the same character. Following this hospitalization she was in bed a substantial portion of each day and required household help for several weeks thereafter.

Approximately a year after the accident plaintiff returned to the same hospital for the reason that her ulcer was again hemorrhaging to the extent that she required a blood transfusion to alleviate an anemic

condition. She was confined to her bed both before and after this hospitalization.

Dr. Wood testified that by March following the accident, some six months later, her condition was such that she had minimal back pain. Referring to her pre-existing condition of osteoarthritis, the doctor stated that it was "a condition of spurring and irritation" of the bones of the spine and was not caused by the accident. On cross-examination, the doctor defined the difference between subjective and objective findings and testified that muscle spasm was an objective finding usually present in a case of serious injury to the neck or back. He testified that upon examination of plaintiff he found no muscle spasm within the region of her neck or her low back. Upon examination of X-rays taken both by the doctor and at the hospital no abnormalities other than the arthritic changes previously mentioned were revealed. Hospital records received in evidence disclosed that during a period of some six years preceding the accident plaintiff had given a history of serious disorders indicative of failing health.

[3,4] Plaintiff claimed special damages aggregating in excess of \$1,000. The medical expenses which plaintiff attributed to the injuries sustained in the accident totaled \$276.70. She claimed additional special damages for laundry, housekeeping and other incidental expenses totaling an additional \$795.22. Clearly, the evidence was such, however, that the jurors might very reasonably have believed, as evidently they did believe, that plaintiff's physical disabilities, as well as the various items of expense which made up her claim of special damages, were chargeable very largely to pre-existing causes. The decisions relied upon by plaintiff such as Clifford v. Ruocco, 39 Cal.2d 327, 246 P.2d 651, and Bencich v. Market St. Ry. Co., supra, are "not in point, for the reason that in those cases there was no issue, as here, as to whether the injuries were caused by the particular accident or due to a pre-existing cause." Post v. Alameda Amuse-

ment Co., 117 Cal.App.2d 588, 595, 256 P.2d 580, 584.

From the foregoing it is manifest that there was no abuse of discretion in the trial court's denial of plaintiff's motion for a new trial.

The attempted appeal from the order denying a motion for a new trial is dismissed, and the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



157 Cal.App.2d 741

Milton W. LOCKWOOD and Lois Lockwood,
Plaintiffs and Appellants,

v.

Carl SHEEDY and Betty Jane Sheedy and
Inter-County Title Co., a corporation,
Defendants and Respondents.

Civ. 9162.

District Court of Appeal, Third District,
California.

Feb. 20, 1958.

Rehearing Denied March 12, 1958.

Hearing Denied April 16, 1958.

Suit by trustors under a deed of trust to restrain a title company as trustee and assignees of the beneficiaries, from proceeding under power of sale contained in the deed of trust. From a judgment of the Superior Court, El Dorado County, Robert E. Roberts, J., the plaintiffs appealed. The District Court of Appeal, Peek, J., held that decree granting an injunction without prejudice to defendants to proceed under a new and different notice was proper and that each party was properly required to bear his own costs.

Judgment affirmed.

See also 321 P.2d 863.

1. Mortgages Ⓒ338

Where court permanently restrained trustee and assignees of beneficiaries from

proceeding under power of sale contained in deed of trust, decree providing that injunction be without prejudice to defendant to proceed under a new and different notice was proper, where no contention was made that the secured note or deed of trust was invalid and no payments had been made by the plaintiffs upon the note for several months prior to the filing of a notice of default.

2. Injunction Ⓒ200

A proceeding for an injunction is an action in equity, and fixing of costs is by the statute lodged wholly within discretion of the court. West's Ann.Code Civ.Proc. § 1032(a, c).

3. Mortgages Ⓒ338

Where court permanently restrained trustee and assignees of beneficiaries from proceeding under a power of sale contained in the deed of trust, and provided that the injunction was without prejudice to defendants proceeding under a new and different notice, requiring each party to bear his own costs, was proper. West's Ann. Code Civ.Proc. § 1032(a, c).

4. Appeal and Error Ⓒ654

Motion of appellants at oral argument to augment the record by inclusion of the entire record in the trial court was denied.

Milton W. Lockwood, in pro. per.

Hughes, Maul & Fogerty, Placerville,
for respondents.

PEEK, Justice.

Plaintiffs, as trustors under a deed of trust, appeal from a judgment permanently restraining the defendant title company, as trustee, and the defendants Sheedy, as assignees of the beneficiaries, from proceeding under the power of sale contained in said deed of trust insofar as the sale was pursuant to a certain notice of breach and election to sell. The judgment further provided that the injunction was without prejudice to defendants to proceed under a new and different notice, and that each party bear his own costs.

[1] It is first contended by plaintiffs that the court erred in decreeing that the injunction be without prejudice to defendants to proceed under a new and different notice. It is difficult to understand plaintiffs' contention which appears to be that the court should have permanently restrained defendants from selling the property under the power of sale contained in the deed of trust. No contention is made that the promissory note or deed of trust was invalid for any reason. Furthermore the court specifically found that no payments had been made by plaintiffs upon the promissory note for several months prior to the filing of the notice of default. It would therefore follow that the court gave to plaintiffs all the relief to which they were entitled. And since the trustee, by the terms of the instrument, was authorized to sell the property on default in payments called for in the note, the court quite properly entered the restraining order without prejudice.

[2,3] Plaintiffs' second contention is that the court erred in ordering each party to bear his own costs on the ground that this is an action involving the title or possession of real estate, and hence, by virtue of the provisions of section 1032, subdivision (a), of the Code of Civil Procedure, costs should have been allowed of course upon a judgment in their favor. Plaintiffs have mistaken the nature of their proceeding. The action by them was not one included within the provisions of subdivision (a). A proceeding for an injunction is an action in equity (Yuba County v. North America Consol. Gold Min. Co., 12 Cal.App. 223, 107 P. 139), and hence comes within the provisions of subdivision (c) of section 1032. Being a proceeding in equity, the fixing of costs was, by said subdivision (c), lodged wholly within the discretion of the court. Speka v. Speka, 124 Cal.App.2d 181, 268 P.2d 129. Measuring the case presented by the rules above enunciated, we cannot say that the trial court abused its discretion in ordering each party to bear his own costs.

[4] At the time of oral argument plaintiffs moved to augment the record on appeal by the inclusion of the entire record in the trial court. The motion was submitted, to be considered with the appeal. After due deliberation it is our conclusion that such motion is without merit and the same is denied.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J.
pro tem., concur.



157 Cal.App.2d 744

Milton W. LOCKWOOD, Plaintiff and
Appellant,

v.

Carl SHEEDY, Betty Jane Sheedy and In-
ter-County Title Co., a corporation,
Defendants and Respondents.

Civ. 9229.

District Court of Appeal, Third District,
California.

Feb. 20, 1958.

Rehearing Denied March 12, 1958.

Hearing Denied April 16, 1958.

Suit to restrain a sale under a deed of trust. From an adverse judgment of the Superior Court, El Dorado County, Robert E. Roberts, J., the plaintiff appealed. The District Court of Appeal, Peek, J., held that a restraining order issued at commencement of the action expired by its own terms at the hearing on an order to show cause and that failure to give notice to plaintiff was not error; and that the present action based upon the same allegations and involving the same issues and parties as a previous action was properly stayed until the determination of the previous action.

Order affirmed.

See also 321 P.2d 862.

I. Mortgages Ⓒ338

Where plaintiff sought an injunction to restrain a sale under a deed of trust, restraining order issued after commencement of the action expired by its own terms at the hearing on the order to show cause and hence failure to give plaintiff notice of the dissolution was not error. West's Ann. Code Civ.Proc. §§ 527, 532.

2. Action Ⓒ69(5)

In suit to restrain sale under a deed of trust, staying the present action pending a final determination in the previous case wherein plaintiff alleged fraud and breach of modification agreement by the defendants was proper where the present action was based upon the same allegations and involved the same parties and the same issues as previous action.

3. Appeal and Error Ⓒ654

Motion of appellant to augment record on appeal by inclusion of the entire record in the trial court was denied.

Milton W. Lockwood, in pro. per.

Hughes, Maul & Fogerty, Placerville, for respondents.

PFEK, Justice.

On the same day that judgment was entered in the case of Lockwood v. Sheedy, Cal.App., 321 P.2d 862, the defendants Sheedy recorded a second notice of breach and election to sell under the deed of trust referred to in that opinion. On October 25, 1956, plaintiff Milton Lockwood instituted a second proceeding for an injunction to restrain the sale. A temporary restraining order was issued notifying the defendants to appear and show cause why an injunction pendente lite should not be issued. At the hearing on the order to show cause defendants moved to dissolve the temporary restraining order and abate the action, which motion was granted. Thereafter plaintiff appealed from the order dissolving the restraining order, denying the injunction pendente lite, and staying this ac-

tion until determination of the appeal in the previous case.

[1] It is plaintiff's contention that the court erred in dissolving the temporary restraining order in that (1) defendants failed to give notice as required by section 532 of the Code of Civil Procedure, and (2) that there was no basis for defendants' motion.

Such contention is wholly without merit. The restraining order issued at the commencement of the action expired by its own terms at the hearing on the order to show cause. *Curtiss v. Bachman*, 110 Cal. 433, 42 P. 910; see also section 527, Code Civ.Proc.

[2] Plaintiff's further contention is that the trial court erred in denying an injunction pendente lite and in staying his present action pending a final determination in the previous case. The record discloses that plaintiffs' complaint in the prior action alleged fraud and breach of a modification agreement by the defendants. Such allegations were found by the court to be untrue. Additionally the court found to the effect that plaintiffs were in default. Since the present action was based upon the same allegations of fraud and breach of a modification agreement by defendants, we must agree with the conclusion of the trial court that the prior action involved the same parties and the same issues as those presented in the instant proceeding, and the action should be stayed pending a final determination of the prior proceeding.

[3] Here, as in the previous case, plaintiff also moved to augment the record on appeal by the inclusion of the entire record in the trial court. The motion was submitted to be considered with this appeal. After due deliberation it is our conclusion that here, as in that proceeding, the motion is without merit and the same is denied.

The order is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

157 Cal.App.2d 733

Cite as 321 P.2d 865

Thomas P. GONZALEZ, doing business under the fictitious firm name of Gonzalez & Blanco, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a California Corporation; Inter-California Railway Company, a California Corporation, Defendants and Respondents.

Civ. 22218.

District Court of Appeal, Second District, Division 3, California.

Feb. 20, 1958.

Rehearing Denied March 12, 1958.

Hearing Denied April 16, 1958.

Action against a carrier for losses sustained in a shipment of seed garbanzos from lower California into the United States which was seized by Mexican customs authorities after diversion under the erroneous belief that carriers were attempting to cross the border with cars without clearing with Mexican customs. From a judgment of the Superior Court of Los Angeles County, Lloyd S. Nix, J., for the carriers, the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that it could not be determined as a matter of law that the cars were moved to the port of entry other than with the consent and under the direction of an agent acting within his authority as the agent of the plaintiff.

Judgment affirmed.

1. Evidence ☞77(5)

Failure of plaintiff to call as a witness agent allegedly authorizing diversion of shipment authorized an unfavorable inference to the plaintiff. West's Ann.Code Civ. Proc. § 1963, subd. 5.

2. Carriers ☞104

In action against carrier for losses sustained in shipment of seed garbanzos from lower California into United States, where shipment was seized by Mexican customs authorities after it had been diverted by some one under erroneous belief that carrier was attempting to cross the border with cars without clearing the Mexican customs, admitting testimony of conductor of train on which the cars had moved with

respect to the conductor's instructions he had received was proper.

3. Carriers ☞106

In action against carrier for losses sustained in a shipment of seed garbanzos from lower California into the United States, where shipment was seized by Mexican customs authorities after diversion by some one under erroneous belief that carrier was attempting to move cars into United States without clearing Mexican customs, it could not be determined as a matter of law that cars were moved to port of entry other than with consent and under direction of an agent acting within his authority as agent of plaintiff.

McBain & Morgan and Newell & Chester, Los Angeles, for appellant.

E. D. Yeomans, E. L. H. Bissinger, Walt A. Steiger, Roger M. Sullivan, Los Angeles, for respondents.

SHINN, Presiding Justice.

The present action was brought by Gonzalez against the Southern Pacific Company and its subsidiary, Inter-California Railway Company, for reimbursement for losses sustained in the shipment of seed garbanzos from Navajoa in Lower California to and across the international boundary into the United States. The shipment was seized by the Mexican customs authorities at Algodones, a railway point on the border some 52 miles east of Mexicali. The reason for the seizure was the belief, much later decided to be in error by the Mexican Fiscal Court, that the defendant railroads were attempting to cross the border with the cars without clearing the Mexican customs. By the time the merchandise was released to plaintiff the garbanzos had become unfit for planting, were disposed of at a greatly depreciated price and plaintiff suffered further detriment through the payment of demurrage charges of the railroads, export duties to the Mexican Government and legal and other expenses in an endeavor to recover his property. The defendants answered, denying the material allegations

of the complaint. In a court trial findings and judgment were in favor of defendants; plaintiff appeals.

The garbanzos were grown in the Navajoa area in the State of Sonora. Gonzales undertook to ship approximately 300 metric tons from Navajoa to Tijuana, Mexico, by rail and from Tijuana to Ensenada by truck. Had he succeeded they would have been sold in Ensenada without payment of export duty. Gonzalez paid the growers \$47,552.27 for the seeds and the purchasers in Ensenada had agreed to pay him \$100,350.

The garbanzos were loaded at Navajoa on cars of Ferrocarril Sud-Mexican del Pacifico which transported them to Pascualitos; from that point transportation to Mexicali would be via Sonora-Baja California Railroad Company, the last 50 miles of the trip being over the tracks of Inter-California Railway Company. At Mexicali the shipment would be taken across the international boundary to Calexico via Inter-California Railway Company; from Calexico it would go to El Centro by Southern Pacific; from El Centro to Tijuana via San Diego and Arizona & Eastern Railroad Company and Tijuana and Tecate Railroad Company. At Mexicali the shipment would be transferred to freight cars that had passed inspection by the United States Department of Agriculture, since it would travel through United States territory for a portion of the journey between Calexico and Tijuana. A Mr. Schoen was plaintiff's agent and field representative. By his arrangement, six cars were loaded by Ferrocarril at Navajoa. Bills of lading to plaintiff were issued March 10 and 11, 1949. The shipment was consigned to the order of plaintiff with notification to be given to J. F. Gonzalez & Co. The bills of lading noted that the freight was paid to Benjamin Hill Station where freight was to be collected to Mexicali. Inter-California did not accept a bill of lading to a point beyond the international boundary line. The bills of lading were endorsed by Gonzalez and delivered to Necoeches & Martinez, his Mexican customs brokers in Mexicali. On

or about March 15, Mr. Schoen arranged with Mr. Galaz, station agent of Inter-California at Mexicali, for six empty box cars which had passed inspection by the United States Department of Agriculture. He executed a written order for the American freight cars indicating that the destination was Tijuana. Because of the crowded condition of the tracks at Mexicali it was arranged by Galaz that the loading of the cars would be made at Packard, a siding about four miles southeast of Mexicali. One of the cars from Navajoa arrived in Mexicali on March 15 and moved to Packard on March 17; the others arrived March 17 and moved to Packard on March 18. Bills of lading covering the movements to Packard were executed by Mr. Schoen. At Packard the garbanzos were loaded from the cars in which they had originated at Navajoa into the six empty box cars ordered by Schoen. The loading took place March 18 and 19. A Mr. Maldonado was the conductor of Inter-California's train numbered 357 or 358, which moves from Mexicali to Los Algodones and back, a distance of some 52 miles. On the afternoon of March 19, Maldonado caused the six American cars to be moved from Packard back to Mexicali, thinking they were fully loaded, which was not the case. Schoen learned the cars were only partially loaded and on the morning of March 22, he contacted a Mr. Limon, who was in charge of Inter-California's yard operations in Mexicali and requested him to return the cars to Packard to complete the loading. The movement was accomplished later that day by Inter-California's train No. 358.

The following day, March 23, Maldonado received telephone instructions from Mr. Polkinhorn, a customs broker at Mexicali, to move the six cars from Packard to Los Algodones, which is situated at the international boundary directly across from Cantu on the American side. This direction was given after a conversation between Polkinhorn, Schoen and one Araiza, Inter-California's agent at Mexicali, to be referred to later. Maldonado moved the cars

to Los Algodones and placed them on the house track adjacent to the railroad station, some 300 feet from the boundary.

At about 1 p. m., on March 23, Jesus Trajos, an employe of Polkinhorn, presented to Luis Rangel, Inter-California's agent at Los Algodones, United States Customs papers authorizing the movement of the six carloads of garbanzos from Los Algodones into the United States. Trajos had no clearance forms from the Mexican Customs officials. He told Rangel that he represented Gonzalez, that he wanted the cars moved across the boundary that night, and that he had to make immediate arrangements with the Mexican Customs authorities because the office closed at 2 p. m. Although the rules of Inter-California forbade him to order the movement of goods across the international boundary without prior clearance from the Mexican officials, Rangel telephoned the chief dispatcher at Mexicali and ordered him to have the cars moved to the American side.

That evening, the chief dispatcher telegraphed Mr. Hyams, who was the conductor of Southern Pacific's freight train operating between El Centro and Yuma over the tracks of Inter-California between Algodones and Mexicali, and instructed Hyams to pick up the cars at Los Algodones and move them across the boundary at that point. The train left El Centro at 9 p. m. and arrived at Los Algodones shortly before midnight. Pursuant to Hyams' instructions, the crew coupled the six cars onto the Southern Pacific train and moved them from the house track to the international line. Meanwhile, Hyams went to the Mexican Customs House to obtain a clearance. It is sufficient to say at this point that there were no papers furnished Mexican Customs and that the cars were put back onto the house track. They were not taken across the boundary into the United States.

The apparent attempt to move the six cars across the boundary without proper clearance aroused the suspicions of the Mexican Customs officials and the cars were impounded on March 24, pending an

investigation. The garbanzos were taken to a siding near Los Algodones where they remained under guard until August 30, 1949, when they were released to Gonzalez. Meanwhile, the time for planting garbanzo seeds in the Ensenada area had passed and the garbanzos had been rendered unfit for seed purposes due to the intense heat in Los Algodones.

There was evidence that Gonzalez sold the garbanzos in the United States for food purposes for a gross price of \$69,300, less additional freight and brokerage charges of \$14,996.59, which reduced his net salvage to \$54,303.41; his loss of gross receipts was \$46,046.59. Since the garbanzos were sold in the United States, Gonzalez was required to pay Mexican export duties amounting to \$25,035.12; he also incurred litigation expenses of \$20,378.04 in obtaining a judicial clearance from the Mexican Fiscal Court and paid \$4,316 to Inter-California under protest as demurrage charges for storage of the garbanzos between March and August 1949. The total damage claimed by Gonzalez was \$95,775.75.

The principal questions presented to us for decision are the following: (1) Was there a contract to deliver the shipment to Mexicali for export at that point? (2) Was the diversion of the shipment to Algodones unauthorized by plaintiff? (3) Was the applicable Statute of Limitations that of the laws of Mexico or the laws of California?

With respect to the first question we shall assume that there was a contract to deliver the shipment to Mexicali. It is not a decisive question and it does not require discussion.

The crucial question is the second one, namely, whether the shipment was diverted by defendants to Algodones without the consent of plaintiff. Defendant's witness, Maldonado, testified that he received instructions from Polkinhorn to take the cars to Algodones. This testimony was received over the objection of defendants that it was not shown that Polkinhorn had authority to control the routing of the ship-

ment, but on the contrary it was shown by the evidence that he had no such authority. He was employed for the single purpose of arranging with United States Customs for the receipt of the goods into California at Mexicali. Plaintiff testified that Polkinhorn was employed for no other purpose and had nothing whatever to do with the routing of the shipment; Schoen was plaintiff's agent for that purpose.

We may agree with plaintiff that there was no competent evidence that Polkinhorn was authorized by the terms of his employment as customs broker to cause the cars to be diverted from Packard to Algodones, and that any statements he may have made would be incompetent to establish the scope of his agency. Had there been no evidence of Polkinhorn's authority other than the above, plaintiff's objection to evidence of statements to Maldonado should have been sustained. However, the circumstances in evidence presented the question whether Polkinhorn in giving instructions to Maldonado was acting with the knowledge and consent of Schoen. The evidence was that defendants knew and recognized the fact that Schoen had authority to arrange for and control the shipment. Maldonado testified that when Polkinhorn gave him instructions to move the cars, he stated that he was acting on behalf of Gonzalez and Schoen. As previously stated, Mr. Schoen had arranged to have six American box cars sent to Packard to be loaded. When he discovered that they had been brought back to Mexicali, not fully loaded, he had them returned to Packard. Ruben Araiza was station accountant of Inter-California at Mexicali. While the six cars were at Mexicali Araiza had a conversation with Polkinhorn and Schoen in front of his office. He testified by deposition that "sometimes Polkinhorn and sometimes Schoen would ask questions." Polkinhorn asked if the railway company could move freight from Algodones to Cantu, stating that he had some freight to move; "they said they had some cars, but they didn't say how many cars or anything like that." Araiza answered "we could move freight

from Algodones to Cantu, provided we had the customs clearance." Araiza also testified that Polkinhorn explained to Schoen what would be required, namely, the same papers that were required to move freight from Mexicali to Calexico; freight was seldom moved from Algodones to Cantu. Araiza then had way bills for six cars of garbanzos issued by Ferrocarril Sonora, which showed Mexicali as their destination. The testimony of Maldonado related to a time subsequent to the conversation just mentioned. According to Maldonado, Polkinhorn told him that he wanted to get the cars to Algodones "in a limited time" and stated that they were to be billed in the name of J. F. Gonzalez, J. Chong. Maldonado wrote these names in his day book, writing "Chong" for Schoen, and made out a way bill for the cars, which he turned in to the railway's agent at Algodones. Maldonado had previously received directions from Schoen with respect to the earlier movement of the cars. Defendant's conductor, Hyams, whose train ran between El Centro and Yuma and was scheduled to pick up the cars at Algodones and take them to Cantu, testified that he had received his orders from the chief dispatcher at Mexicali. His train arrived at Algodones around 11:30 p. m.; he identified the cars on the house track and inquired of Diaz, the Mexican Customs officer, whether he had papers covering the cars and learned that Diaz had none; he went across the line to find out about the American papers and discussed them with the customs officer, Mr. Miller, at the latter's office. Present were Polkinhorn and Schoen. Hyams was informed by Miller that the papers were in order with respect to American Customs. Hyams asked Polkinhorn to go across and get the papers for clearance with Mexican Customs and Polkinhorn answered that they had a man there taking care of it. Hyams went over and asked Diaz to wake up the chief of Customs, Cristo, which Diaz did. Cristo appeared and said "The cars can't move." Hyams then reported to Polkinhorn and Schoen that the papers were not ready and that he could not wait any longer.

Schoen then said "Well, everything is alright," and Hyams replied "No, everything isn't alright, until I see them papers." Hyams then put the cars back on the house track; they did not at any time cross the border, which was some 300 feet away. This was the testimony with respect to the critical question whether any authorized agent of plaintiff ordered or advisedly acquiesced in the movement of the cars from Packard to Algodones. Neither Polkinhorn nor Schoen was called as a witness, nor does the record disclose that any reason was stated by plaintiff for failure to call them, or to take their testimony by deposition.

The court found that it was not true that the cars were diverted to Algodones without the consent of plaintiff, and since plaintiff himself had no part in the transaction and Polkinhorn was not shown to have necessary authority, the finding implies either that the movement of the cars to Algodones was under directions given by Schoen to Polkinhorn, to be relayed to Maldonado, or that Schoen, knowing Maldonado was being given the instructions, consented either expressly or by his failure to object. That Schoen and Polkinhorn were considering sending the cars to Algodones appeared from the testimony of Araiza. There was the additional circumstance that both Polkinhorn and Schoen went to Algodones for the purpose of accomplishing the movement of the cars into California. The failure to accomplish this purpose was due to the fact that although the papers necessary for the Mexican Customs officials had been placed in the hands of Necoechea & Martinez at Mexicali, none had been furnished to the customs officials at Algodones. We think it is clear from these facts that the court could reasonably have inferred that Polkinhorn telephoned instructions to Maldonado with the knowledge and consent of Schoen, and not upon his own responsibility. There would have been no reason for the two men to go to Cantu if they had not known that the cars were being taken there, and there was no apparent reason for their having that knowledge if directions had not been given

to Maldonado in the manner described by the latter. There was no apparent reason for Maldonado's taking the cars to Algodones if he had not received directions to do so. Maldonado knew that Schoen was plaintiff's agent; he had previously acted upon instructions from Schoen with respect to earlier movements of the cars. The fact that Maldonado entered in his day book "J. Chong," for Schoen, indicated that he believed Polkinhorn was telephoning on behalf of Schoen and with the latter's consent.

[1] The reasonableness of the inference that Schoen authorized the diversion of the shipment was strengthened by the failure of plaintiff to furnish the court with the testimony of either Polkinhorn or Schoen. If their testimony had not been available plaintiff should have disclosed that fact. Ordinarily, it would have been presumed that their testimony, if given, would have been adverse to plaintiff. Code Civ.Proc. § 1963, subd. 5; *Breland v. Traylor Eng. & Mfg. Co.*, 52 Cal.App.2d 415, 425-426, 126 P.2d 455, and cases cited; *Logan v. Andrews*, 25 Cal.App.2d 683, 690-691, 78 P.2d 748; *Simpson v. Bergmann*, 125 Cal.App. 1, 9, 13 P.2d 531. The trial court could only assume that if they had testified neither would have contradicted the testimony of Araiza, Maldonado or Hyams. At the conclusion of Hyams' direct examination, he was not cross-examined by plaintiff, and counsel stated "Your Honor, I think I won't ask any questions. There is nothing that concerns our phase of the case that would be substantial disagreement with Mr. Hyams, so he can be excused as far as I am concerned."

[2,3] In view of the foregoing it was not error to receive the testimony of Maldonado with respect to the instructions he had received. It cannot be determined as a matter of law that the cars were moved to Algodones other than with the consent and under the direction of Schoen acting within his authority as plaintiff's agent.

The question whether the applicable Statute of Limitations was that of the laws of Mexico or of California has been ably

briefed by counsel, but in our disposition of the appeal we do not find it necessary to decide that question.

Upon the findings which have substantial support in the evidence, the judgment in favor of defendants must be affirmed.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



157 Cal.App.2d 851

The PEOPLE of the State of California,
Plaintiff and Appellant,
v.

ONE 1955 CHEVROLET BEL AIR, Engine
VC550072543, License DAB 972, Defendant
and Respondent.

No. 17729.

District Court of Appeal, First District,
Division 1, California.

Feb. 25, 1958.

As Corrected March 17, 1958.

Proceeding by assignee of automobile conditional sales contract to avoid forfeiture of automobile for narcotics violation. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., ordered the automobile forfeited subject to the assignee's lien. The state appealed. The District Court of Appeal, McMurray, J. pro tem., held that evidence relating to visit to buyer's home and discussion with his parents and personal interview with buyer and check on buyer's employment and credit standing supported finding that there had been a reasonable investigation of moral responsibility, character and reputation of buyer as required by statute.

Affirmed.

1. Forfeitures ⇨5

Claimant seeking to avoid forfeiture of his interest in automobile for narcotics

violation had burden of proving that the investigation he made before acquiring his interest, fulfilled the statutory requirements. West's Ann. Health & Safety Code, § 11620.

2. Forfeitures ⇨3

The investigation which statute requires claimant to make in order to avoid forfeiture of his interest in automobile for narcotics violation must be of the moral responsibility, character, and reputation of purchaser of automobile and must not be limited merely to an inquiry as to purchaser's financial standing or credit rating. West's Ann. Health & Safety Code, § 11620.

3. Forfeitures ⇨5

In proceeding by assignee of automobile conditional sales contract to avoid forfeiture of automobile for narcotics violation, evidence relating to visit to buyer's home and discussion with his parents and personal interview with buyer and check on buyer's employment and credit standing, supported finding that there had been a reasonable investigation of moral responsibility, character and reputation of buyer as required by statute. West's Ann. Health & Safety Code, § 11620.

Edmund G. Brown, Atty. Gen., of the State of Cal., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for appellant.

Pillsbury, Madison & Sutro, Francis N. Marshall, Thomas E. Haven, Willis D. Hannawalt, San Francisco, for respondent, The Bank of California, Nat. Ass'n.

McMURRAY, Justice pro tem.

Several months after The Bank of California, National Association, as legal owner of the defendant vehicle, lent money to Eugene L. Selmi whereby he became the registered owner of the defendant vehicle, it was seized by the state for having been unlawfully used to transport narcotics. The respondent did not dispute the fact and the state proved that the vehicle had been so unlawfully used. The state does

not contend that the conditional sale contract between Selmi and Gateway Chevrolet, respondent's assignor, was other than bona fide, or that respondent's interest in the vehicle was created other than without knowledge that the vehicle was or would be used unlawfully.

After a trial before the court without a jury, findings were made that respondent's lien was created after an investigation of the moral responsibility, character and reputation of Selmi and that the investigation was made in good faith and was reasonable in the circumstances. The trial court ordered the seized vehicle forfeited to the state subject to respondent's lien. On this appeal the state contends that under the evidence before it the trial court was in error as a matter of law in finding that respondent's investigation was reasonable under the circumstances. At the time respondent acquired its lien in July, 1955, Health and Safety Code, section 11620, provided as follows: "The claimant of any right, title or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged * * *." Under the facts presented in this appeal we feel that the section as it stood prior to its amendment in 1955 and as above quoted was the law which governed this action.

In July, 1955, Eugene L. Selmi went to Gateway Chevrolet Company to attempt to purchase a car. He discussed the matter with Mr. Allen, a salesman for that company, and Mr. Allen, finding that Selmi's finances were inadequate to meet the usual requirements of Gateway's source of financing, referred the financing to The Bank of California, as Allen from previous dealings was aware that the bank might finance a purchase on terms which appeared to be feasible for Selmi. Allen filled out a purchaser's credit statement, and because he had not known Selmi before the purchase

of the car and because of the uncertain financial status, he visited the Selmi home to verify the information. He did not testify as to the details of the conversation with Selmi's parents but did state that he determined from his investigation that the boy had a "solid background" and was convinced that he had a respectable standing in the community. Allen also telephoned the Daly City Water Department to verify Selmi's employment. He testified that the number he used he believed to be the one given him by Selmi. However, it turned out that the number was in fact the number of the "Selmi Realty Company" instead of the Water Department at which Selmi worked. The "Selmi Realty Company" was owned and operated by Selmi's parents. The number of the company was Plaza 5-5800; whereas the number of the Water Department, Selmi's employer, was Plaza 5-0850.

Allen did not specifically ask anyone relative to Selmi's moral character.

The California Bank also investigated Selmi. One of their representatives personally interviewed him and testified that he felt a personal interview is the best way to avoid obvious moral risks. He further testified that in such an investigation the "character, capacity and credit" of an applicant for credit is considered by the bank, and that in his interview with Selmi he had this in mind. The representative of the bank stated that he did not personally check the information given him by Selmi but that the investigation was done under his direction. The personal references given by the purchaser, Selmi, were not checked by the bank, because the representative said that in his experience such references are likely to mislead the lender. Inquiry made by Mr. Allen revealed that Selmi had been employed for at least a year by Daly City at their Water Department and had good prospects for permanency, that his immediate supervisor at the Water Department had known Selmi for over twenty years and that Selmi had worked for the Water Department "roughly a couple of years" and that his employ-

ment was "steady." There is no testimony that any person during the course of this investigation made any direct inquiry as to the moral character of Selmi. The attorney general urges that in the absence of such inquiry the investigation is insufficient as a matter of law to show that a reasonable investigation was made.

[1,2] The burden of proving that the investigation fulfilled the requirements of Health and Safety Code, section 11620, is on the claimant. *People v. One 1940 Buick 8 Sedan*, 70 Cal.App.2d 542, 161 P.2d 264. This investigation must be of the moral responsibility, character, and reputation of the purchaser and not limited merely to an inquiry as to his financial standing or credit rating. *People v. One 1953 Pontiac*, 135 Cal.App.2d 195, 286 P.2d 885. In defining a bona fide investigation the following has been laid down as a criterion: "It would seem that a *bona fide* investigation should, among other essentials, reveal the home address of the prospect, his employer, either past or present, the source of his income, his family or social connections, and as in the case here of a stranger, some inquiry as to his prior location and his standing in that community." *People v. One 1939 Buick 8 Coupe*, 43 Cal.App.2d 411, at page 416, 110 P.2d 1013, 1016. In *People v. One 1940 Buick 8 Sedan*, supra, 70 Cal.App. 2d at page 548, 161 P.2d at page 268 in discussing the sufficiency of the investigation required by statute, it is said, "1. The defense that the investigation required by the statute has been made is an affirmative defense, and the burden of proof on the issue rests with the claimant.

"2. The question as to whether a proper investigation has been made is one of fact and is to be tested by the legal standards ordinarily applied to such fact questions.

"3. The statute does not prescribe the maximum or minimum of the investigation that must be made. It requires a 'reasonable' investigation of the factors involved. What is reasonable must be governed by the facts of each case.

"4. An investigation into the financial standing or the credit rating of the car

purchaser is not sufficient—the law requires an investigation of the 'moral responsibility, character, and reputation of the purchaser.'"

In *People v. One 1949 Ford Tudor Sedan*, 115 Cal.App.2d 157, at page 166, 251 P.2d 776, 781, it was said, "* * * whether a sufficient or insufficient inquiry has been made is a question of fact, and generally must be governed by the facts of each case. Subject to the general rules already mentioned, a precise test is impracticable. The best that can be done is to look at the facts and holdings of the decided cases and compare them with the facts of the case involved, so as to ascertain, if possible, by this inductive process, on which side of the line the case involved falls." Many cases have been cited to this court by the parties, but none is absolutely determinative of the question here.

[3] In the case at bar it would appear that respondent's investigation, and the results of investigation by others which were conveyed to respondent, included a visit to the purchaser's home, discussion with his parents, a personal interview of the purchaser, and a check on his employment and on his credit standing. From all this respondent could well form an opinion of the purchaser's standing in the community which is some evidence of a person's moral character. Perhaps the basic reason for such investigation was to ascertain whether the purchaser was capable of repaying the loan, but this does not preclude the conclusion that in such investigation some consideration was given to the party's moral character when the testimony of respondent's representative that such was so is remembered. This was highly likely here, since it was a doubtful loan, and it would seem unreasonable that the loan would be extended unless the lender was satisfied as to the purchaser's character and moral standing. From the facts revealed it cannot be said that the finding of the trial court that a reasonable investigation was made is without support.

To require lenders to ask specific questions as to a borrower's morals and particu-

larly as to his use of narcotics might well result in an employer concluding that the lender knew something detrimental to or derogatory about the morals and habits of his employee. It would seem to be of doubtful value to a seller and perhaps extremely detrimental to an employee to have a third person go to an employer and ask, "Does the employee use narcotics?" or "Did he ever use narcotics?" The asking of such a question would be sufficient to raise doubt in the mind of any employer who employed many persons; and it is questionable that a person who did know of one's use of narcotics would answer such a question in the affirmative because such knowledge would generally be had only by co-participants in such use.

It may be noted in passing that section 11620 of the Health & Safety Code was amended in 1955 to provide: "The claimant of any right, title or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged but, in any case, a reasonable investigation of the moral responsibility, character and reputation of the purchaser or mortgagor shall be deemed to have been made if it was made in good faith and it disclosed and the fact also was that:

"(a) The purchaser or mortgagor was at the time the holder of any occupational or business license issued by the State of California, or

"(b) The purchaser or mortgagor was at the time a civil service employee or an employee with tenure of the United States, the State of California or of any political subdivision thereof or of any municipal corporation, or

"(c) The purchaser or mortgagor was at the time a commissioned or noncommissioned officer of any of the branches of the armed forces of the United States or of the State Militia, or

"(d) The purchaser or mortgagor, for at least one year immediately prior to the time such right, title or interest was created, had been regularly employed in a legitimate occupation and his present or last employer reports in substance that he is of good moral responsibility, character and reputation,

"(e) And no facts were known to the claimant or his successor tending to show that the purchaser or mortgagor was not of good moral responsibility, character and reputation."

It may be seen that under the provisions of the amended section the investigation made by respondent would now be reasonable and sufficient.

Under the facts here disclosed we cannot say as a matter of law that the finding of the court below was erroneous. The judgment appealed from is affirmed.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.



157 Cal.App.2d 756

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Roy MORGAN, Defendant and Appellant.
Cr. 3380.**

District Court of Appeal, First District,
Division 1, California.

Feb. 21, 1958.

Hearing Denied April 16, 1958.

Prosecution for sale of heroin to a person whom police officers, upon four separate occasions, "strip searched" and supplied with currency and took by auto to point near defendant's apartment where he departed in direction of defendant's apartment and returned after a brief interval upon each occasion with a package of her-

oin and without the money. From adverse judgment of the Superior Court, City and County of San Francisco, C. Harold Caulfield, J., and from an order denying a new trial, the defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that failure to prove that the informant contacted no one upon his way to and from defendant's apartment resulted in a fatal gap in chain of proof tending to show that defendant made a sale of heroin on dates charged.

Judgment and order reversed.

1. Poisons ☞9

In prosecution for sale of heroin to person whom police officers, upon four separate occasions, "strip searched" and supplied with currency and took by auto to point near defendant's apartment, where he departed in direction of defendant's apartment and returned after a brief interval upon each occasion with package of heroin and without money, failure to prove that informant contacted no one upon his way to and from defendant's apartment resulted in a fatal gap in chain of proof tending to show that defendant made a sale of heroin on dates charged. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ☞404(4)

In prosecution for sale of heroin to a person whom police officers "strip searched" and supplied with currency and took by automobile to point near defendant's residence, where such person departed in direction of defendant's place of abode and returned on each occasion with package of heroin and without money, packets of heroin, which such person delivered to officers, were inadmissible in absence of evidence showing that such person contacted no one upon his way to and from defendant's apartment. West's Ann.Health & Safety Code, § 11500.

3. Poisons ☞9

Evidence was insufficient to sustain a conviction for maintaining a place for the

use and disposal of heroin. West's Ann. Health & Safety Code, § 11557.

4. Criminal Law ☞1170½(1)

Witnesses ☞216

In prosecution for sale of heroin to an informant-participant, who was "strip searched" by police officers on four occasions, supplied with currency by them, and taken by auto to a point near defendant's residence from where he departed in direction of defendant's apartment and returned each time without currency and with package of heroin, refusal of defendant's demands for identity of informant-participant, required reversal of conviction. West's Ann.Health & Safety Code, §§ 11500, 11557; West's Ann.Code Civ.Proc. § 1881, subd. 5.

Benjamin Davis, Lionel Browne, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of a violation of section 11500 of the Health and Safety Code, sale of heroin on August 30, 1956 (count I), and of a violation of section 11557 of that code, opening and maintaining a place for selling, giving away and using narcotics on that date (count II), defendant has appealed from the judgment and from the order denying a new trial.

[1,2] Upon four separate occasions (August 21, 24, 28 and 30, 1956) two officers "strip searched" an informant, supplied him with currency and took him by auto to a point near defendant's residence, whence the informant departed in the direction of defendant's place of abode.¹ In each case one of the officers remained in the auto and the other took a position in a sandwich shop across the street from defendant's house. After a brief interval the informant upon each occasion returned to

1. Upon none of these occasions did the officers have a warrant for the arrest of

the defendant or the search of his apartment.

the officers with a package of heroin and without the money. The officers, not the informant-participant, testified at the trial. The prosecution refused to disclose the name of the informant-participant, claiming the information privileged under section 1881(5) of the Code of Civil Procedure.

There is no direct evidence that defendant was at home upon any occasion except the last. There is a gap in the evidence of the officers' observations of the movements of the informant-participant after he left the auto, on the way to and from defendant's apartment, in the following particulars: (1) In respect to August 24 and 28, there is no evidence on the question whether the informant-participant contacted anyone while out of the sight of the officer who remained in the auto; (2) In respect to August 30, neither officer was asked whether the informant-participant contacted anyone between the time he left the auto and the time he returned to it.

The packets of heroin which the informant-participant delivered to the officers on the 24th, 28th and 30th of August were admitted in evidence over the objection that they were incompetent, irrelevant and immaterial as regards this defendant and have no bearing upon this case. Because of the lack of connection with the defendant, the objection should have been sustained. *People v. Dixon*, 94 Cal. 255, 258, 29 P. 504 [acts and declarations of third parties in attempting to influence a witness, not in presence of the defendant or authorized by him, inadmissible]; *People v. Choy Ah Sing*, 84 Cal. 276, 278, 24 P. 379 [same]; *Union Transportation Co. v. Bassett*, 118 Cal. 604, 613, 50 P. 754 [evidence that a man offered for \$2,000 to obtain a rescission of order of removal, without a showing of connection with defendants, in order to impugn motives of defendants in ordering removal, held inadmissible]; *Edwards v. San Jose Printing & Publishing Soc.*, 99 Cal. 431, 439, 34 P. 128 [evidence of plaintiffs' use of money in elections prior to publication of libel held inadmissible in absence of showing

that defendants had knowledge of such acts when making the publication complained of].

The failure to prove that the informant-participant contacted no one upon his way to and from defendant's apartment resulted in a fatal gap in the chain of proof tending to show that defendant made sales of heroin on August 24, 28 and 30. There was, therefore, a failure to prove count I, which charged a sale on August 30. In *People v. Barnett*, 118 Cal.App.2d 336, 257 P.2d 1041 (hearing by Supreme Court denied), such a gap was deemed fatal. There the unnamed operator who supposedly made a purchase was out of sight of the officer-witness for an hour and a half, but we do not consider the length of that period a significantly differentiating factor. In *People v. Richardson*, 152 Cal.App.2d 310, 313-314, 313 P.2d 651 (hearing by Supreme Court denied), the officer stayed in the car while the defendant and two other persons entered defendant's residence. About 20 minutes later one of the three, not the defendant, came out and handed the officer a packet containing heroin. The evidence was held insufficient. Similarly, in our case, this gap in the chain of evidence leaves without support the verdict that defendant made an unlawful sale on August 30. It is, therefore, unnecessary to consider whether without such a gap the evidence would have been sufficient.

[3] This failure to prove three of the four sales which the prosecution undertook to prove, coupled with the erroneous admission of the three packets of heroin, leaves such slender support for the verdict that on August 30 defendant maintained a place for the use and disposal of heroin, we are impelled to hold the indicated errors prejudicial. This requires a reversal in respect to count II also.

[4] The refusal of defendant's demands for the identity of the informant-participant additionally requires reversal in respect to both counts. *People v. Lawrence*, 149 Cal.App.2d 435, 308 P.2d 821, hearing by Supreme Court denied; *People v. Cas-*

tiel, 153 Cal.App.2d 653, 315 P.2d 79, hearing by Supreme Court denied.

The judgment and the order denying a new trial are reversed.

PETERS, P. J., and BRAY, J., concur.



157 Cal.App.2d 603

Birja M. WILKINS and Mildred L. Wilkins,
Plaintiffs and Respondents,

v.

Harry OKEN, Harry S. Oken, Frederick S. Oken, Harry Brenner, Melvina Brenner, Mrs. Melvina Oken, Mrs. Harry Oken, Melvina Brenner Oken, Dorothy Chattoff, Dorothy Bertha Chattoff Oken, Dorothy Oken, El Monte School District, a political subdivision of the State of California, Consolidated Escrow Company, a corporation, Wilshire Escrow Company, a corporation, P. H. Youngblood, Ellen W. Youngblood, et al., Defendants,

Harry Oken, Frederick S. Oken and Melvina Brenner Oken, Appellants.

Civ. 22796

District Court of Appeal, Second District,
Division 1, California.

Feb. 17, 1958.

Action by grantors for rescission of sale of real property. From an order of the Superior Court, Los Angeles County, Bayard Rhone, J., granting a preliminary injunction, the defendants appealed. The District Court of Appeal, Fourth, J., held that where ten acres of 30 acre tract of land had been condemned by school district, notice of pendency of action by grantors of land for rescission of sale was inadequate protection to grantors with respect to ten acres of land acquired by school district, and grantors were entitled to injunction restraining grantee and others from withdrawing any money de-

posited by school district with court in condemnation proceeding pending determination of action for rescission based on misrepresentation and fraud.

Judgment affirmed.

1. Injunction ⇨1, 128

Injunction is an extraordinary remedy and courts require a clear showing that threatened and impending injury is great, and can be averted only by injunction. West's Ann.Code Civ.Proc. §§ 409, 526, subd. 3.

2. Lis Pendens ⇨22(1)

Lis pendens, by giving constructive notice to world of claims which are asserted to certain land, is generally regarded as adequate remedy to protect rights of parties in action for rescission of sale of land.

3. Conversion ⇨4

Under doctrine of equitable conversion, money awarded for land appropriated to public use is considered as land with respect to all rights and interests therein.

4. Eminent Domain ⇨158

Where ten acres of 30 acre tract of land had been condemned by school district, notice of pendency of action by grantors of land for rescission of sale of land was inadequate protection to grantors with respect to ten acres of land acquired by school district, and grantors were entitled to injunction restraining grantee and others from withdrawing any money deposited by school district with court in condemnation proceeding pending determination of action for rescission. West's Ann.Code Civ.Proc. §§ 409, 526, subd. 3.

5. Attorney and Client ⇨182(2)

In absence of contract, an attorney is not entitled to an equitable lien on an award in a condemnation proceeding in favor of his client.

Vaughan, Brandlin & Baggot, Los Angeles, for appellants.

Robert Wanamaker, John Ruskin Lane and William A. Tookey, Pasadena, for respondents.

FOURT, Justice.

This is an appeal from an order granting a preliminary injunction. The effect of the injunction is that, pending the outcome of the present action for rescission of a sale of real property, the parties are restrained from taking possession of those portions of an eminent domain award to which they have been held to be entitled in an eminent domain proceeding commenced by the El Monte School District, in which proceeding the judgment is not yet final.

Upon the ultimate determination of the rescission action, the amount available under the final judgment in the eminent domain award will be distributed to the sellers Harry Oken and the plaintiffs; or, in the alternative, to the purchaser Melvina Brenner Oken and the sellers Harry Oken and the plaintiffs as owners of the second deed of trust on the property.

A resume of the facts is as follows: Title to the parcel of real property known as Hicks Camp and consisting of approximately thirty acres, was vested in plaintiffs and Harry Oken as tenants in common, each of them owning an undivided one-third interest. The interest of Harry Oken was held in the name of defendant Frederick S. Oken, as trustee for Harry Oken. Frederick S. Oken is the adult son of Harry Oken. Upon the real property were located a partially completed water system and numerous small and sub-standard dwellings, which were owned by the occupants thereof, who rented the land.

A grant deed executed January 23, 1956 by plaintiffs and Frederick S. Oken conveyed title to Melvina Brenner. Harry Oken and Melvina Brenner were married February 1, 1956, and the aforesaid grant deed was recorded on February 1, 1956. The sale price was \$121,000. The property was subject to an existing first trust deed with an unpaid balance of approximately \$66,000 in favor of defendants P. H. Youngblood and Ellen W. Youngblood; and sellers took back a second trust deed in the amount of \$32,500.

Previously, on December 15, 1954, the El Monte School Board District had com-

menced the eminent domain proceeding to appropriate about ten acres of said Hicks Camp, in which a verdict was returned for the real property, improvements and dwellings taken in the amount of \$95,149.90, and for severance damage to the remaining property in the amount of \$17,750. In a second phase of the eminent domain proceeding to apportion the award, judgment was entered that \$30,764.85 be paid to plaintiffs and to defendant Frederick Oken on their promissory note, thereby removing the lien of the second trust deed; that \$45,000 be paid to defendants P. H. Youngblood and Ellen W. Youngblood on the first trust deed; that \$1,550 be paid to certain of the tenants for their dwellings; and that the balance of \$35,585.05 be paid to Melvina Brenner Oken as owner.

The El Monte School District paid the award by placing the entire amount on deposit with the clerk of the superior court. An appeal by the tenants from the judgment in the eminent domain proceeding was pending at the time the present action to rescind the sale to Melvina Brenner because of misrepresentations and fraud and seeking an accounting was filed on December 12, 1956. Affidavits were filed, and upon appropriate motion, a preliminary injunction was granted May 8, 1957, "restraining all parties from withdrawing any money deposited with the court until final judgment or further order of court."

Appellants contend that a preliminary injunction should not be issued in a doubtful case; that the plaintiffs have not sustained their burden of showing a legal right to the injunction, and that the benefits to be gained by the plaintiffs outweigh the detriments to be suffered by the defendants; that plaintiffs have an adequate remedy at law; that he who seeks equity must do equity, and that plaintiffs have not done or offered to do equity herein; that no cause of action is stated against the clerk of the superior court; and that the complaint does not state facts sufficient to constitute a cause of action.

Code of Civil Procedure, section 526, subd. 3, provides as follows:

"An injunction may be granted in the following cases:

* * * * *

"3. When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual; * * *."

[1] Injunction is an extraordinary remedy and courts have consistently proceeded with great caution in exercising their power, and have required a clear showing that the threatened and impending injury is great, and can be averted only by injunction.

[2-4] By giving constructive notice to the world of the claims which are asserted to certain land, *lis pendens* is generally regarded as an adequate remedy to protect the rights of the parties in an action for rescission of a sale of land. In the instant action, pursuant to the provisions of the Code of Civil Procedure, section 409, a notice of pendency of action was filed; and this legal remedy should be regarded as adequate protection to the plaintiffs as to the approximately twenty acres of Hicks Camp which is not affected directly by the eminent domain proceeding. The situation is quite different, however, as to the approximately ten acres to which the fee now stands in the El Monte School District, free and clear of the rights of any parties to this suit. Under the doctrine of equitable conversion, money awarded for land appropriated to the public use is considered as land with respect to all rights and interests therein. *Los Angeles Trust & Savings Bank v. Bortenstein*, 47 Cal.App. 421, 423, 190 P. 850; *Pomona College v. Dunn*, 7 Cal.App.2d 227, 232, 46 P.2d 270.

Notwithstanding the doctrine of equitable conversion, the filing of a *lis pendens* is completely ineffectual as a protection for the rights of the parties with respect to the money deposited with the clerk of the superior court in payment of the condemna-

tion award. In the absence of some restraint the defendants could, and the plaintiffs contend that the defendants would, secure and misapply and disburse the funds which, under the doctrine of equitable conversion, stand in place of the land. Thereafter if the plaintiffs should prevail in the rescission action, any judgment would not adequately protect the rights of the parties insofar as the specific funds are concerned, and plaintiffs would be relegated to the position of common creditors of the defendants.

There is the additional possibility of harm to the plaintiffs in that the payment to be made to plaintiffs and the defendant Frederick S. Oken of \$30,764.85 representing the balance due on a second trust deed executed in their favor as sellers by Melvina Brenner Oken as buyer, would be regarded in law as a ratification by them of the sale and that they would thereby be estopped to rescind the sale.

In balancing the equities, it would appear that the only detriment which the defendants would suffer because of the injunction would be that for a comparatively short time their funds will have been withheld from them. Plaintiffs have posted a bond of \$5,000. In addition, a substantial part of the money on deposit with the clerk of the superior court unquestionably belongs to the plaintiffs, and the court could properly order payment of interest from that amount, thereby adequately compensating defendants for any detriment suffered by the withholding of their funds.

[5] Appellants further assert that plaintiffs have neither paid nor offered to pay any part of the attorneys' fees and costs in the condemnation action. A review of the record fails to disclose any contract creating a lien against monies collected by any attorney on behalf of any client in the condemnation action. In the absence of a contract creating such a lien, we know of no rule entitling an attorney to an equitable lien on any specific funds under the circumstances of this case.

A review of the record discloses that the clerk of the superior court is not a

party to the present action, and the restraining order is not directed to the clerk, but is directed to the appellants and the respondents herein.

The trial court in overruling a general demurrer to the complaint held, we think correctly, that the complaint does state a cause of action. 36 Calif.L.Rev. 606, 610; California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593; Rosemead Co. v. Shipley Co., 207 Cal. 414, 421-422, 278 P. 1038.

Under the circumstances of this case, we believe the issuance of the injunction was proper.

Judgment affirmed.

WHITE, P. J., and HERNDON, J. pro tem., concur.



157 Cal.App.2d 730

L. M. BAXTER, doing business as **L. M. Baxter Co.**, Plaintiff and Appellant,

v.

Herbert L. KRIEGER et al., Defendants.

Sunbeam Lighting Co., a Limited Partnership, and **Herbert L. Krieger, Philip R. Freeman and MacBodian, General Partners**, doing business as **Sunbeam Lighting Co.**, a Limited Partnership, Respondents.

Civ. 22424.

District Court of Appeal, Second District,
Division 2, California.

Feb. 20, 1958.

Action by a manufacturer's representative against manufacturer of fluorescent lighting fixtures for commissions allegedly due and for an accounting. The Superior Court of Los Angeles County, Gerald C. Kepple, J., rendered judgment in favor of defendants and plaintiff appealed. The District Court of Appeal, Kincaid, J. pro tem., held that evidence sustained finding

that commission provision of oral employment agreement was modified so that the commissions varied from two to five percent of gross sales price depending on nature of merchandise sold, that representative was not entitled to any additional commission on orders filled prior to termination of his employment and that under custom and usage in business where there has been a good faith termination of employment payment of commission terminates with termination of employment.

Affirmed.

1. Account ⇐18

Before an accounting is in order, the right to it must be established, but it may be dispensed with where, under the evidence, the need or right to one is not shown.

2. Account ⇐20(1)

Ordering a reference is, generally, within the discretion of the trial judge who may take the accounting himself from the evidence as presented.

3. Customs and Usages ⇐19(3)

Principal and Agent ⇐89(8)

In action by manufacturer's representative against manufacturer for commissions due and for an accounting, evidence sustained finding that commission provision of oral employment agreement was modified so that the commissions varied from two to five percent of gross sales price depending on nature of merchandise sold, that representative was not entitled to any additional commission on orders filled prior to termination of his employment and that under custom and usage in business, where there has been a good faith termination of employment, payment of commission terminates with termination of employment.

4. Continuance ⇐22

Where plaintiff announced that he was ready for trial although he had not received ruling on prior motion to inspect and make copies of certain records of defendant and, during trial, plaintiff received a post card notice of granting of motion, denial of motion for continuance made during trial for

purpose of inspecting books and records was not an abuse of discretion, in view of fact that court extended plaintiff considerable latitude in extensive examination of accounts and records, and defendant produced cartons of documents at plaintiff's request.

Hurley R. Talpis and Aaron L. Lincoff, Los Angeles, for appellant.

Mitchell & Gold, Beverly Hills, for respondents.

KINCAID, Justice pro tem.

This is an appeal from a judgment in favor of defendants, hereinafter referred to as Sunbeam, and against plaintiff-appellant based upon a fourth amended complaint for claimed commissions due and for an accounting. Under the findings and judgment no commissions or any moneys were found due by Sunbeam to plaintiff and an accounting was denied.

Sunbeam, a manufacturer of fluorescent lighting fixtures, employed plaintiff in February 1947 as its manufacturer's representative in two areas, the San Francisco territory, and the Northwest territory. Plaintiff's representation was terminated April 15, 1953, as to the San Francisco territory and in July 1953 as to all other areas.

It is plaintiff's contention that, by oral agreement at the time of his employment, he was to receive sales commissions of five per cent on all sales made in his territory whether by him or not. Sunbeam contends that the terms of the commission agreement were varied by mutual consent from time to time during the term of employment depending upon the type and sales price of merchandise. The agreed percentages, though generally five per cent, varied from two, two and one-half, three, three and one-half, and four per cent. Commission statements were furnished monthly to plaintiff accompanied by check, some 84 regular monthly commission statements with check having been delivered to plaintiff over a period of some six and one-half years. Plaintiff protested cuts in his commission

from time to time but received explanation therefor, the amount of such commission being determined by the nature of the merchandise sold, the suggested distributor's price, the necessity of meeting competitive conditions as well as the amount of profit involved in the particular sale. Likewise, after shipment of orders, plaintiff received notices of the amount of commission earned on the particular order by receiving a copy of the order with the commission shown thereon.

Plaintiff contends he was entitled to an accounting of moneys due by reason of orders procured prior to termination of his employment. He seeks this accounting covering the entire period of his employment by Sunbeam. He claims he is entitled to (1) the difference between the commissions received by him monthly and a sum representing five per cent of all sales procured and filled from plaintiff's territories, and (2) commissions on all orders procured from such territories prior to termination of his employment even though they may have been filled after his leaving.

Sunbeam contends that by oral agreement plaintiff was to and did receive commissions on orders secured by others prior to the time he began his employment in 1947 where deliveries on such orders were made during the term of his employment and that, conversely, commissions were to be and were paid to the successors of plaintiff for deliveries made during the term of employment of such successors even though the orders were received during plaintiff's term of employment.

Upon substantial conflicting evidence the court found:

(1) That the oral agreement of employment as to the payment of commissions to plaintiff was modified by both correspondence and by the conduct of the parties in that the commissions varied from two to five per cent of the gross sales price, the amount being determined by the nature of the merchandise sold, the suggested distributor's price and the necessity of meeting competitive conditions; that plaintiff was

not entitled to any additional commissions for orders procured by him or originating from his territories and which had been filled prior to the termination of his employment;

(2) That it was the agreement of the parties that no commissions were due or payable to plaintiff for any orders as to which deliveries were made after termination of plaintiff's employment irrespective of the origination of the orders;

(3) That the custom and usage in the fluorescent lighting manufacturing business is that where there has been a termination in good faith, payment of commission terminates with such termination of employment and the successor commission agent is entitled to commissions thereafter.

Plaintiff argues that the evidence, even though conflicting, fails to support the findings and judgment, and that in any event he is entitled to a full and formal accounting.

[1-3] Before an accounting is in order, the right to an accounting must be established. It may be dispensed with where under the evidence the need or right to one is not shown. *Stoll v. Selander*, 81 Cal. App.2d 286, 294, 183 P.2d 935. Ordering a reference is generally within the discretion of the trial judge and the judge may take the accounting himself from the evidence as presented. *Berkowitz v. Kiener Co.*, 37 Cal.App.2d 419, 426, 99 P.2d 578; *Puim v. Callahan*, 135 Cal.App.2d 70, 76, 286 P.2d 526. The evidence herein substantially supports the findings and judgment.

[4] Plaintiff asserts further prejudicial error in the denial of his motion for a continuance made during the trial for the purpose of inspecting books and records of Sunbeam. He had previously filed a written motion to inspect and make copies of certain records of defendants and the Law and Motion Department of the Court had taken the matter under submission. Not having had a ruling on such motion by date of trial, plaintiff answered "ready" and the trial was commenced. During the trial plaintiff received a postcard notice of granting of his

motion. The record indicates that the court extended plaintiff considerable latitude in permitting him extensive examination of the accounts and records of defendants, and that Sunbeam produced cartons of documents at plaintiff's request. No prejudicial abuse of discretion seems to be evidenced by the refusal by the court of plaintiff's motion for a continuance made during the trial nor does the record disclose any prejudicial error in the admission or rejection of proffered evidence by plaintiff or in the conduct of the trial.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.



157 Cal.App.2d 665

Grover MacLEOD, Plaintiff and Appellant,

v.

TRIBUNE PUBLISHING CO., Inc., a California Corporation, First Doe, Second Doe, Doe Company, a Partnership and Roe Company, a Corporation, Defendants and Respondents.

Civ. 17505.

District Court of Appeal, First District,
Division 1, California.

Feb. 19, 1958.

Libel action. After plaintiff filed a request for a dismissal without prejudice, judgment of dismissal was entered in favor of defendants awarding attorney's fees and plaintiff noticed a motion to vacate such order and to tax costs. The Superior Court, Alameda County, Charles Wade Snook, J., denied the motion to vacate order for attorney's fees and granted motion to tax costs, and plaintiff appealed. The District Court of Appeal, McMurray, J. pro tem., held that second paragraph of section of Code of Civil Procedure providing for entry of judgments of dismissal

must be read so as to provide for payment of costs to the prevailing party in accordance with portion of section of Code of Civil Procedure providing that a clerk or judge must include costs in a judgment entered up by him.

Affirmed.

1. Appeal and Error ⚡230

Costs ⚡219

Where a plaintiff's notice of motion of objection to filing of a cost memorandum was made within two days after the filing thereof, such objection was timely made, which was necessary in order to preserve the objection on appeal.

2. Statutes ⚡223.2(24)

Second paragraph of section of Code of Civil Procedure providing for entry of judgments of dismissal must be read so as to provide for payment of costs to the prevailing party in accordance with portion of section of Code of Civil Procedure providing that a clerk or judge must include costs in a judgment entered up by him. West's Ann.Code Civ.Proc. §§ 581d, 836, 1033.

3. Appeal and Error ⚡82(4)

An order of the trial court denying an appellant's motion to vacate an order for attorney's fees and costs is appealable as a special order after final judgment since it is the only way an appellant can present to an appellate court the question as to timeliness of filing the cost bill and propriety of refusal to vacate an order for attorney's fees. West's Ann.Code Civ.Proc. § 963.

Jay Graves, Donald MacLeod, Oakland, for appellant.

Price, MacDonald & Knox, Houlihan & Brown, Oakland, for respondent.

McMURRAY, Justice pro tem.

On April 5, 1956, plaintiff prepared a request for dismissal without prejudice, which was filed the same day. A notation to that effect was made on the clerk's Reg-

ister of Actions. On April 30, 1956, a judgment of dismissal in favor of the defendants was filed, awarding attorney's fees in the sum of \$100 to defendants, together with costs. This judgment was entered on May 2, 1956, the same day the defendants filed a memorandum of costs.

On May 4, 1956, plaintiff noticed a motion for the date of May 14, 1956, to vacate the order for attorney's fees and to tax costs. The basis for this motion was that the cost bill was filed too late. The court denied the motion to vacate the order for attorney's fees and costs and granted the motion to tax costs, taxing them at \$316.50. This appeal is taken upon the ground that the court's order denying the motion to vacate the order for attorney's fees and its order taxing costs were erroneous.

The original judgment of April 30, 1956, awarding attorney's fees in the sum of \$100 was entered in conformity with the provisions of section 836, Code of Civil Procedure, which expressly authorizes such award upon a dismissal by plaintiff of a libel action, which was the form of action in the instant case.

[1] Appellant in this appeal contends that the cost bill was filed too late and that his motion to vacate the order for court costs and attorney's fees should have been granted. The appellant's objection to the filing of the cost memorandum was timely made, which is necessary in order to preserve the objection on appeal (San Francisco, etc., School Dist. v. Board of National Missions, 129 Cal.App.2d 236, 276 P.2d 829), as it appears that the appellant's notice of motion in this case was filed within two days after the filing of the memorandum of costs.

Appellant's motion appears to have been predicated upon Code of Civil Procedure, section 1033, which provides in part: "In superior courts * * * the party in whose favor the judgment is ordered, and who claims his costs, must serve upon the adverse party, and file at any time after the verdict or decision of the court, and not later than ten (10) days after the entry of the judgment, a memorandum of the items

of his costs and necessary disbursements in the action or proceeding * * *."

We have before us, therefore, the question as to whether "the entry of judgment" is the entry of the notation in the clerk's register that a "dismissal without prejudice" was filed on April 5, or the entry of the dismissal judgment on May 2.

There are two cases decided before the 1955 amendment to section 1033 of the Code of Civil Procedure which state by way of dicta that "judgment" means the entry of the dismissal in the clerk's register. The section then required that the memorandum of costs be filed "not later than five (5) days after the verdict, or, if the action is tried without a jury, not later than five (5) days after notice of the entry of the judgment." These cases are *Fisher v. Eckert*, 94 Cal.App.2d 890, 212 P.2d 64, and *Hauptman v. Heebner*, 34 Cal.App.2d 600, 94 P.2d 48. Neither of these cases is here governing, however, since the code section has been amended since their decision. The section, as will be noted, before these decisions required the filing of the memorandum to be after notice of entry of judgment in court cases, which provision is omitted from the amendment made to section 1033 in 1955.

Appellant argues that section 581(d) of the Code of Civil Procedure is governing here, and that the written dismissal of an action is in fact the judgment. It should be noted that the first paragraph of section 581(d) providing that such dismissals shall be effective for all purposes makes no provision for costs to the prevailing party. Section 1032 of the Code of Civil Procedure provides that a defendant, as to whom the action is dismissed, is entitled to his costs as a matter of course. Code of Civil Procedure, section 581(d), reads as follows:

"A written dismissal of an action shall be entered in the clerk's register or in the docket in the justice court, as the case may be, and is effective for all purposes when so entered.

"All dismissals ordered by the court shall be entered upon the minutes there-

of or in the docket in the justice court, as the case may be, and such orders when so entered shall constitute judgments and be effective for all purposes, and the clerk in superior and municipal courts shall note such judgments in his register of actions in the case."

[2] The first paragraph of section 581 (d) expressly provides that a written dismissal of an action which is entered in the clerk's register is a bar to any further proceedings in that action, but it does not provide that such written dismissal so entered in the clerk's register is a judgment, but merely that it is effective as a dismissal of the principal action. The second paragraph, however, clearly contemplates court orders of dismissal and further provides that such orders shall constitute judgments. It is apparent that the order obtained by the respondents here on April 30, 1956, which was entered on May 2, 1956, was a judgment such as is contemplated by the second paragraph of this section. We hold, therefore, that section 581(d) in order to be consonant with the other provisions of the Code of Civil Procedure and with the just and proper award of costs to a party who has been put to expense in defending a suit which is subsequently dismissed, requires that section 581(d) be construed as providing for a dismissal of the particular action by the first paragraph thereof, but that it must be read in the light of section 1033 and section 836 of the same code and that the second paragraph thereof provides when and how a judgment after such dismissal shall be obtained. To hold otherwise would be to place the burden upon a person involved in any litigation of constantly checking the clerk's records to see whether or not a dismissal has been entered without notice to him. We feel that this was not the intention of the legislation, and that the second paragraph of section 581 (d) of the Code of Civil Procedure must be read so as to provide for the payment of costs to the prevailing party, in accordance with that portion of section 1033 of the Code of Civil Procedure, which reads as follows:

"The clerk or judge must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must within two days after the same are tried or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and must make a similar insertion of the costs in the copies."

The respondents in this matter have contended vigorously that the record before this court is incomplete, that the judgment appealed from is nonappealable and that appellant cannot appeal from the order in his favor, they construing the order taxing costs to be a judgment favorable to appellant. These contentions are, however, without merit.

[3] Appellant was granted permission to augment the record on appeal over respondents' objection, whereby there is now before this court the order of the trial court denying appellant's motion to vacate the order for attorney's fees and costs, contained in the judgment of April 30, 1956. That such an order is appealable as a special order after final judgment and within the provisions of Code of Civil Procedure, section 963, is almost self-evident; to hold otherwise would deny appellant the right to present to an appellate court the questions as to the timeliness of filing the cost bill and the propriety of the refusal to vacate the order for attorney's fees. Appealing from this order is the only way appellant can present his objection to the timeliness of filing the cost bill. *San Francisco etc. School Dist. v. Board of National Missions*, supra, 129 Cal.App.2d 236, 276 P.2d 829; *Davis Lumber Co. v. Hubbell*, 137 Cal.App.2d 148, 290 P.2d 33.

Respondents' position that the order taxing costs is not appealable as it was favorable to appellant in that it did tax costs is highly artificial, since such orders are again special orders after judgment and appealable under Code of Civil Procedure, section 963.

The record before us is assuredly not of the sort that is exemplary of good appellate practice, but it is sufficient to sustain an appeal. The orders appealed from are and each of them is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



157 Cal.App.2d 753

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Clarence WEEMS, Defendant and Appellant.
Cr. 1336.

District Court of Appeal, Fourth District,
California.

Feb. 20, 1958.

Defendant was convicted of forgery. The Superior Court of San Diego County, James C. Toothaker, Judge assigned, entered judgment, and defendant appealed. The District Court of Appeal, Griffin, J., held that the evidence sufficiently established the identity of the defendant.

Affirmed.

1. Criminal Law Ⓒ566

In forgery prosecution, evidence sufficiently established identity of defendant. *West's Ann.Pen.Code*, § 470.

2. Criminal Law Ⓒ566

In order to sustain conviction it is not necessary that identification of accused as perpetrator of crime be made positively or in a manner free from all inconsistencies.

3. Criminal Law Ⓒ741(2)

Function of jury is to pass on strength or weakness of identification and uncertainties of witnesses in giving their testimony.

4. Criminal Law §511(1)

In forgery prosecution, testimony of purported accomplice was sufficiently corroborated. West's Ann.Pen.Code, §§ 470, 1111.

Sankery & Sankery, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Albert Bianchi, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

In an information defendant was charged with three counts of forgery, violating Penal Code Section 470, and four prior felony convictions, robbery, second degree, forgery, conspiracy to steal mail and to forge and utter checks, and possession of stolen mail. He admitted the four prior felony convictions and a jury found him guilty on counts one and two, but not guilty on the third count.

Defendant, in January, 1957, sought employment at the Heidelberg Ballroom, and apparently took about 20 printed blank checks from their checkbook. Thereafter, Don Chambers, a colored 16-year-old student, was in defendant's car with him and he showed Don 10 or 12 blank checks, the majority of them being the ones printed "Heidelberg Ballroom".

Don testified defendant asked him to endorse these various checks and furnished the names to be written with various pens furnished by him, telling Don he was going into business with these men and to write each name in a different handwriting. Don claimed he did not know he was doing wrong in so endorsing the checks.

As to count one, in February, 1957, Don rode with defendant to a Safeway Store in Linda Vista. The manager accepted a Janitors' Union card furnished by defendant, with his photograph attached, bearing the name George Larkin, as identification, and approved the cashing of a check by his clerk for \$90.15. It was purportedly signed by the Heidelberg Ballroom officials and made payable to George Larkin. At

the trial the manager of the Safeway Store identified defendant as the one who presented the card and photograph to him at the store, described him as colored, wearing khaki trousers, a zipper-front jacket and a dark blue cap. The clerk likewise identified him as the man who cashed the check. She gave the same description and said she was not "absolutely positive" he was the man but she was certain to the best of her knowledge. The check was identified as one of those taken from the Heidelberg Ballroom. The signature on its face was unauthorized by its officers.

As to count two, in the same month Don went with defendant to a liquor store and according to Don, defendant told him to go inside with him and if anyone entered who looked suspicious to "beck to him"; that defendant purchased some merchandise and cashed a check in the sum of \$97.13 drawn on the Heidelberg Ballroom. The check was made payable to "Curtis Mosley". Defendant showed the owner a driver's license with the name Curtis Mosley on it. Defendant was asked to write his telephone number and he wrote on the check "BE 22506". The owner testified there was another boy with defendant when defendant cashed the check. He identified the defendant as being "very similar" to the defendant who was then seated at the table in the courtroom. It was established that this was also one of the unauthorized checks of the Heidelberg Ballroom.

Don testified to the facts set forth in the third count but the payee of the check was uncertain as to the identity of the defendant. A handwriting expert testified that the endorsements on the back of the two checks, George Larkin and Curtis Mosley, were in the handwriting of Don Chambers. Defendant failed to testify in his own behalf. He produced a witness who testified that a white man, James Carter, produced a similar check drawn on the Heidelberg Ballroom and it was cashed by him on January 23, 1957, which check was returned. He then said that ten days later he then remembered it was

a short negro man, but definitely said defendant was not the man.

Don testified that just before trial defendant offered him "a quite large amount of money" if he would change his testimony, and that the first time he really thought there was something wrong about the affair was when he came out of the liquor store and the defendant bragged about "pulling it over" on the owner after he cashed one of the checks.

[1-3] On this appeal it is defendant's argument that there was insufficient evidence to sustain the conviction on counts one and two, and secondly, that the conviction was improperly had on uncorroborated testimony of the boy. In consideration of this testimony, the other evidence and many other incriminating circumstances, the jury's findings are sufficiently supported. There was sufficient evidence, if believed by the jury, establishing the identity of the defendant as to both counts. In order to sustain a conviction it is not necessary that the identification of the accused as the perpetrator of the crime be made positively or in a manner free from all inconsistencies. It is the function of the jury to pass on the strength or weakness of the identification and the uncertainties of the witnesses in giving their testimony. *People v. Mahoney*, 146 Cal.App.2d 485, 498, 304 P.2d 73.

[4] The question as to whether Don was an accomplice under section 1111 of the Penal Code was left for the determination of the jury under proper instructions. Assuming he was an accomplice within the meaning of that section, there still was sufficient independent and corroborating evidence to submit the question of defendant's guilt to the jury. *People v. Payton*, 36 Cal.App.2d 41, 52, 96 P.2d 991; *People v. Lindsey*, 90 Cal.App.2d 558, 562, 203 P.2d 572.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.

Lillian Lorene SMITH, Plaintiff and
Appellant,

v.

Maurice A. SMITH, Defendant and
Respondent.

Civ. 22509.

District Court of Appeal, Second District,
Division 2, California.

Feb. 18, 1958.

Proceedings on ex-wife's motion to change a minute order and divorce decree based thereon on ground that through clerical error minutes of court failed to correctly and fully reflect interlocutory divorce decree and order made by court. The Superior Court of Los Angeles County, Philbrick McCoy, J., denied motion in general terms and ex-wife appealed. The District Court of Appeal, Fox, P. J., held that where there was no suggestion to court that there was any impropriety in considering extrajudicial statements of court reporter to effect that it was her practice to record for future reference any additional comments that were made concerning matters incidental to decree and that upon examination of her notes she found no colloquy between court and counsel and there was no request for opportunity to cross-examine court reporter, ex-wife could not, on appeal, complain that court in making its decision took in account extrajudicial statements.

Order affirmed.

1. Courts ⇨116(1)

The court has power and duty to correct its records so as to make them conform to judicial decisions actually made, regardless of lapse of time.

2. Judgment ⇨304

In proceedings on motion to change a minute order and judgment based on grounds of clerical error, court has no jurisdiction to correct a judicial error.

3. Divorce ⇨243

Where husband and wife signed property settlement agreement which provided

for alimony, and interlocutory divorce decree merely provided that agreement was approved, error, if any, in failing to incorporate property settlement agreement in decree was judicial and could not be corrected in proceedings to change minute order and decree based thereon on ground of clerical error.

4. Judgment ⇨324

In proceedings on motion to change a minute order and judgment based thereon on ground that there had been a clerical error, burden of proof was on plaintiff to establish that there was a clerical error in clerk's minutes.

5. Evidence ⇨82, 83(1)

Presumption is that official duty has been regularly performed and that minutes of court are correct. West's Ann.Code Civ. Proc. § 1963, subd. 15.

6. Trial ⇨139(1), 140(1)

It is function of trial court to pass upon credibility of witnesses and to determine the weight to be given their testimony and same rule applies where affidavits are used.

7. Affidavits ⇨18

Court was privileged not to give full credit to affidavits of plaintiff, her daughter and her attorney even though affidavits were not contradicted by opposing affidavits, in view of interest of affiants in outcome of case.

8. Divorce ⇨243

In proceeding on motion to change a minute order and divorce decree based thereon on ground of clerical error on theory provisions of property settlement had not been incorporated in divorce decree, record did not support allegation that at conclusion of testimony in default divorce action, plaintiff's attorney was to prepare divorce decree which incorporated the property settlement agreement.

9. Divorce ⇨179

Where ex-wife sought change of a minute order and a divorce decree based thereon on ground of clerical error, but there was no suggestion to court that there was any impropriety in considering extra-

judicial statements of court reporter to effect that it was her practice to record for future reference any additional comments which were made concerning matters incidental to decree and that upon examination of her notes she found no colloquy between court and counsel and there was no request for opportunity to cross-examine court reporter, ex-wife could not, on appeal, complain that court in making its decision took in account extrajudicial statements.

10. Appeal and Error ⇨994(3), 996, 1012(1)

Appellate court is not at liberty to re-evaluate credibility of witnesses, reweigh the evidence, and draw inferences contrary to those drawn by trial court.

Low & Stone, Beverly Hills, for appellant.

McCormick & Norris, Los Angeles, for respondent.

FOX, Presiding Justice.

This is an appeal from an order denying plaintiff's motion to change a minute order and judgment based thereon on the ground that through a clerical error the minutes of the court failed to correctly and fully reflect the order made by the court.

Plaintiff filed a suit for divorce on July 30, 1953. Thereafter her husband, who was not represented by counsel, signed a property settlement agreement which had been prepared by plaintiff's attorney. It provided, inter alia, that defendant pay plaintiff \$150 per month alimony for a period of three years and that beginning August 1, 1956, he pay her \$1 per month thereafter. The agreement further provided, in paragraph 13, that it could be incorporated in any decree that might be rendered in the divorce action. The case was heard as a default before Judge McCoy on September 25, 1953. During the course of the hearing the property settlement agreement was received in evidence. At the conclusion of the testimony the judge announced his decision, according to the clerk's minutes, as follows: "The court finds the plaintiff is entitled to an inter-

locutory decree of divorce. The property settlement agreement is approved."

Plaintiff's attorney later prepared a proposed interlocutory decree on one of the printed forms, typing in the following: "The property settlement agreement is approved *and incorporated into the decree and the parties are ordered to carry out the executory provisions thereof.* The clerk is ordered to enter this decree." Before the judgment was signed by the judge, the italicized portion was stricken by running a line through it. On motion of the plaintiff a final decree of divorce was entered on October 14, 1954.

Nothing further appears until September 24, 1956, when an order to show cause re modification, seeking alimony of \$250 per month, came on for hearing. Defendant moved to dismiss for lack of jurisdiction. The matter went off calendar pending a clarification of the previously mentioned minute order. Thereafter plaintiff made a motion to change the minute order and the judgment made in reliance thereon. The substance of plaintiff's motion was that the minute order and judgment should be amended to incorporate the property settlement agreement, providing specifically for \$150 per month alimony for the first three years, \$1 per month thereafter until plaintiff remarried or until further order of the court, and to restore plaintiff's maiden name. Plaintiff's motion was supported by her own affidavit and affidavits by her daughter and her attorney. These affidavits were in substance that following the conclusion of the testimony a conversation took place between the judge and plaintiff's attorney to the effect that the attorney would prepare the decree when he got back to his office and that it would include a provision incorporating the property settlement agreement into the decree and ordering the parties to carry out its executory provisions and provide for the restoration of plaintiff's maiden name. Defendant filed no affidavit. The judge had no independent recollection of the circumstances here involved. Inquiry from the court reporter then working in Judge Mc-

Coy's department revealed that it was her practice to record for future reference, but not necessarily to be written up as a part of the transcript, any additional comments that may be made as to matters incidental to the decree; that she had examined her notes and found no colloquy between court and counsel. The court denied plaintiff's motion in general terms.

Plaintiff's contentions are basically two: (1) that the court did not pass upon the question as to whether there was a clerical error on the ground that it lacked jurisdiction so to do; and (2) that the record and affidavits compel the conclusion that the complete decision of Judge McCoy was not fully recorded in the minutes and that there is no support for an implied finding of fact to the contrary.

[1,2] We start with the well settled rule that the court has the power and the duty to correct its records "so as to make them conform to the judicial decisions actually made, and this regardless of the lapse of time." *Meyer v. Porath*, 113 Cal. App.2d 808, 811, 248 P.2d 984, 986; *Benway v. Benway*, 69 Cal.App.2d 574, 579, 159 P.2d 682. "The provisions of section 473 of the Code of Civil Procedure are not controlling." *La Mar v. Superior Court*, 87 Cal.App.2d 126, 129, 196 P.2d 98, 100. Thus if there was in fact a clerical error in this case, as claimed by plaintiff, the court had the jurisdiction to correct it. It is equally well settled that the court has no jurisdiction in such a proceeding to correct a judicial error. *Bastajian v. Brown*, 19 Cal.2d 209, 214, 120 P.2d 9; *Stevens v. Superior Court*, 7 Cal.2d 110, 112, 59 P.2d 988.

[3] Plaintiff bases her contention that the court did not pass on the merits of her motion on a statement of the court made in discussing various aspects of the case at the conclusion of the hearing. This discussion covers approximately five pages of the reporter's transcript. The court began by analyzing the record that was made at the default hearing of the divorce suit and continued with a consideration of the

papers that had since been filed and the proceeding that had transpired. Near the end of this analysis the court observed "all of those things being considered * * * I don't see that the court has any jurisdiction to make the modification, and even if he did, the record being what it is, I cannot see that it is a clerical error. * * * The court may, on motion of the injured party or on its own motion, correct clerical mistakes so as to conform with the judgment or order directed * * *." The reasonable interpretation of this statement is that the court believed the clerk had fully and correctly recorded the order the court made at the conclusion of the default divorce hearing and that no clerical error had been established. Our interpretation is fortified by the fact that the statement of the court demonstrates its familiarity with its power to correct an order that is the result of a clerical error. It is therefore apparent that the court determined the error, if any, was judicial, and his conclusion that the court lacked jurisdiction was based upon that determination.

We turn now to a consideration of the factual aspects of the case.

[4-6] Initially it should be noted that the burden of proof is on the plaintiff to establish that there was a clerical error in the clerk's minutes. "The presumption is that official duty has been regularly performed. Code Civ.Proc., sec. 1963 (subd. 15), and that the minutes of the court are correct." *People v. Oster*, 129 Cal.App.2d 688, 692, 278 P.2d 39, 42. "The presumptions declared by the provisions of section 1963 of the Code of Civil Procedure, 'while disputable are in themselves evidence * * * and will support a finding made in accordance with them, even though there be evidence to the contrary.'" In re *Estate of Wiechers*, 199 Cal. 523, 530, 250 P. 397, 399; *People v. Siemsen*, 153 Cal. 387, 390, 95 P.

863. It is, of course, elementary that it is the function of the trial court to pass upon the credibility of the witnesses and to determine the weight to be given their testimony. This same rule applies where affidavits are used. *Lohman v. Lohman*, 29 Cal.2d 144, 149, 173 P.2d 657.

[7] It is clear from the court's discussion, previously referred to, that the court did not give full credence to the affidavits of plaintiff, her daughter and her attorney. This the court was privileged to do although the affidavits were not contradicted by opposing affidavits in view of the interest of the affiants in the outcome of the case. *Herron v. Pacific Electric Ry. Co.*, 134 Cal.App.2d 199, 201, 285 P.2d 77; *Hill v. Thomas*, 135 Cal.App.2d 672, 680-682, 288 P.2d 157.

Plaintiff contends that it must be assumed that the rulings here in question were in fact made despite their omission in the minutes. She argues that "it cannot be considered that Judge McCoy would make the obvious and gross error that would be entailed by a judgment limited to granting" her a divorce and only approving the property settlement agreement. This argument would be more persuasive if it appeared from the transcript in the divorce hearing that either the property settlement agreement or any of its provisions had been drawn to the court's specific attention. There were no allegations in the complaint relative to the terms of the property settlement and no copy of the agreement was attached to the complaint as an exhibit because it had not been executed when the complaint was filed. The examination of plaintiff at the conclusion of her testimony on the charge of cruelty did not indicate or suggest that the property settlement agreement contained any agreement relative to alimony or any provision that it might be incorporated in a decree.¹ In fact, the last

1. On this aspect of the default divorce hearing the transcript reveals the following:

(By counsel for plaintiff): "I show you a document which purports to be a property settlement agreement. Have

you ever seen this document before?
A. Yes, I have.

"Q. I turn to the last page of this document and show you two signatures. Is one of those your signature? A. It is.

question seems to imply that this was truly a property settlement agreement and nothing more. Counsel asked plaintiff: "And do you feel this property settlement agreement makes an equitable distribution of the property?" Her answer was "Yes." The document shows that it was duly marked by the clerk as Plaintiff's Exhibit 1. The testimony of plaintiff's daughter as her corroborating witness covers less than two pages of the reporter's transcript. This, of course, did not take very long. If the agreement was handed to the clerk, as it normally might well have been, at the conclusion of plaintiff's testimony it is entirely likely that it never came to the court's specific attention. This would be entirely understandable because there was no suggestion that the agreement presented any problem at all since plaintiff regarded it as "an equitable distribution of the property."

In the court's analysis, previously referred to, of the case at the conclusion of the hearing on plaintiff's motion to correct the clerk's minutes, the court observed that, "The only question asked with respect to the property agreement, following the identification of signatures, being, 'And do you feel this property settlement agreement makes an equitable distribution of the property?'" The court thus seems to imply that no aspect of the agreement was brought to its attention which necessitated any order beyond that of its approval, which could readily be granted upon plaintiff's expressed satisfaction with it. In such a factual setting there would be no reason for the court to make any order relative to the agreement beyond an approval of it.

[8] Plaintiff argues that "the only reasonable inference to be drawn from the undisputed evidence as to the actions of appellant's attorney, supports the conclusion that

Judge McCoy must have made the claimed ruling." In support of this argument plaintiff asserts that her counsel conducted the default divorce hearing "so as to obtain for appellant a ruling that would merge the support provisions of the property settlement agreement in the interlocutory judgment of divorce so as to give the court a continuing power of jurisdiction. No other interpretation can be placed on his conduct." This conclusion does not necessarily follow in view of the brief reference to the agreement in that hearing as revealed by the transcript. (See testimony quoted in footnote.)

In this connection plaintiff further argues that the conduct of her counsel "subsequent to the hearing is consistent only with the assumption that the court recognized his efforts and made a ruling permitting the merger." The proper inference to be drawn from such conduct was for the determination of the trial court and in making that determination the court was entitled to take into consideration the state of the record and all the surrounding circumstances.

[9] Plaintiff now seems to complain that the court in making its decision on her motion took into account the extrajudicial statement of the court reporter that it was her practice to record for future reference any additional comments that were made concerning matters incidental to the decree and that upon examination of her notes she found no colloquy between court and counsel in this case. Counsel points out that he had no opportunity to refute the reporter's testimony by cross-examination, which might reveal that her practice in noting everything was not always followed. However, counsel did not suggest to the court any impropriety in its consideration of her statement, nor did he make any request for

"Q. To your best knowledge, is the other signature the signature of Mr. Smith, your husband? A. Yes.

"Q. And do you feel this property settlement agreement makes an equitable distribution of the property? A. Yes.

"Mr. Stone: I offer it, your Honor.

"The Court: Plaintiff's 1.

"Mr. Stone: No further questions, your Honor."

Cite as 321 P.2d 891

an opportunity to cross-examine her. Under such circumstances plaintiff is in no position to complain at this time. See *Denke v. Bowes*, 77 Cal.App.2d 642, 644, 176 P.2d 81.

[10] The basic difficulty with plaintiff's argument is that she would have this court reevaluate the credibility of the witnesses, reweigh the evidence, and draw inferences contrary to those drawn by the trial court. Under firmly established principles, an appellate court is not at liberty to do this. *People v. Gould*, 111 Cal.App.2d 1, 8, 243 P.2d 809.

The order is affirmed.

ASHBURN, J., and KINCAID, J. pro tem., concur.



158 Cal.App.2d 13

Troy EAGANS, Plaintiff and Respondent,

v.

KEY SYSTEM TRANSIT LINES, a corporation, and J. Garcia Montanez, Defendants and Appellants.

Civ. 17703.

District Court of Appeal, First District,
Division 2, California.

Feb. 25, 1958.

Rehearing Denied March 27, 1958.

Action for injuries sustained in an automobile accident. Judgment for plaintiff for \$30,000 as reduced from an original amount of \$40,000 in the Superior Court, County of Alameda, S. Victor Wagler, J., and the defendants appealed. The District Court of Appeal, Brazil, J. pro tem., held that where plaintiff was injured in two separate automobile accidents and defendant claimed that the second accident was responsible in a large part for the injuries of plaintiff, verdict was not shown to be the result of passion or prejudice.

Judgment affirmed.

1. Appeal and Error ⇐989, 994(2)

It is not the province of the appellate court to pass on the weight of evidence or determine the credibility of witnesses.

2. Appeal and Error ⇐836

An appeal is not a retrial.

3. Evidence ⇐597

Trial ⇐139(1), 140(1), 337

In personal injury action, jury was required to judge the credibility of witnesses, to pass on all questions of fact and to return a verdict based upon judgment and not on speculation, and in accordance with the law stated in the instructions.

4. Evidence ⇐5(2)

It is a matter of common knowledge that many a person has walked away unscathed from a violent accident and others not so fortunate have suffered greatly from what, to all intents and purposes was but a minor accident.

5. Appeal and Error ⇐994(2)

Conflict in opinions and testimony of medical witnesses is one to be resolved by a jury, and not by an appellate court.

6. Damages ⇐208(1)

New Trial ⇐74

In personal injury action, the amount of damages which may be awarded to the injured plaintiff is first committed to the sound discretion of the jury and next to the trial judge in ruling on a motion for new trial. West's Ann.Code Civ.Proc. § 657, subd. 5.

7. Damages ⇐130(1)

\$30,000 for injuries sustained when plaintiff sitting in stationary automobile was struck from rear by bus of defendant causing his head first to jerk backward and then forward was not result of passion or prejudice, though plaintiff was also involved in a subsequent automobile accident which defendant claimed was in a large part responsible for injuries of plaintiff, where subject of injury resulting from each of separate accidents was exhaustively inquired into by both sides. West's Ann. Code Civ.Proc. § 657, subd. 5.

Donahue, Richards & Gallagher, Oakland, for appellants.

Jeremiah F. O'Neill, Jr., Robert A. Kaiser, Kaiser & O'Neill, J. F. Vokoun, Jr., Oakland, for respondent.

BRAZIL, Justice pro tem.

This appeal is by the defendant bus company and its driver from a judgment of \$30,000 entered pursuant to a jury verdict, as such judgment was modified by the trial court from an original amount of \$40,000 in its ruling on defendants' motion for a new trial. The trial took six days, the record of which discloses an extensive inquiry by both sides of the facts of the case, particularly with relation to damages.

The evidence need not here be set forth in great detail, except insofar as it may be helpful in understanding the size of the judgment, for the appellants have no quarrel with any of the trial court's rulings, the instructions or the jury's finding on liability. They claim that the verdict as regards damages is without foundation in the evidence and therefore under the circumstances it is a question of law, not of fact, whether the judgment finds any support in the evidence.

Troy Eagans, a husky, young (32) driver of heavy duty trucks, a former army paratrooper, on returning in his car from his job at Bigge Drayage Company, about five in the afternoon of July 28, 1955, got into an accident, which was the basis of his action against the defendants. While stopped in traffic on an Oakland street, with his foot on the brake, he was struck from behind by one of defendant's buses. The collision was hard enough to skid the plaintiff's car forward about a car length, the skid marks of that length appearing on the pavement. When the accident occurred, plaintiff having no notice of its imminence, his head was jerked back and then forward, his arm went through the steering wheel and his hard McDonald hat was jerked from his head and fell to the floor.

Right at the scene of the accident it did not appear that the plaintiff was seriously,

if at all, hurt for the most he says of his feeling at that time and place is that he "was not comfortable." After a few minutes discussion, looking around to see the extent of the damage to the two vehicles and the exchange of driver information, the two drivers got into their motor vehicles and went their respective ways. A few minutes later and several blocks from the place where the accident occurred, the plaintiff stopped at his mother-in-law's house to call his wife to let her know he would be late getting home. While telephoning he fell to the floor, although not unconscious; his head started aching severely, like it was splitting open, and he became aware of low back pain. Soon thereafter he went to a hospital for emergency treatment, returning home the same night with a hard collar applied to his neck.

On the advice of a doctor, he entered the Eden Hospital on August 2nd, and there he stayed in bed under treatment for 17 days. His complaints were severe pain in the neck area, violent headaches and pain in the lower back. X-ray pictures taken then and on several occasions later all the way up to time of trial showed no fractures or visible objective evidence of injury. Just about all the time he was in the hospital, he was under heavy traction, about 17 pounds pulling on his chin and 11 or 12 pounds pulling from his waist. The hospital records disclose a most painful and uncomfortable stay there, exemplified by the fact that he was given medication and injections from empirin codeine compound to hypnotic drugs, no less than 129 times, quite obviously in attempts to relieve pain and suffering. He left the hospital in a wheel chair, feeling little if any better, to go home, where he stayed in bed for eight or nine days more. His wife said he was in pain most of the time; that he had a terrible time sleeping, and would often wake her up crying and screaming from pain. Other witnesses testified that Mr. Eagans had to sleep on a plyboard mattress, that he perspired excessively and that he acted in a manner far different from that before the accident.

On September 25, 1955, plaintiff went back to work at Bigge Drayage Company, working only one day because he "couldn't take it any more."

On October 3, 1955, plaintiff went back to work on a regular basis for the same employer, the work, however, being of a very easy type compared to what he had been doing before the first accident. While on the job he said he was always uncomfortable with headaches and backaches. On coming home at night he had great difficulty in getting up the stairs, being assisted in making the climb by his wife who would meet him at the bottom of the stairs.

And then there was another accident; and that second accident became an integral part of the trial, even though all agree that defendants had no connection whatever with it. It was the subject of lengthy examination to determine what portion of plaintiff's present complaints were due to it and not to the first accident. Because the second was far more violent than the first, appellants claim that as a matter of law the damages awarded are for all plaintiff's injuries without any deduction whatever for that portion of his injuries attributable to the second accident.

On November 18, 1955, plaintiff was driving a tractor-trailer type truck with a load on the trailer weighing 19 tons. Someone miscalculated either the height of the trailer or the clearance of the underpass on Eastshore Freeway. Going at a speed of 28 miles an hour, the tractor cleared the ceiling of the underpass but the trailer did not. The result, of course, was a violent crash, the trailer being pulled completely loose from the tractor at the fifth wheel assembly, and the undamaged tractor continuing on for 90 feet or so. The appellants established that the contact of the top of the heavy trailer with the structure of the underpass resulted in flattening ten steel rivet heads, tearing out a three-fourth inch sliver of metal six inches long and bending a forty ton steel girder one-half an inch out of line. For a while

the plaintiff sat in the cab of the tractor unable to get out because his legs wouldn't work. They felt numb. In this accident he said he hurt his back, but not his neck.

Mr. Eagans was thereupon taken to the Highland Emergency Hospital, given a shot of pain reliever, x-rayed and then discharged about five hours after entry. The plaintiff was fired from his truck driving job on the Friday the second accident happened, so he went to the union hall on the next Monday and got a job with Farnsworth & Ruggles, which job required him to lift 50 pound cartons. After working a full day, he found that he just couldn't do that kind of work for as he said, "My back was killing me and so was my head." Thereafter, the plaintiff tried light delivery work for a few days, but was never able because of his physical and mental condition to go back to the kind of work he knew and liked the best—unrestricted truck driving. When the matter came on for trial in October, 1956, the plaintiff was still wearing a back brace most of the time and he was unable to do anything other than the lightest kind of work. After the second accident and for about six months plaintiff received compensation of an industrial nature for injuries incurred in that accident. For about 30 days in January and February, plaintiff wore a full body cast.

[1,2] From the briefs, it does not appear that appellants maintain that the award is too much for plaintiff's total injuries, but rather that as a matter of law the jury must have assessed all the damages to the defendants, even though it is obvious that there is no responsibility at all on them to pay for what happened to plaintiff as a result of the second accident. Appellants' position that they were assessed for damages resulting from both collisions is born more of disappointment in the result than from a consideration of the evidence and the law, particularly in view of the fact that it is not the province of this court to pass on the weight of the evidence or determine the credibility

of the witnesses. An appeal is not a retrial.

[3,4] The appellants appear greatly impressed with the fact that the second accident was far and away more violent than the first; and so, they reason, the amount of the injury in the second must be far greater than that resulting from the first one. The jury was required to judge the credibility of the witnesses, to pass on all questions of fact and to return a verdict based upon judgment, not speculation, and in accordance with the law as stated in the instructions. The jury apparently did not follow appellants' reasoning, nor was it in the proper exercise of its duty required to do so. It is a matter of common knowledge that many a person has walked away unscathed from a violent accident, and others, not so fortunate, have suffered greatly from what to all intents and purposes was but a minor accident. It was not unreasonable to find that greater injury came from the lesser collision for the further reason that the stress or strain to plaintiff came from different directions. In the first accident, plaintiff was struck unannounced from the rear, causing his head to first jerk backward and then forward. In the second one we have the unusual situation of having a pulling force from the rear, which, of course, would throw plaintiff's head forward and then backward. In the second accident, there would not be the resistance of the automobile seat to the first violent movement of the body.

[5] The transcript of the proceedings discloses that the trial judge accurately and repeatedly instructed the jury that damages resulting from the second accident could not be assessed against the appellants. There isn't anything apparent from the record that could lead to a finding that the jury failed to follow the law as set forth in the instructions. The jury in this case listened long, and presumably patiently, to a parade of witnesses who testified to the condition of the plaintiff before and after the first accident and just

before and after the second one right up to the time of trial. Seven doctors, each well qualified, including two of the best known psychiatrists in California, testified at length on all phases of plaintiff's physical and mental condition, present, past and future, expressing opinions and giving reasons therefor. There was a conflict in the opinions and testimony of these doctors but that conflict is one to be resolved by the jury sworn to try the case and not by an appellate court. One psychiatrist expressed an opinion that the plaintiff as a result of the first accident suffered from neurosis, with which opinion the other psychiatrist disagreed. Plaintiff's attending physician described him as a beaten, pitiful man who even before the second accident had given up hope. Two of the doctors expressed the opinion that 75% or more of plaintiff's present condition was attributable to the first accident. The defendants did not attempt to find out from their doctor witnesses what percentage of injury resulted from each accident.

[6, 7] Relief from allegedly excessive damages is available only when it appears that the damages awarded have been given under influence of passion or prejudice. Code of Civil Procedure, § 657(5). There is nothing at all in the record to indicate that the verdict was the result of passion or prejudice. To the contrary, the subject of injury resulting from each of the two separate accidents was exhaustively inquired into by both sides. The amount of damages which may be awarded to the plaintiff is first committed to the sound discretion of the jury, and next to the trial judge ruling on a motion for new trial.

No error appears in the trial and no reason suggests itself from the record or the arguments set forth in the briefs on appeal why the judgment should be disturbed.

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

CALIFORNIA REPORTER

**322 PACIFIC REPORTER
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322 PACIFIC REPORTER SECOND SERIES



49 Cal.2d 764

SIGNAL OIL AND GAS COMPANY, a corporation, Hancock Oil Company, a corporation, Ralph K. Davies, Globe Oil and Refining Company, a corporation, and Lario Oil and Gas Company, a corporation, Plaintiffs and Respondents,

v.

ASHLAND OIL & REFINING COMPANY, a corporation, R. S. Blazer, S. M. Burnam, and American Independent Oil Company, a corporation, Defendants,

and

Ashland Oil & Refining Company, a corporation, and American Independent Oil Company, a corporation, Appellants.

S. F. 19329.

Supreme Court of California,
In Bank.

Feb. 25, 1958.

Rehearing Denied March 26, 1958.

Action by stockholders against corporation for declaration that agent's agreement was valid and for injunction restraining meeting of corporation's board of directors allegedly in violation of agreement. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., granted preliminary injunction and corporation and one of corporate stockholders not members of agent's agreement, appealed. The Supreme Court, Schauer, J., held that that part of preliminary injunction forbidding recognition by corporation of actions taken at directors meeting in disobedience to previously issued temporary restraining order designed to enforce agreement which had been declared void as an illegal voting trust by court in state where corporation was formed, was valid.

322 P.2d—1

Order reversed in part and affirmed in part.

Opinion, 314 P.2d 62, vacated.

1. Corporations ⇨198

Law of state where corporation was formed determined validity of so-called agent's agreement having as its purpose a plan whereby signatory parties might initiate or maintain in effect any general plan or program affecting corporation which parties should determine to be to their joint benefit.

2. Judgment ⇨822(3)

Where corporation was formed in Delaware, Delaware Supreme Court decree that agent's agreement providing for the voting by certain signatories as a block was totally void was binding upon California court on principles of full faith and credit. West's Ann.Corp.Code, § 6602; U. S.C.A.Const. art. 4, § 1.

3. Corporations ⇨201

Where certain directors of Delaware corporation had a voting agreement and by preliminary injunction of California court it was ordered that such agreement be carried out, and subsequently Delaware Supreme Court declared that agreement was totally void as an illegal voting trust, order granting preliminary injunction had to be reversed in so far as it purported to require the carrying out of illegal agreement.

4. Courts ⇨207(3)

California Supreme Court does not assume original jurisdiction in an injunction matter.

5. Injunction Ⓒ152

Question of sufficiency of showing to justify temporary injunctive relief is necessarily a question of law.

6. Corporations Ⓒ201

Where it was sought to compel compliance with agent's agreement requiring voting at directors' meeting in block by signatories of agreement, validity of agreement was a question of law which trial court had power to determine in first instance, and its determination that agreement was valid, even though erroneous, had to be respected until reversed.

7. Injunction Ⓒ157

Where at time temporary injunction was issued court had jurisdiction over parties and the subject matter, and there was no claim that procedural requirements of injunction statute had not been met and there was at least a prima facie showing of facts which would sustain the court's orders, under circumstances, these orders, although subsequently determined to be erroneous, were not void.

8. Injunction Ⓒ157

Court of equity has power to issue order maintaining status quo pending its determination of applicable law by injunction, and whether court misapplies law and holds valid an illegal contract or subsequently determines that contract was void ab initio under controlling law, its interim orders do not thereby become a nullity.

9. Judgment Ⓒ576(1)**Motions** Ⓒ64

Generally, a final judgment or order is res judicata even though contrary to statute where court has jurisdiction in the fundamental sense of the subject matter and the parties, and such an order is not void since a void order is never res judicata.

10. Corporations Ⓒ201

In proceedings to require compliance with agent's agreement whereby certain directors of corporation agreed to vote in a block agreement's invalidity did not appear as a matter of law on its face within meaning of doctrine that if a court grants relief

which under no circumstances it had any authority to grant its judgment to that extent is void.

11. Corporations Ⓒ398(2)

Directors are the chosen representatives of the corporation and constitute for all purposes of dealing with others the corporation, and what they do within the scope of the objects and purposes of the corporation, the corporation does.

12. Corporations Ⓒ201

An injunction against the corporation respecting a pooling agreement is clearly an injunction against the directors acting in their capacity as directors.

13. Injunction Ⓒ228

Where temporary restraining order enjoined corporation and anyone acting on its behalf with knowledge of order from conducting certain directors' meeting and copy of order was served on secretary of corporation within the state and he in turn transmitted copies of orders to Chicago where directors' meeting was to be held, action taken by directors was corporate action in violation of restraining order and rendered corporation and those acting in its behalf liable to punitive measures.

14. Injunction Ⓒ212

Enjoining a corporation from holding a directors' meeting necessarily enjoins those directors with the knowledge of decree from participating and holding such meeting.

15. Injunction Ⓒ230(4)

Where corporate meeting has been held in violation of injunctive order and violation of injunction has not damaged any property or rights of complainants, court may properly conclude that it is inequitable to compel an invalidation of proceedings taken contrary to order and leave violator liable only for criminal contempt, but where disobedient action directly harms complainant or deprives him of some substantial right which he failed to protect in reliance on injunctive order, it is within power of court to declare action invalid and to prevent its effectuation.

16. Injunction ⇨230(4)

Where California court temporarily enjoined Delaware corporation by service on its secretary in California of order prohibiting holding of contemplated directors' meeting allegedly in violation of agent's agreement which Delaware court subsequently declared illegal, and directors were given notice of restraining order and some obeyed the same, it was within power of court to declare that proceedings taken at directors' meeting in violation of restraining order were invalid.

17. Corporations ⇨201

Each member of corporate body has right of consultation with others and right to be heard upon all questions considered, and it is presumed that if absent members had been present they might have dissented and their arguments might have convinced the majority of the unwisdom of their proposed action, and thus have produced a different result.

John L. Bradley, Robert E. Burns, Crimmins, Kent, Draper & Bradley, Park Chamberlain, Reginald L. Vaughan, Varnum Paul and Vaughan, Paul & Lyons, San Francisco, for appellants.

James D. Adams, Owen Jameson, Walker Lowry, McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, and Warner W. Gardner, Washington, D. C., for respondents.

SCHAUER, Justice.

Defendants-appellants Ashland Oil & Refining Company (hereinafter referred to as Ashland) and American Independent Oil Company (hereinafter termed American or American Independent) appeal¹ from an order granting a preliminary injunction restraining them from acting or recognizing action taken contrary to a certain so-called

"Agents' Agreement," and from giving effect to certain actions taken at a meeting of American's board of directors held on December 16, 1954. We have concluded that, for reasons hereinafter stated, the order should be reversed in so far as it enjoins noncompliance with the Agents' Agreement, but affirmed in so far as it enjoins recognition by American of the actions taken at the December 16, 1954, board meeting.

American is a Delaware corporation formed in 1947 for the general purposes of exploration, extraction, processing, and sale of oil and gas and related products. The principal office of the corporation is in San Francisco, California, and the principal activities of the corporation are carried out in the geographic region generally referred to as the Middle East. The capital stock of American is held by ten shareholders. Each shareholder elects a certain number of the 15 members of American's board of directors in the approximate ratio which the number of shares owned by such shareholder bears to the total number of shares issued and outstanding. Thus Phillips Petroleum Company (hereinafter termed Phillips) elects four directors; Signal Oil and Gas Company (Signal), Hancock Oil Company (Hancock) and Ashland each elect two directors; Ralph K. Davies (Davies), J. S. Abercrombie (Abercrombie) Deep Rock Oil Company (Deep Rock) and Sunray Oil Corporation (Sunray) each elect one director; and Globe Oil and Refining Company (Globe) and its apparent subsidiary Lario Oil and Gas Company (Lario) together elect one director.

On March 30, 1950, Signal, Hancock, Ashland, Davies, Globe, and Lario, who together hold about 54.5 per cent of American's stock and who elect eight directors, entered into an agreement (sometimes hereinafter termed the Agents' Agreement)

1. The other named defendants in this action, R. S. Blazer and S. M. Burnam, are directors of American elected by Ashland, which is a major stockholder in American. Neither Blazer nor Burnam are residents of California, and neither has been served with process herein.

Burnam has filed an affidavit "in opposition to motion for preliminary injunction," but Blazer has made no appearance whatsoever. American has not filed an answer to the complaint, but has appeared and actively participated in all stages of the action to date.

with eight persons designated as agents. These agents were in fact the respective directors of American elected by these stockholders. The stated purpose of the Agents' Agreement was "to provide a means whereby the parties hereto may initiate or maintain in effect any general policy, plan, or program affecting American * * * which said parties should determine to be to their joint benefit, interest, and advantage, and to be to the best interests of all stockholders of American * * *." The Agents' Agreement provided, in so far as here pertinent, that the shares of American's stock held by the signatory stockholders would be endorsed over to the agents, who would place the stock certificates in escrow, and who thereafter for the ten year term of the agreement would "have the sole and exclusive voting power" of such stock; that the agents should consult and confer with each other relative to casting their votes, but that the "vote of the Agents shall always be exercised as a unit, on any matter on which a vote of the stockholders is called for, as any seven of said Agents shall direct and determine"; that in the event seven agents could not agree the matter would be submitted to an arbitrator chosen pursuant to an outlined procedure.

On December 9, 1954, at a meeting in Chicago of American's board of directors, one of the directors elected by Ashland moved that another board meeting be held in Chicago on December 16, 1954, for the purpose of considering certain amendments to American's by-laws. The substance of the principal changes to be made by these amendments was that (1) the directors be given power to remove any corporate offi-

cer (including the president,² who therefore could be removed only for cause) "summarily without cause"; (2) the office of chairman of the board be created; and (3) the stockholders' meetings be held in Dover, Delaware, rather than in San Francisco. The six directors representing Signal, Hancock, Davies, Globe, and Lario opposed the motion, but the directors elected by Ashland refused to join this opposition and took the position that their action was not contrary to the Agents' Agreement. The proposal to hold the December 16 meeting for the stated purposes was adopted by a nine to six vote.³

On December 14, 1954, a meeting of the agents under the Agents' Agreement was held. At this meeting the representatives of Ashland did not agree to proposals of the other representatives to postpone the December 16 meeting and to submit the proposed by-law amendments to arbitration.

On December 15, 1954, Signal, Hancock, Davies, Globe, and Lario commenced the instant action against Ashland, the two directors of American elected by Ashland, and American. The complaint alleges the facts as above stated; that the purpose of the Agents' Agreement was to prevent control of American from passing to any one stockholder (specifically Phillips, which is a so-called "major" oil company and allegedly controls the votes of Abercrombie and Sunray); that the actions of Ashland and the directors elected by it at and after the December 9 board meeting "are all pursuant to and in furtherance of the plan to transfer control of American Independent to a combination of its stockholders consisting of Phillips, Ashland, Abercrom-

2. The president of American has since its organization been Ralph K. Davies, one of the plaintiffs herein.

3. It appears that shortly before this proposal was actually introduced at the directors' meeting, the meeting was recessed, and during this recess a meeting of the agents under the Agents' Agreement (who were also the respective directors elected by the signatory stock-

holders) was held. It was at this meeting that the six agent-directors representing plaintiffs stated their opposition to the proposed by-law changes and the December 16 meeting, and the two agent-directors representing Ashland took their contrary position. After the recess the directors' meeting reconvened and the motion to hold the December 16 meeting to adopt the proposed changes was introduced and adopted as above stated.

bie and Sunray, all in direct violation of the Agents' Agreement and the purposes pursuant to which American Independent was organized"; and that unless defendants are restrained from holding the proposed December 16 directors' meeting "plaintiffs will suffer great and irreparable injury in that plaintiffs and the other signatories to the Agents' Agreement will lose control of American Independent and American Independent will itself lose its character as an independent oil company, all to the great loss and damage of American Independent and plaintiffs as its stockholders."

The complaint is supported by affidavits of Davies and the presidents of Signal and Hancock, which in substance aver that American was formed with the understanding that it would be free from the control of any one stockholder, that Phillips has been trying to seize control of American, that the Agents' Agreement was executed in order to prevent such seizure, that the actions of Ashland and its representatives referred to in the complaint are in violation of the Agents' Agreement and present the danger that American will fall into the control of Phillips, and that unless Ashland and its representatives are restrained from acting contrary to the Agents' Agreement the respective investments of the stockholders represented by the affiants will be greatly impaired.

Based on the above described complaint and affidavits, the superior court, on December 15, 1954, issued a "temporary restraining order and order to show cause," directing that pending the hearing defendants "and all persons acting for or on behalf of you or any of you * * * and all persons having knowledge of the contents of this order" refrain from conducting or participating in the proposed December 16 directors' meeting or any other directors' meeting called to accomplish the purposes proposed to be undertaken at the December 16 meeting, and from taking any action in violation of the Agents' Agreement. It was further ordered that American refrain from recognizing any action

taken contrary to the preceding provisions of the order. The general counsel of American had notice and represented American as attorney of record when the application for the order was heard. Ashland, although not represented at the hearing, appeared in court by counsel later on the same day and moved to vacate the temporary restraining order. The motion was denied.

The restraining order was served in California on December 15, on Ashland's designated statutory agent for service of process in California and on the secretary of American. Copies of the order were sent by telegram to those directors of American who were assembled in Chicago to attend the December 16 meeting, and these directors received their copies prior to holding that meeting. The directors elected by plaintiffs did not attend the December 16 meeting, but the remaining directors, although informed of the terms of the restraining order, proceeded to hold that meeting as planned. It appears that they were advised by counsel that the restraining order did not apply to them because (1) they were not served with process in the pending action and (2) they were not acting as agents of American but were acting "upon" the corporation and were in a position superior to it. At this meeting the proposed by-law changes were adopted by an eight to zero vote.

Plaintiff applied for an order to show cause re contempt against Ashland, American, and the directors of American who attended the December 16 meeting, for violating the terms of the temporary restraining order. This order was issued on February 24, 1955. The terms of the order relative to American stated that it should show cause why it "should not be ordered to purge the contempt aforesaid by expunging from your records all references to the meeting * * * [of December 16] as being null and void and in contempt of this Court." This order to show cause came on for hearing on March 9, 1955, at which time it was dismissed as to all but one of American's directors because

they were nonresidents of California and the court had no personal jurisdiction over them, dismissed as to Ashland and the one director of American who was a California resident because of the insufficiency of the affidavits supporting the application for the order, and held in abeyance as to American. It appears that no disposition of the order as to American has yet been made.

On March 10, 1955, plaintiffs filed a supplemental complaint alleging the events which occurred at the December 16 meeting, and asserting that the action taken at that meeting was contrary to the temporary restraining order, the Agents' Agreement, and the underlying agreement on which the corporation was formed. Plaintiffs prayed that the December 16 meeting be declared null and void, that Ashland be restrained from taking any action contrary to the Agents' Agreement, that American be restrained from recognizing or giving effect to any action taken contrary to the provisions of the Agents' Agreement, that all defendants be "enjoined and restrained from conspiring or combining or acting in concert with Phillips * * * for the purpose of transferring control of American * * * to Phillips," and that a preliminary injunction issue embodying the previously mentioned restraints.

On May 3, 1955, a preliminary injunction was issued, enjoining American from giving effect to any action taken at the December 16 meeting (except in so far as the assembled directors authorized retention of new counsel for purposes of defense of the pending action), enjoining American from giving effect to any vote of its directors or stockholders cast contrary to the provisions of the Agents' Agreement, and enjoining Ashland from taking any action contrary to the Agents' Agreement. The injunction specifically provides that American is not restrained "in conducting the ordinary business affairs of the company." Such affairs are defined generally as those not dealing with the corporate structure and organization. The court retained jurisdiction to modify

its order, but apparently such jurisdiction has never been invoked. It is from this order that American and Ashland have appealed.

Following the issuance of the temporary restraining order, Phillips, Abercrombie, and Sunray filed an action in the Delaware Chancery Court against the other seven stockholders of American, American, certain named directors of American, and the bank which held as escrow the shares of American's stock which were subject to the Agents' Agreement. The purpose of this action was to have the Agents' Agreement declared invalid. The Chancery Court, after rendering several tentative opinions, finally concluded that the Agents' Agreement was valid in part and invalid in part, but its order was reversed by the Delaware Supreme Court on March 19, 1957, the high court holding that the Agents' Agreement was totally "void as an illegal voting trust" contrary to the applicable Delaware statutes. (*Abercrombie v. Davies* (Del.1957), 130 A.2d 338, 347.) The cause was remanded to the Chancery Court for an appropriate order and on May 3, 1957, that court obediently decreed that the Agents' Agreement "be, and the same hereby is, declared void in its entirety, and is hereby cancelled, vacated and set aside, and the parties thereto, their successors and assigns, are released from all obligations thereunder." The court further enjoined Davies, Signal, Hancock, Globe and Lario (plaintiffs herein) from attempting to induce compliance with the terms of the Agents' Agreement.

The present appeal initially was transferred by this court to the District Court of Appeal. In that court, on April 24, 1957, plaintiffs filed a "notice of motion for leave to produce additional evidence." The "additional evidence" apparently related to the alleged preincorporation understanding of the stockholders on which American was assertedly founded. This motion was denied on May 1, 1957. Subsequently, a hearing of the pending cause was granted by this court. In the meantime, on August 9, 1957, the superior court

in which the underlying action is still pending granted defendants' motion to strike the paragraphs of plaintiffs' supplemental complaint which referred to the asserted underlying agreement of the founders of American. The present appeal, which is only from the order granting the preliminary injunction, must be considered in the light of the above summarized proceedings in the courts of both California and Delaware.

[1-4] All of the parties here agree that because American is a Delaware corporation the validity of the Agents' Agreement is governed by Delaware law. (*Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows* (1946), 29 Del.Ch. 318, 49 A.2d 603, 607 [1]; *Deibler v. Chas. H. Elliott Co.* (1951), 368 Pa. 267, 81 A.2d 557, 561 [4].) The decision of the Delaware Supreme Court that the Agents' Agreement is totally void is part of the record in this case (see also Corp.Code, § 6602) and that decision, under the above cited authorities and on principles of full faith and credit (U.S.Const. art. IV, § 1), is binding upon us. Since the Agents' Agreement is now to be regarded as wholly void, it necessarily follows that the order granting the preliminary injunction must be reversed in so far as it purports to require defendants to carry out the illegal contract.⁴ However, it does not necessarily follow that the temporary restraining

order was void or that the preliminary injunction is void to the extent that it enjoins recognition of action taken in disobedience of the restraining order.

Appellants argue that since the Agents' Agreement is wholly void, and since a copy of that agreement is attached to and incorporated in the complaint in this action, the invalidity of the agreement is apparent from the face of the complaint, and therefore the temporary restraining order based on that agreement and the preliminary injunction which replaced it are also totally void and without effect. This contention is not tenable.

If the Agents' Agreement was void under Delaware law in 1957, presumably it was equally void in 1954 when the present action was filed, or in 1950 when the agreement was made. However, even if the agreement was void *ab initio*, it does not follow that such voidness was apparent on the face of the complaint herein, or that the superior court lacked the power to make its temporary orders.

The validity of the agreement here depended upon the interpretation and application of Delaware law. The effect of such law was not so clear at the time the complaint herein was filed that the superior court could make its ruling on the validity of the Agents' Agreement prior to a full adversary hearing on the merits. By issuing the temporary restraining order the

4. Plaintiffs suggest that the preliminary injunction should be modified rather than dissolved as to its provisions restraining action or recognition of action taken contrary to the Agents' Agreement, so as to restrain action taken contrary to the "underlying" agreement of American's stockholders that Phillips not be allowed to seize control of American. However, the complaint in this action seeks to enforce the Agents' Agreement rather than any underlying understanding. By their supplemental complaint plaintiffs sought to inject the issue of the alleged preincorporation understanding but, as noted previously, the superior court, by its order dated August 9, 1957, apparently struck out the paragraphs referring to such "understanding." Thus what plaintiffs actually seek is not a modification of

the preliminary injunction as it now stands but a grant of injunctive relief based on a different set of circumstances not presently embraced by the pleadings in this action. In other words, plaintiffs seek what would be in effect an entirely new injunction and if this court responded to such a request it would be tantamount to the assumption of original jurisdiction in an injunction matter. We do not exercise such power. (*McCann v. Union Bank & Trust Co.* (1935), 4 Cal.2d 24, 27 [2], 47 P.2d 283; *Hicks v. Michael* (1860), 15 Cal. 107, 114-115.) If plaintiffs have any grounds for the issuance of an injunction based on some underlying agreement of American's stockholders, they should present such grounds to the trial court in an appropriate proceeding.

court was attempting to maintain the status quo pending its determination of the applicable law and it cannot be said, as a matter of law, that the trial court, based on the showing made before it, should have then declared the agreement void.

[5,6] The cases cited by appellants in support of their position, that the temporary orders are void as in excess of the jurisdiction of the court, are not in point. This is not a case where the court which issued the injunction did not have jurisdiction to do so because of noncompliance with the notice requirements of the injunction statute (Code Civ.Proc., § 527; cf. *Green v. Superior Court* (1924), 65 Cal. App. 237, 223 P. 582; *Kelsey v. Superior Court* (1919), 40 Cal.App. 229, 180 P. 662), or where the issuing court lacked the power to grant injunctive relief because exclusive jurisdiction rested in another body (cf. *In re De Silva* (1948), 33 Cal.2d 76, 199 P.2d 6). Nor is this case similar to *Harlan v. Superior Court* (1949), 94 Cal.App.2d 902, 905, 211 P.2d 942, where the injunction statute was not complied with because there was "a complete absence of any factual showing by pleading

or affidavit upon which the court could have based a finding of the existence or nonexistence of grounds for granting the temporary [restraining order or] injunction."⁵ Here a factual showing was made and the sufficiency of the facts, i. e., the validity of the Agents' Agreement, was a question of law which the trial court had the power to determine in the first instance, and its determination, even though erroneous, had to be respected until reversed.⁶

[7] At the time the orders in this case were issued, the court had jurisdiction over the parties⁷ and the subject matter, there was no claim that the procedural requirements of the injunction statute had not been met, and there was at least a prima facie showing of facts which would sustain the court's orders. Under the circumstances, these orders, although subsequently determined to be erroneous, were not void. As stated in *In re Valterza* (1940), 37 Cal.App. 2d 682, 683-684, 100 P.2d 337 (quoting from *Smith v. Schlink* (1908), 44 Colo. 200, 99 P. 566, 570), "That the court had jurisdiction of the parties and the subject-matter cannot be questioned. This being true, and it not appearing that the judgment was not within

5. Because there was no factual showing whatsoever in the *Harlan* case the court there stated that the situation was "not one where a question of law exists as to the sufficiency of the facts averred by the appellant to justify an order made in the exercise of the court's jurisdiction." (At page 905 [3] of 94 Cal.App. 2d, at page 945 of 211 P.2d.) But the question of the sufficiency of the showing to justify temporary injunctive relief is necessarily a question of law. What the court in *Harlan* apparently meant was that the showing was insufficient as a matter of law to meet the requirements of section 527 of the Code of Civil Procedure and therefore could not justify the order made; however, such a determination itself is a resolution of a question of law. The holding in the *Harlan* case is sustainable on the stated ground that failure to show any factual basis for injunctive relief is a failure to comply with the requirements of the injunction statute. However, in so far as that case implies that no question of law is involved in such a situation, it is contrary to law and should be disapproved.

6. "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within its jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." (*Howat v. State of Kansas* (1922), 258 U.S. 181, 189-190, 42 S.Ct. 277, 280-281, 66 L.Ed. 550.)

7. Whether the court had personal jurisdiction over defendants *Blazer* and *Burnam* need not be here decided since its jurisdiction over *Ashland* and *American* is undisputed and such jurisdiction is clearly sufficient to support its orders.

the issues presented by the pleadings, however erroneous it may be, the judgment cannot be held to be void, so as to bring this case within the rule that disobedience of a void decree does not constitute contempt of court."

Had there been no proceedings in Delaware, and had the case gone to trial in California on its merits and the California courts ultimately determined that plaintiffs had no right to an injunction because the agreement was invalid, it cannot seriously be contended that such determination would have affected the interim validity of the temporary orders. (See *In re Fortenbury* (1940), 38 Cal.App.2d 284, 290 [3], 101 P.2d 105; see also *United States v. United Mine Workers* (1947), 330 U.S. 258, 294, 67 S.Ct. 677, 696, 91 L.Ed. 884 ["Violations of an order are punishable as criminal contempt even though the order is set aside on appeal"].) The ruling of the Delaware court could have no greater effect on the validity of the temporary orders.

[8, 9] The power of a court of equity to issue an order maintaining the status quo pending its determination of the applicable law cannot be seriously disputed. (See *United States v. United Mine Workers* (1947), supra, 330 U.S. 258, 293, 67 S.Ct. 677, 695 ["the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief"]; *Borg v. International Silver Co.* (2 Cir., 1925), 11 F.2d 147, 152 ["If it appeared here that the directors were using their powers to get control, or in any way other than the honest exercise of their discretion, we ought to maintain the status quo till hearing, even though the plaintiffs' case were doubtful"].) And, whether the court misapplies the law and holds valid an illegal contract, or subsequently determines that the contract was void *ab initio* under the controlling law, its interim orders do not thereby become a nullity. As this court stated in *Pacific Mutual Life Ins. Co. of California v. McConnell* (1955), 44 Cal.2d 715, 725 [10], 285 P.2d 636: "It is the general rule that a final judgment or order is *res judicata* even though contrary to stat-

ute where the court has jurisdiction in the fundamental sense, i. e., of the subject matter and the parties." This means that such an order is not void, since a void order is never *res judicata*. It follows that an interlocutory order issued contrary to law is not void either, where the court has "fundamental" jurisdiction. "[I]f the court finds contrary to the evidence or misapplies the law * * * the judgment, until corrected or vacated in some appropriate manner, is as conclusive upon the parties as though it had settled the controversy in accordance with the principles of abstract justice." (*In re Estate of Harrington* (1905), 147 Cal. 124, 129, 81 P. 546.) The court in this case had "fundamental" jurisdiction over American and Ashland and its temporary orders were not void as to them.

[10] But, it is argued, "lack of jurisdiction * * * may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." (*Abelleira v. District Court of Appeal* (1941), 17 Cal. 2d 280, 288, 109 P.2d 942, 132 A.L.R. 715.) And, appellants contend, this latter rule is applicable here. In support of this contention appellants rely on *Hunter v. Superior Court* (1939), 36 Cal.App.2d 100, 97 P.2d 492. In *Vasquez v. Vasquez* (1952), 109 Cal.App.2d 280, 283-284, 240 P.2d 319, the court reviewed the cases in which the above quoted rule has been applied. The court there (at page 284 [13] of 109 Cal.App.2d at page 321 of 240 P.2d) cited the *Hunter* case for the proposition that "A judgment based on an illegal contract because it was in restraint of trade is void where the illegality appeared on the face of the judgment roll," adding, however, "If a court grants relief, which under no circumstances it has any authority to grant, its judgment is *to that extent* void." As noted hereinabove, the invalidity of the Agents' Agreement in this case does not appear as a matter of law on the face of the complaint

or the restraining order, and the relief granted was not of a character which "under no circumstances" it had "any authority to grant." The Hunter case is thus clearly distinguishable. It is nevertheless argued that the principle for which the Hunter case actually stands is that "a judgment based on a void contract is itself void." (See *In re Estate of Crane* (1946), 73 Cal. App.2d 93, 100, 165 P.2d 940.) But the Hunter case does not reasonably admit of such construction. As aptly pointed out in the Crane case, "to apply the quoted statement * * * generally * * * would be demonstrably unsound. 'Jurisdiction, being the power to hear and determine, implies power to decide a question wrong as well as right' [citation]." The legality of a contract presents a question of law, and a temporary restraining order enforcing (prohibiting breach of) such contract is not invalid merely because the court decided that question erroneously in the first instance and it was subsequently determined that the contract was illegal and void.

Appellants next contend that, even if the temporary restraining order was not void, there was no violation of this order since the December 16, 1954, meeting was held by the directors as directors and not for the corporation, and the court had no jurisdiction over the directors as such. Thus it is urged that "Only two directors were named as parties and not one was served with process. They were all outside the state. Orders to show cause why they should not be adjudged guilty of contempt of court were quashed⁸ * * * In holding the directors' meeting, they were not performing any corporate act so that service upon the corporation would bind them as servants or agents of the corporation. They were acting *upon*, not *for*, the corporation. The corporation was the *actee*, the directors the actors." Defendants' argument, simply stated, is that an injunction against a corporation does not bind the directors of the corporation, because the directors do not act

for the corporation, but *upon* it. This contention is without merit.

[11-13] It has long been settled that "The Directors are the chosen representatives of the corporation, and constitute, * * * to all purposes of dealing with others, *the corporation*. What they do within the scope of the objects and purposes of the corporation, the corporation does." (*Maynard v. Fireman's Fund Insurance Co.* (1867), 34 Cal. 48, 57.) An injunction against the corporation, therefore, is clearly an injunction against the directors, acting in their capacity as directors. "A corporation, as an artificial entity, cannot of itself perform or refrain from performing an act; only its officers and agents can. An injunction against a corporation binds not only the so-called 'corporate entity' but also all persons who act for the corporation in the transaction of its business and have knowledge of the decree." (*Katenkamp v. Superior Court* (1940), 16 Cal.2d 696, 700 [5], 108 P.2d 1.) The temporary restraining order in this case enjoined the corporation and anyone acting on its behalf with knowledge of the order from conducting the December 16 meeting. A copy of this order was served on the secretary of the corporation in California, and he in turn transmitted copies of the order to Chicago, where the directors' meeting was to be held. That those directors present had knowledge of the existence of the order prior to holding that meeting is shown by the minutes of the meeting, which they held despite the injunction. The action which they thereafter purported to take was corporate action. In taking such action they acted *as* the corporation, but also, since the corporation is technically unable to act for itself, they acted *for* the corporation. The action so taken was in violation of the restraining order and rendered the corporation and those acting in its behalf liable to punitive measures. Whether or not the directors, who with one exception were nonresidents

8. However, the order to show cause re contempt against American is apparently still pending in the superior court, and the order against Ashland was dismissed

solely because of the failure of the supporting affidavits to properly show that Ashland had knowledge of the restraining order.

of California and who were not served with process and have not appeared in this action, are individually liable for contempt in California, the corporation which was served with process and is a party, and which acted, through its directors, with knowledge of the restraining order in violation of it, is subject to remedial measures.

[14] As stated in *Morton v. Superior Court* (1884), 65 Cal. 496, 497, 4 P. 489, "the effect of an injunction restraining any acts of a corporate body, and addressed to it and its agents, etc., is to bind not only the *intangible artificial being*, but also all the individuals who act for the corporation in the transaction of its business to whose knowledge the decree comes. Unless this be so, it would be necessary in order effectually to bind a corporation by an injunction, to make every person a party to a suit who could by any possibility be its agent in doing the prohibited act." (High Injunctions, § 850.)" The only persons who could act for the corporation in doing the prohibited act in this case, i. e., carry on a directors' meeting, were the directors. Enjoining a corporation from holding a directors' meeting necessarily enjoins those directors with knowledge of the decree from participating in holding such meeting.

In its preliminary injunction herein, the court enjoined American from recognizing or giving effect to the actions taken at the December 16 meeting in disobedience to the earlier court decree. Such a remedial measure, under the circumstances, is appropriate. As noted hereinabove, the proposed remedy in the contempt proceeding brought against American is that the corporation be ordered to expunge from its records all references to the December 16 meeting. The preliminary injunction, by restraining the recognition of actions taken at that meeting (other than the authorization to retain new counsel to defend in these proceedings), preserves the potentiality of such remedy being imposed, and in the meantime prevents the corporation from giving effect to actions taken contrary to the court's order. However, appellants contend that even if the corporation may be held in criminal contempt it may not be

subjected to punishment which has a remedial effect since, it is urged, it is improper to declare actions taken contrary to an injunction invalid where it is later determined that the injunction should never have issued, and that the effect of the preliminary injunction is to declare invalid the actions taken at the December 16 meeting.

[15, 16] Appellants, in reliance upon *Hanley v. Most* (1941), 9 Wash.2d 474, 115 P.2d 951, 118 P.2d 946, and *Deeds v. Gilmer* (1934), 162 Va. 157, 174 S.E. 37, 79, urge that the actions taken at the December 16 directors' meeting were not invalid, even if such actions were contrary to the terms of the temporary restraining order, and that therefore the preliminary injunction should not be allowed to stand in so far as it restrains recognition of such actions. However, those cases are not persuasive or controlling to the end for which they are cited here. To the contrary, they recognize that the condition on which action in violation of an erroneous injunctive order is allowed to stand is that "the violation of the injunction has not damaged any property or rights" of the complainant so that "he has not been damaged by its violation." (See *Deeds v. Gilmer* (1934), supra, 162 Va. 157, 174 S.E. 37, 79.) In such a situation the court may properly conclude that it is inequitable to compel an invalidation of the proceedings taken contrary to the order, and leave the violator liable only for criminal contempt. But where the disobedient action directly harms the complainant, or deprives him of some substantial right which he failed to protect in reliance on the injunctive order, it is within the power of the court to declare the action invalid and to prevent its effectuation. Such is the case here.

[17] As we have already shown, the temporary restraining order enjoined American, and *a fortiori* its directors through whom alone American could act, from conducting or participating in the December 16 directors' meeting. Relying on and obedient to the order, the six directors elected by plaintiffs did not attend or take part in that meeting; to do so would have rendered them subject to possible contempt

proceedings. But the remaining nine directors nonetheless proceeded to act as and for the corporation and as such to hold the meeting as planned, and therein purported as corporate action to adopt the resolutions to which plaintiffs and the directors elected by them were opposed. To allow those actions to stand would mean that plaintiffs, by relying on an order of a court which was valid on its face, would be foreclosed from being heard on measures which affected major changes in the organization of the corporation of which they were stockholders, merely because it was later determined that the injunction should not have been issued. "Each member of a corporate body has the right of consultation with the others, and has the right to be heard upon all questions considered, and it is presumed that, if the absent members had been present, they might have dissented, and their arguments might have convinced the majority of the unwisdom of their proposed action, and thus have produced a different result." (*Holcombe v. Trenton White City Co.* (1912), 80 N.J.Eq. 122, 82 A. 618, 624.) "Every director is entitled to an opportunity to be present and participate in the deliberations of the board and to express his opinion with respect to any proposed action." (*Hill Dredging Corp. v. Risley* (1955), 18 N.J. 501, 114 A.2d 697, 714.) American, acting through the directors who conducted the December 16 meeting, violated the restraining order and should not be allowed, through thus proceeding, to in effect deprive the directors who in obedience to the restraining order did not attend the meeting, of their right to participate in all corporate meetings, and to be heard and vote on basic issues.

Thus the preliminary injunction, in so far as it restrains American from recognizing or giving effect to the actions purportedly taken at the December 16 meeting (other than the action in retaining new counsel to defend in the present proceedings), is valid and should be continued in effect. This conclusion is not inconsistent with the order of the Delaware court enjoining plaintiffs from attempting to induce compliance with the terms of the Agents' Agreement. By preventing recognition of the actions taken at the December 16 meet-

ing we do not breathe new life into or purport to enforce the Agents' Agreement; we merely compel respect for an order of a California court which was valid on its face, and we refuse to allow a party who acted in reliance on such order to be deprived of substantial rights by action taken in disobedience to it.

For the above stated reasons the order granting the preliminary injunction is reversed in so far as it purports to compel compliance with the void Agents' Agreement, but is affirmed in so far as it forbids recognition by American of the actions purportedly taken as corporate action at the December 16, 1954, directors' meeting in disobedience to the previously issued temporary restraining order.

SHENK, Acting C. J., TRAYNOR, SPENCE and McCOMB, JJ., and DRAPER, J. pro tem., concur.

GIBSON, C. J., did not participate herein.

CARTER, Justice.

I concur in the result reached by the majority but only with the understanding that the temporary restraining order and preliminary injunction are declared valid for the sole purpose of protecting the plaintiffs who relied upon the erroneous temporary restraining order and were absent from the directors' meeting held on December 16, 1954 as the result of complying with said order. This will now afford plaintiffs the opportunity of participating in a meeting of the board and expressing their views relevant to the business conducted at said meeting. For all other purposes I regard both the temporary restraining order and preliminary injunction as void.

Furthermore, inasmuch as the only reason for considering the temporary restraining order as valid, was to show that plaintiffs' reliance thereon was justified, and therefore, entitled to protection, I refrain at this time from expressing any opinion concerning its operative effect since it was not before the court in any other context but the one heretofore mentioned.

Rehearing denied; DRAPER, J. pro tem., participating in place of GIBSON, C. J.

49 Cal.2d 754

**WEST COVINA ENTERPRISES, Inc., a
Corporation, Plaintiff and Respondent,
v.**

**John H. CHALMERS, Defendant and
Appellant.**

L. A. 24586.

Supreme Court of California.

Feb. 25, 1958.

Action for damages for breach of contract to render architectural services in connection with construction of addition to hospital. From adverse judgment of the Superior Court, Los Angeles County, Donald E. Dunbar, J. pro tem., the architect appealed. The Supreme Court, Shenk, J., held that where contract to render architectural services in connection with construction of addition to hospital, which administrative regulation required be prepared by duly licensed architect or registered civil engineer, stated that architect was not licensed to practice in California and that contract was sole measure of architect's obligation, architect was not required to obtain an architect's license or a temporary certificate so that he could legally perform contract nor did provision of contract authorizing him to obtain assistance of other individuals authorize him to delegate designing of hospital to a licensed architect, and architect could refuse to proceed under contract and could not be held liable for breach of contract.

Judgment reversed.

Carter, J., dissented.

Opinions, 308 P.2d 508; 309 P.2d 907, vacated.

1. Appeal and Error ⇐939

Where appeal is presented on clerk's transcript and certain exhibits, and error is claimed to appear on face of record, it will be presumed that it contains all matters material to a determination of points on appeal, in absence of proceedings to augment record. West's Ann.Rules on Appeal, rule 52.

2. Licenses ⇐39.40

Where contract to render architectural services in connection with construction of addition to hospital, which administrative regulation required be prepared by duly licensed architect or registered civil engineer, stated that architect was not licensed to practice in California and that contract was sole measure of architect's obligation, architect was not required to obtain architect's license or temporary certificate so that he could legally perform contract nor did provision of contract authorizing him to obtain assistance of other individuals authorize him to delegate designing of hospital to licensed architect, and architect could refuse to proceed under contract and could not be held liable for breach of contract. West's Ann.Bus. & Prof.Code, §§ 5537, 5540, 5550, 5551; West's Ann.Health & Safety Code, §§ 1411, 1417.

3. Hospitals ⇐2

Administrative regulation requiring that hospital building be designed by persons of proved ability as evidenced by certificate of State Board of Architectural Examiners is reasonable and does not conflict with statute providing that unlicensed person may render architectural services if, prior to performing any service, he informs his client in writing that he is not a licensed architect. West's Ann.Bus. & Prof.Code, § 5537; West's Ann.Health & Safety Code, § 1411.

4. Hospitals ⇐3

Purpose of statute providing that State department shall make reasonable rules and regulations to carry out purposes of Health and Safety Code, classifying hospitals and prescribing minimum standards of safety and sanitation in physical plant and equipment of hospitals, was to enable Department of Public Health to make rules providing for safety and sanitation of hospital building. West's Ann.Health & Safety Code, § 1411.

5. Licenses ⇐39.40

Purpose of statute providing that unlicensed person may render architectural services if, prior to performing any serv-

ice, he informs his client in writing that he is not a licensed architect is to except from general licensing provisions of code those persons who, upon written disclosure of fact that they are unlicensed, seek to provide architectural services, but it does not confer on all persons for all purposes right to design buildings in the state. West's Ann.Bus. & Prof.Code, § 5537.

Louis M. Welsh, Los Angeles, and David H. Thompson, San Diego, for appellant.

Morrow & Morrow and John C. Morrow, Los Angeles, for respondent.

SHENK, Justice.

This is an appeal on the judgment roll from a judgment for the plaintiff in an action to recover damages for the breach of a contract to render architectural services in connection with the construction of an addition to a hospital.

The defendant is an architect licensed to practice in the State of Nebraska. He is not licensed in the State of California, nor does he hold a temporary certificate to act as an architect in this state. In April 1954 the plaintiff and the defendant signed a contract dated January 2, 1954. The contract provides in part as follows:

"* * * Chalmers is not an architect [licensed to practice in California] * * * Chalmers, because of his education, training and experience, can prepare for Owner plans, drawings and specifications for said hospital addition and is willing to assist Owner in the construction and finishing of said building and * * * Owner desires to employ Chalmers for the period of time necessary to complete such work * * * the parties hereto agree as follows:

"1. That Chalmers shall be employed by Owner and shall:

"A. Prepare for Owner plans, drawings and specifications for said building including preliminary plans, final and working drawings and specifications complying with the requirements and regulations of the

California State Department of Public Health, the California State Fire Marshal, the United States Department of Public Health and United States Civil Defense Administration including such large scale and full sized detailed drawings for architectural, structural, plumbing, heating, electrical, other mechanical work and engineering reports as are necessary for purposes of construction.

"B. Obtain the approval of said final and working drawings and specifications of any of the aforesaid agencies whenever the same may be necessary to obtain financing of the construction of said building.

"C. Assist * * * in obtaining the services of a general contractor * * *.

"D. Inspect the building during construction. * * *"

"E. Approve bills for costs of construction. * * *"

"2. That Owner shall pay to Chalmers as salary the sum of Seven Hundred Fifty Dollars * * * a month for each month from February through December, 1954. * * *

"4. That preliminary plans for the erection of said building shall be completed on or before May 1, 1954, and final working drawings and specifications shall be completed and twelve * * * copies of the same submitted to Owner on or before September 1, 1954.

"5. That Chalmers may obtain the assistance of other individuals to assist him in his work hereunder but they shall not be employees of Owner and Owner shall be under no obligation to compensate such individuals or to reimburse Chalmers for such expenses as may be incurred by him in connection therewith. * * *

"9. That this agreement shall constitute the entire contract with respect to this matter."

The defendant began work in February 1954. He prepared some preliminary drawings which were found by the trial court to be incomplete, not in accordance with the agreement, and of no value to the plaintiff. The defendant did not complete any

of the final or working drawings, plans, or specifications as required by the contract.

In October 1954 the defendant repudiated the contract on the ground that performance by him was illegal because he was not licensed to practice architecture in California.

The trial court found against the defendant, denied him relief on his cross-complaint, and rendered judgment for the plaintiff for \$13,075 of which \$6,375 was for salary theretofore paid by the plaintiff to the defendant and \$6,700 of which was for the difference between the salary to which Chalmers was entitled under the contract and the fee paid to the architect who undertook to design and construct the building after Chalmers' repudiation.

An unlicensed person may render architectural services in this state if, prior to performing any service, he informs his client in writing that he is not a licensed architect. Business and Professions Code, § 5537. The preparation of hospital plans and specifications, however, is regulated by the Department of Public Health pursuant to rules and regulations adopted under section 1411 of the Health and Safety Code. Title 17, section 406 of the California Administrative Code provides:

"(a) Architectural plans and specifications for new construction, additions, alterations or repair of any buildings to be licensed and operated as hospitals as defined in Title 17, Group 2 of the Administrative Code shall be submitted to the State Department of Public Health for review and approval prior to commencement of construction. * * *

"(b) Plans and specifications shall be prepared by a duly licensed architect or registered civil engineer.

"(c) Plans shall be submitted in two stages:

- (1) Preliminary drawings and
- (2) Working drawings and specifications."

The trial court made the following conclusion of law: "Said written agreement

was not illegal or unlawful in any particular, either at the time it was executed or thereafter, nor was the performance thereof by either party thereto illegal, unlawful, or impossible. Said written agreement was not void or voidable by either party thereto."

It is the defendant's contention that the findings of fact which paraphrase the foregoing provisions of the contract and recite the above quoted sections of the Administrative Code do not support that conclusion.

[1] It should be noted that the appeal is presented on the clerk's transcript and certain exhibits. The error is claimed to appear on the face of the record. Thus, in the absence of proceedings to augment the record, it will be presumed that it contains all matters material to a determination of the points on appeal. Rule 52, Rules on Appeal; see also 3 Witkin, California Procedure, pp. 2239-2243.

[2] If section 406 is a valid administrative regulation, it is clear that Chalmers could not have rendered a lawful performance without first obtaining a license (Bus. and Prof.Code, § 5550, 5551), or a temporary certificate (Bus. and Prof.Code, § 5540). The plaintiff contends that an obligation to obtain a license was enjoined upon the defendant by the contract. The contract contains two recitals relevant to the determination of that issue. First, it states that Chalmers "is not an architect." Second, it provides that "* * * Chalmers, because of his education, training and experience, can prepare for Owner plans, drawings and specifications for said hospital addition. * * *" It is apparent from the terms of the contract that the respondent entered into the agreement with full knowledge of the extent of Chalmers' qualifications; that it knew that Chalmers was not licensed to practice architecture in California and that he had no temporary certificate to practice architecture in this state. If the contract is the sole measure of the defendant's obligations, it is clear that he cannot be required to obtain an

architect's license or a temporary certificate. It is contended, however, that because the defendant could have legally performed the contract by first obtaining a temporary certificate or a license to practice architecture, he was not precluded from rendering a lawful performance by section 406. It is a familiar rule that where a contract does not provide for an illegal mode of performance, but may be lawfully performed, it will be assumed that the parties contracted for a lawful performance. *Burne v. Lee*, 156 Cal. 221, 104 P. 438; *Vagim v. Brown*, 63 Cal.App.2d 504, 146 P.2d 923. The present contract is not, however, of that nature. It recites that it contains the whole agreement and an examination of that agreement shows that it was assumed by the parties that the defendant possessed all of the qualifications essential to a lawful performance. To now require a different performance would impose upon the defendant a burden which he did not assume under the contract. Had it been intended that the defendant should obtain a license, it would have been no task to have so provided in the contract. The finding that before entering into the agreement the defendant orally informed the plaintiff that he intended to obtain a license does not affect that conclusion. The contract purports to be a complete integration and the findings of fact are silent as to what effect, if any, such a statement could have had upon the present contract. Moreover, the finding that the contract was drawn by the plaintiff's attorney tends to support the construction which is now placed upon it. See *Thomas v. Hunt Mfg. Corp.*, 42 Cal.2d 734, 739, 269 P.2d 12.

The plaintiff urges that because the contract authorized the defendant to " * * * obtain the assistance of other individuals to assist him in his work. * * *" Chalmers could have lawfully performed the contract by associating a licensed architect. Although Chalmers was so authorized, he was not authorized to delegate the duty of designing the hospital to a third party under the guise of obtaining the "assistance of other individuals." Moreover,

it cannot be said that the preparation of plans and specifications by Chalmers personally, but with the assistance of a licensed architect, would have met the requirement of section 406 that plans and specifications be prepared by a "duly licensed architect."

[3, 4] The plaintiff contends that section 406 is not a valid regulation, that it is unreasonable, not related to any statutory purpose, and that it conflicts with section 5537 of the Business and Professions Code.

Section 1411 of the Health and Safety Code provides: "The State department * * * shall make * * * reasonable rules and regulations to carry out the purposes of this chapter, classifying hospitals and prescribing minimum standards of safety and sanitation in the physical plant, of diagnostic, therapeutic and laboratory facilities and equipment * * * of hospitals." The purpose of that section was to enable the Department of Public Health to make rules providing for the safety and sanitation of hospital buildings. It is clear that the requirement of section 406 that hospital buildings be designed by persons of proved ability as evidenced by the certification of the State Board of Architectural Examiners is reasonably related to accomplishment of that purpose.

[5] Nor is the contention that the regulation conflicts with section 5537 of the Business and Professions Code meritorious. That section provides: "This chapter does not prevent any person from making plans or drawings for his own buildings or from furnishing to other persons plans, drawings, specifications, instruments of service, or other data for buildings, if, prior to accepting employment or commencing work on such plans, drawings, specifications, instruments of service, or other data, the person, so furnishing such plans, drawings, specifications, instruments of service, or data, fully informs such other person or persons, in writing, that he * * * is not an architect." The obvious purpose of that section is to except from the general licensing provisions of the code those persons who, upon written disclosure of the

fact that they are unlicensed, seek to provide architectural services. It does not confer upon all persons for all purposes the right to design buildings in this state.

Section 1417 of the Health and Safety Code provides: "Any person who violates any of the provisions of this chapter or of the rules and regulations promulgated under this chapter is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed five hundred dollars * * * or by imprisonment in the county jail for a period not to exceed 180 days or by both such fine and imprisonment."

As stated, section 406 of the Administrative Code was adopted pursuant to section 1411 of that chapter. In view of the fact that the contract required a performance in violation of section 406 such conduct would have been punishable under section 1417. Recovery under the facts of this case would give effect to an unlawful bargain. The defendant was therefore justified in refusing to proceed further under the contract.

The judgment is reversed.

GIBSON, C. J., and TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

I cannot agree with the majority that the contract involved here is illegal on the ground that it violates section 406, Title 17, of the California Administrative Code, inasmuch as the provisions of section 5537 of the Business and Professions Code expressly permit a contract between an unlicensed architect and client upon the former's disclosure that he is unlicensed.

We are dealing here with a code section (Bus. & Prof.Code, § 5537) enacted by the Legislature and a regulation adopted by an administrative agency pursuant to enabling legislation. The fact that this regulation appears within the California Administrative Code does not raise the regulation to the comparable status of a code section

passed by the Legislature since the "Administrative Code" is not a code as such but only the conglomeration of all the rules and regulations adopted by state agencies and filed with the secretary of state (Govt. Code, § 11370 et seq.) Where on one hand there is a law passed by the Legislature under its general police power, and on the other hand a regulation adopted by a state agency, laws enacted by the Legislature will prevail over regulations made by the administrative agency with regard to matters which are not exclusively that agency's affairs (see, *Tolman v. Underhill*, 39 Cal.2d 708, 712, 249 P.2d 280; *Wilson v. Beville*, 47 Cal.2d 852, 859, 306 P.2d 789; *La Societe Francaise etc. v. California Emp. Com.*, 56 Cal.App.2d 534, 554, 133 P.2d 47; *Hamblin v. State Personnel Board*, 148 Cal.App.2d 53, 55, 306 P.2d 118; cf., *Hirschman v. County of Los Angeles*, 39 Cal.2d 698, 703, 249 P.2d 287, 250 P.2d 145).

To determine whether or not the Legislature has undertaken to occupy exclusively a given field of legislation depends on an analysis of the statute and a consideration of the facts and circumstances on which it was intended to operate (see, *Tolman v. Underhill*, supra, 39 Cal.2d 708, 712, 249 P.2d 280). Moreover where the Legislature has enacted statutes governing a particular subject matter, its intent to occupy the field preempting other regulations is not to be measured by the language alone but by the whole purpose and scope of the legislative scheme (see, *Tolman v. Underhill*, supra, 39 Cal.2d 708, 712, 249 P.2d 280).

It is clear that the Legislature of California has attempted to regulate the practice of architecture in this state. It has seen fit to require an architect desiring to practice here to obtain a license and his failure to do so is a misdemeanor (Bus. & Prof.Code, § 5536). However, it has also written an exemption into this licensing requirement in section 5537, by which an architect may practice even though unlicensed, if he makes a written disclosure to his client of the fact he is unlicensed. The determinative question before us is whether

this exemption is intended by the Legislature to occupy exclusively the matters of architectural licensing. The majority answers this question by stating that "It [Bus. & Prof.Code, § 5537] does not confer upon all persons for all purposes the right to design buildings in this state." This answer would appear to beg the question, but in addition it is inadequate for the reason that there is no attempt to explore the situations and conditions upon which section 5537 is intended to operate, as is required by the principles heretofore stated.

Section 5537 of the Business and Professions Code permits an unlicensed person to perform services constituting the practice of architecture if he gives written notice that he is not an architect. The policy underlying this section has been stated to be the prevention of unlicensed persons from preparing plans and specifications unless the client knows and is informed that such person is unlicensed. *Walter M. Ballard Corp. v. Dougherty*, 106 Cal.App.2d 35, 41, 234 P.2d 745. In more concrete terms the statutory notice is provided for the benefit of the owner merely to place him on his guard as to whether or not he wishes to employ an uncertified person (see, *Van Doren v. Burns*, 106 Cal.App. 224, 226, 288 P. 1107).

It is clear from the cases that the exemption provisions of section 5537 are intended to operate for the benefit of all owners. There is no attempt to restrict the exemption to certain owners and exclude others; the statute by its terms appears all encompassing.

However this statement of legislative policy is too uncertain and not conclusive on the question of intent to occupy the field of architecture licensing, and further analysis is necessary.

The key to the ascertainment of the legislative intent is found in the reason for creating such an exemption. The most obvious reason, and the one I believe makes sense, is to enable the citizens of California to have access to architects licensed in other states but who are unlicensed in this state. This exemption, when so interpreted,

recognizes the individualistic disposition of an architect and the attempts architects make to preserve the integrity of their individual expression. In other words if a citizen of California admires the work of a New York architect and wishes to employ him he may do so, and the architect in turn would be able to work unfettered by any association with California architects, preserving the individuality of his work. It is clear that without such exemption a California citizen could only employ a non-resident unlicensed architect where the latter would be required to work with a certified California architect, and this could well be an unacceptable condition to an architect who places the individual nature of his work in a paramount position. The exemption appears to be realistic in that the Legislature recognized the desirability of permitting architects from other states, and indeed other countries, to practice in California in a manner by which they can express their individual ideas unimpeded by others. Therefore, in its broader aspects the exemption is an attempt by the Legislature to eliminate provincialism in architecture.

To be successful this attempt must be exclusive and not subject to exceptions. If the Department of Public Health is permitted to deal with the licensing of architects, then logically other administrative agencies may likewise carve out exceptions subject only to constitutional limitations. But if this were permitted the reason for allowing unlicensed architects to practice in California would be defeated. Thus, in order to effectuate the reasons behind section 5537, its application must be deemed exclusive, and any regulation that abridges this application must fail. See, *Tolman v. Underhill*, supra, 39 Cal.2d 708, 249 P.2d 280.

This conclusion does not undermine the Department of Public Health in their supervision over hospitals since all plans for hospitals must be submitted to them and disapproved if they are defective (17 Cal.Admin. Code 406). Moreover, the department may disapprove plans even though the architect

submitting them is licensed in California. So, in fact, whether or not a person is licensed is immaterial to the approval or disapproval. It is further evident that there is no more assurance that an architect licensed by the State of California will be any more able to submit qualified plans for a hospital than a licensed architect from any other state. Any assumption to the contrary appears to suggest the provincialism that section 5537 was designed to avoid.

For the reasons above stated it would appear that the contract here involved is valid under section 5537 of the Business and Professions Code, and plaintiff is therefore entitled to recover damages for its breach.

I would therefore affirm the judgment.



158 Cal.App.2d 159

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Dale Joaquin JENNINGS, Defendant and
Appellant.**

Cr. 1227.

District Court of Appeal, Fourth District,
California.

March 3, 1958.

Hearing Denied April 30, 1958.

Murder prosecution. The Superior Court of Kern County, W. L. Bradshaw, J., entered a judgment convicting the defendant of murder in the first degree, and the defendant appealed. The District Court of Appeal, Mussell, J., held that remarks by trial judge, in determining degree of homicide before passing sentence when considered as a whole, did not show that trial court erred in applying the law

in requiring the defendant to show mitigating circumstances or motive.

Affirmed.

1. Criminal Law Ⓒ286

Where defendant charged with murder entered plea of not guilty by reason of insanity without also pleading not guilty, defendant admitted offense charged, and when he was found to be sane at the time offense was committed, the court was required to sentence him as required by law. West's Ann.Pen.Code, §§ 187, 189, 1016, 1026, 1192.

2. Criminal Law Ⓒ412(1)

Where corpus delicti of crime of murder has been established by independent evidence, circumstances surrounding commission of crime can be shown by extrajudicial statements of accused, and evidence of the surrounding circumstances may be used to establish the degree of the crime committed. West's Ann.Pen.Code, §§ 187, 189.

3. Homicide Ⓒ235

Fact that defendant had secured loaded revolver from his grandmother's home and carried it concealed upon his person when he secured ride in victim's automobile as hitchhiker constituted substantial evidence from which trial court could reasonably infer that murder was committed in perpetration of the crime of robbery. West's Ann.Pen.Code, §§ 189, 211.

4. Homicide Ⓒ18(1)

Proof of strict causal relationship between felony and homicide is unnecessary to constitute first degree murder. West's Ann.Pen.Code, § 189.

5. Homicide Ⓒ18(1)

Homicide is committed "in the perpetration of felony" if killing and felony are part of one continuous transaction. West's Ann.Pen.Code, §§ 189.

See publication Words and Phrases, for other judicial constructions and definitions of "In the Perpetration of Felony".

6. Criminal Law ⚖554

Trial court was not required to accept as conclusive statement of defendant as to reason for the killing or taking of victim's automobile, where evidence and inferences to be drawn therefrom substantially supported trial court's findings. West's Ann.Pen.Code, § 189.

7. Robbery ⚖3

A necessary element of the crime of robbery is the specific intent to steal property, but such intent can be inferred from all circumstances in the case. West's Ann. Pen.Code, § 211.

8. Homicide ⚖253(3)

Circumstances as to shooting of victim by defendant who had secured ride in victim's automobile as a hitchhiker constituted proof of deliberation and premeditation, so as to support conviction of first degree murder. West's Ann.Pen.Code, §§ 187, 189.

9. Criminal Law ⚖1144

It must be assumed in favor of upholding judgment that trial court performed its duties in accordance with the applicable law.

10. Criminal Law ⚖980(2)

Remarks by trial judge, in determining degree of homicide before passing sentence, when considered as a whole, did not show that trial court erred in applying the law in requiring defendant to show mitigating circumstances or motive. West's Ann.Pen.Code, §§ 189, 1192.

11. Homicide ⚖253(3)

Deliberation and premeditation to establish murder in first degree need not be proven by direct evidence and may be inferred from proof of such facts and circumstances as will furnish a reasonable foundation for such inference. West's Ann.Pen.Code, § 189.

12. Criminal Law ⚖1177

Remarks of trial judge, in determining degree of homicide before passing sentence, that "under the circumstances malice or premeditation in deliberation may be inferred and I think very probably should

be in this case" indicated that trial court considered that the evidence was sufficient to show premeditation and deliberation, and did not indicate reversible error. West's Ann.Pen.Code, § 189.

Dale Joaquin Jennings, in pro. per., and Thomas P. Daly, Jr., Bakersfield, for appellant.

Edmund G. Brown, Atty. Gen., and Joe J. Yasaki, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged with the crime of Murder, in violation of Section 187 of the Penal Code, in that on or about March 2, 1957, he did wilfully, unlawfully, feloniously and with malice aforethought murder Westley Earnest Haworth, a human being. Defendant entered a plea of not guilty by reason of insanity and waived trial by jury. Three doctors were then appointed to conduct an examination upon him to determine his sanity and to report thereon to the court in writing. These reports were read and considered by the court and defendant was thereupon found to be sane.

It was then stipulated by the parties that the setting of the degree of the crime be submitted to the court on the medical reports and on June 19, 1957, the cause came on regularly for setting the degree for the crime charged. The court read and considered the reports of the three appointed medical examiners and the statement made by the defendant to the Kern county officers. A deputy sheriff testified on behalf of the People, and defendant's signed statement was offered and received in evidence. Counsel for the respective parties stipulated that if the doctors were called to testify, their testimony would be the same as their reports on file in said matter. The court then found the defendant to be sane and fixed the degree of the crime as murder in the first degree.

Defendant appeals from the judgment ordering that he be punished by imprisonment in the state prison for life.

On March 3, 1957, officers found the body of Westley⁴ Earnest Haworth near the intersection of Superior Road and Rosedale Highway in the vicinity of Bakersfield in Kern county. An autopsy revealed that Haworth died as a result of two gunshot wounds in the head. When found, the victim was lying on his back, his head to the north, and there was a considerable amount of blood under the back of his head. There were tire tracks near the body which indicated that a vehicle had made a "U" turn at a point approximately 10 feet south of the body and had stopped on the west side of the road. The tire tracks also indicated that approximately 40 feet south of the body the vehicle had left the vicinity at a fairly high rate of speed. Footprints were observed extending from the car to a point approximately 10 feet south of it.

At about 5:30 p. m. on March 3, 1957, a Kern county deputy sheriff had a conversation with the appellant in the Kern county hospital, in which appellant stated that he remembered that he was driving an automobile and a highway patrol car pursued him in the vicinity of Camp Roberts; that he had had an accident but that he could not remember what had happened "previous to that". On March 4th the officer had a second conversation with appellant in an ambulance in which appellant was being taken to the Kern General Hospital. Appellant then stated that he "couldn't remember any of the events". On March 6th appellant made another statement to the officers at the hospital. Shorthand notes were made of this statement and a tape recording was made thereof by one of the officers. This statement is substantially as follows:

Appellant was 19 years old, lived in Bakersfield, and was stationed at Fort Ord, California. On March 2, 1957, he visited his grandmother, who lived near Shafter. While there he saw her husband's revolver, a .38 calibre, which was loaded with five rounds of ammunition, and when appellant left his grandmother's place, he took this gun, which she had placed under

the mattress in the bedroom, and put it in his overcoat pocket. It was late in the morning of March 2nd when he left and he then hitchhiked to Calders Corner to visit some friends. He obtained a ride back to Shafter and then hitchhiked to Bakersfield, where he got off at the city limits, walked down town and started to hitchhike back towards Shafter. He caught a ride to Rosedale and from there to the intersection of Allen Road or Santa Fe Road, near Shafter. At about 4:30 in the afternoon, while he was trying to get a ride, a 1957 Chevrolet sedan was brought to a stop near him and the driver, who was alone, offered to take appellant to Bakersfield. He got into the car and when they reached Oak and 19th Streets in Bakersfield, appellant told the driver to stop the car. Appellant then got out and started to get his handbag, when the driver asked him to get back into the car and said that he would take appellant down where he was going. They then drove towards Taft Highway. The driver began talking about his Army experiences and about a young recruit who was forced to engage in sexual acts with members of his platoon. However, the driver made no advances or suggestions to the appellant. After talking about women, drinking, and again about the young recruit, the driver drove a short distance on a dirt road, made a "U" turn, so that the car faced south, and stopped. The driver then reached over and put his hand on the appellant's shoulder, but said nothing. Appellant told him he had better take appellant back to Bakersfield and when the driver said he was not going to do it, appellant reached into his overcoat and drew the revolver. The driver opened the car door on his side, jumped out and walked or ran backwards toward the rear of the car. Appellant got out on the driver's side and when the driver was facing him, a little distance behind the car, appellant stepped toward him, raised the gun, and pulled the trigger. Nothing was said by either appellant or the driver when they got out of the car and before the first shot was fired. After the

first shot, the driver fell backwards and appellant then ran to him and, while the driver was lying on his back, appellant pointed the gun at his head and pulled the trigger again. Appellant then went back to the car, threw the gun on the front seat, got in and drove forward a few feet, when the car stalled. He again started the motor, spun the tires, and drove out onto the highway. When he was near Paso Robles, he opened the gun and threw the cartridges out the car window. He turned north toward Salinas and then saw a car with red lights behind him. He speeded up, and going into a curve, lost control of the car, crashed through a railing and was "thrown towards the ceiling". The next thing he remembered was that he was lying on the ground, with a coat or blanket over him. Appellant further stated that he thought he fired the first shot at the victim because he was "mad and disgusted" as a result of his conversation with him and that he did not know why he had fired the second shot.

All three of the appointed medical examiners reached the conclusion that appellant was legally sane. Dr. Stockton stated that in his opinion the appellant was a moderately intelligent "psychopathic delinquent", as defined in the Welfare and Institutions Code, § 7050, and that he should be institutionalized indefinitely. Dr. Antonio Perelli-Minetti stated that appellant is considered sane with respect to the act charged and, at the time of his examination, sane for the purposes of standing trial; that appellant did not suffer from any mental defect, disease, or derangement rendering him incapable of appreciating the character and quality of the act charged or incapable of distinguishing between right and wrong as to the act. Dr. Alexander Augur stated that it was his opinion that appellant was not insane at the time he committed the offense charged and was not insane on April 27, 1957, when the doctor examined him.

The principal question involved in this appeal is whether the evidence was suffi-

cient to sustain a finding of first degree murder.

[1] When appellant entered a plea of not guilty by reason of insanity without also pleading not guilty, he admitted the offense charged (Penal Code, Sec. 1016), and when he was found to be sane at the time the offense was committed, the court was required to sentence him as required by law (Penal Code, Sec. 1026). Since the crime of murder is divided into two degrees (Penal Code, Sec. 189), the court was required to determine the degree of the crime before passing sentence (Penal Code, Sec. 1192). Section 189 of the Penal Code provides in part that all murder which is committed in the perpetration or attempt to perpetrate robbery is murder of the first degree, and robbery is defined in section 211 of the Penal Code as the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

[2] The corpus delicti of the crime of murder was established herein by evidence other than the statement of the appellant and by his failure to enter a plea of not guilty. In *People v. Miller*, 37 Cal.2d 801, 806, 236 P.2d 137, 139, the court said:

"The corpus delicti of the crime of murder having been established by independent evidence, both reason and authority indicate that the circumstances surrounding the commission of the crime can be shown by the extrajudicial statements of the accused, and that such evidence of the surrounding circumstances may be used to establish the degree of the crime committed."

In *People v. Kerr*, 37 Cal.2d 11, 15-16, 229 P.2d 777, 779, the court said:

"The rule as to circumstantial evidence and the requirement as to burden of proof are for application in, and primarily are the concern of, the trial court; an appellate court will not alter or hold unsupported the trial court's findings merely because it might rea-

sonably draw an inference different from one the trial court reasonably drew, or might not be convinced beyond a reasonable doubt that it would have made the same findings. * * * 'If the record affords substantial support * * * for the conclusion that one of the enumerated felonies was perpetrated or attempted, and the killing was committed in such perpetration or attempt, the judgment must be affirmed * * *. After conviction all intentions are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it. * * *'

[3] The record shows that the appellant secured a loaded revolver from his grandmother's home and carried it concealed upon his person; that the deceased, Westley Earnest Haworth, had in his possession a 1957 automobile; that after this automobile was brought to a stop on a dirt road, appellant told Haworth he had better take him (appellant) back to Bakersfield and upon Haworth's refusal to do so, appellant drew the revolver from his coat pocket; that Haworth got out of the car and was walking or running backward from it when appellant shot him; that after the first shot and while Haworth was lying on his back, appellant fired a second shot at Haworth's head at close range; that immediately thereafter appellant took Haworth's car and hurriedly left the scene; that he emptied the gun and threw the shells out the window of the car and attempted to escape from the officers when he saw the red lights of their approaching car. These facts constitute substantial evidence from which the trial court could reasonably infer that the murder was committed in the perpetration of the crime of robbery.

[4,5] In *People v. Chavez*, 37 Cal.2d 656, 669-670, 234 P.2d 632, it was held that the law of this state has never required proof of a strict causal relationship between the felony and the homicide; that the homicide is committed in the perpetra-

tion of the felony if the killing and the felony are parts of one continuous transaction. In *People v. King*, 13 Cal.2d 521, 524-525, 90 P.2d 291, it was held that a murder committed prior to the actual forcible taking of property was committed in the perpetration of the robbery when the killing and the robbery were parts of one continuous transaction. And in *People v. Cabalero*, 31 Cal.App.2d 52, 61-62, 87 P.2d 364, where the killing was done while the conspirators were attempting to flee from the scene of the robbery with the fruits thereof, it was held that the homicide was committed in the perpetration of a robbery.

[6] The trial court herein was not required to accept as conclusive the statement of the appellant as to the reasons for the killing or the taking of the victim's car where, as here, the evidence and the inferences to be drawn therefrom substantially support the trial court's findings. *People v. Kerr*, supra, 37 Cal.2d 14, 229 P.2d 778.

[7] While a necessary element of the crime of robbery is the specific intent to steal property (*People v. Sanchez*, 35 Cal.2d 522, 526, 219 P.2d 9), such intent can be inferred from all the circumstances in the case (*People v. Hubler*, 102 Cal.App.2d 689, 695, 228 P.2d 37).

Appellant contends that the evidence is insufficient to show premeditation and deliberation and in support of this contention cites *People v. Howard*, 211 Cal. 322, 329, 295 P. 333, 336, 71 A.L.R. 1385, holding that "When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree." Appellant also cites *People v. Bender*, 27 Cal.2d 164, 186-187, 163 P.2d 8, holding that where there is no substantial evidence from which it reasonably can be inferred that defendant either formed or carried out the intent to kill deliberately, and with premeditation, in the ordinary meaning of those words, the judgment upon the finding of murder of the first degree cannot be sus-

tained. These are correct statements of the law. However, in *People v. Eggers*, 30 Cal.2d 676, 685, 686, 185 P.2d 1, 6, it was held that it is the exclusive province of the jury to determine from the evidence whether the killing was the "wilful, deliberate and premeditated" act of the defendant; that an appellate court may not, in reviewing the evidence, substitute its judgment for that of the jury, and, where there is substantial evidence in support of the jury's verdict, its determination must be upheld; that to justify the reversal of a judgment of conviction, the record must clearly show that the evidence could not be interpreted as supporting the verdict; that no rule can be laid down as to the character or amount of proof necessary to show deliberation and premeditation; that each case depends upon its own facts; that the nature of the weapon used, or acts of malice which, in the usual course of things, would cause death or great bodily harm, tend to provide the reasonable basis for a conviction of murder in the first degree; and that in arriving at the intention of the defendant, regard should be given to what occurred at the time of the killing, if indicated by the evidence, as well as what was done before and after that time.

In *People v. Hills*, 30 Cal.2d 694, 700, 185 P.2d 11, it was held that the premeditated or deliberate intent need not be shown by direct evidence, but may be inferred from the proof of facts and circumstances as will furnish a reasonable foundation for such a conclusion.

In *People v. Dessauer*, 38 Cal.2d 547, 241 P.2d 238, the evidence showed that the defendant had a gun in the back seat of his car, that he entered the back seat rather than the front seat where his woman companion was seated, and that, after a conversation with her and with no apparent provocation, he aimed the gun at the back of her head and shot her four times. The court held that this evidence, together with other evidence, was sufficient to indicate an intent to kill and clearly established deliberation and premeditation.

[8] In the instant case, the appellant, without provocation, deliberately pulled a loaded revolver from his pocket and pointed it at Haworth, who then got out of the car and ran or walked backwards from it. Appellant then shot Haworth and when he fell and was lying on his back, defendant pursued him and fired a second bullet into his head. There were no words spoken after Haworth left the car and there was no evidence on the ground indicating a struggle of any kind, or that Haworth, who was unarmed, had resisted in any way or struggled with the defendant. These circumstances, under the rules announced, constituted proof of deliberation and premeditation.

[9, 10] Appellant contends that the court erred in applying the law in requiring him to show mitigating circumstances or motive. This argument is based on the following remarks of the trial court:

"In the face of the circumstances that no, there are no witnesses, of course, other than the defendant to the act that are able to state anything, taking the defendant's own statement the Court fails to find mitigating circumstance or motive, which might cause this offense."

However, at the conclusion of the hearing the court said:

"Well, the Court has read these various statements that have been submitted to it and has attempted to analyze them, and the problem that faces the Court is that of fixing the degree.

"In the face of the circumstances that no, there are no witnesses, of course, other than the defendant to the act that are able to state anything, taking the defendant's own statement the Court fails to find any mitigating circumstance or motive which might cause this offense, and,—under the circumstances malice or premeditation and deliberation may be inferred and I think very probably should be in this case, so it is the finding of this Court at this time that this defendant is guilty of Murder in the First Degree."

In *People v. Hooper*, 35 Cal.2d 165, 169, 216 P.2d 876, 878, the trial court referred to the hearing in a murder case as one "in mitigation of punishment" and the appellant argued that this characterization of the hearing showed that the court mistakenly believed that the defendant had the burden of showing mitigating circumstances to reduce the murder from first to second degree. It was there held that it could not be assumed that the reference to mitigation of punishment indicated misapprehension as to the law concerning the burden of proof of the degree of the offense; that in determining the degree of an offense and the punishment to be imposed, after a plea of guilty, it is the duty of the trial court to consider matters in aggravation as well as in mitigation of the offense and that there being nothing in the record establishing the contrary, it must be assumed in favor of upholding the judgment that the court performed its duties in accordance with the applicable law. Here, it cannot be assumed that the court's reference to "mitigating circumstances or motive" indicated misapprehension as to the law applicable. When the court's entire remarks are considered, a reasonable interpretation thereof is that the court determined that there was sufficient evidence to justify the finding of murder in the first degree.

[11, 12] Finally, appellant contends that the court erred in applying the law when it was said that premeditation and deliberation might be inferred. This contention is based on the following remarks of the trial court: "* * * under the circumstances malice or premeditation and deliberation may be inferred and I think very probably should be in this case." These remarks indicate that the court considered that the evidence was sufficient to show premeditation and deliberation. Deliberation and premeditation need not be proven by direct evidence and may be inferred from proof of such facts and circumstances as will furnish a reasonable foundation for such an inference, and where the evidence is not in law insufficient, the matter is exclusively within the province of the jury

for determination. *People v. Guldbrandsen*, 35 Cal.2d 514, 519-520, 218 P.2d 977. The quoted remarks of the trial court do not indicate reversible error.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



158 Cal.App.2d 123

**NORTHRIDGE PARK COUNTY WATER
DISTRICT, a Public Corporation,
Petitioner,**

v.

**Edward M. McDONELL, Secretary of the
Northridge Park County Water
District, Respondent.**

Civ. 9438.

District Court of Appeal, Third District,
California.

Feb. 28, 1958.

Proceedings on petition for writ of mandate. The District Court of Appeal, Van Dyke, P. J., held that even if, as alleged, secretary of water district had publicly announced his intention to refuse to sign bonds, court could not assume that he would refuse to sign them when they were presented to him; and held that since time for performance of act sought to be compelled had not yet arrived, mandamus would not lie.

Order accordingly.

1. Courts $\hookrightarrow$ 206(1)

District Court of Appeal has no original jurisdiction under Code sections which govern submission of controversy without action. West's Ann.Code Civ.Proc. §§ 1138-1140; West's Ann.Const. art. 6, § 4b.

2. Mandamus $\hookrightarrow$ 14(3), 168(2)

Even if, as alleged, secretary of water district had publicly announced his intention

to refuse to sign bonds, court could not assume that he would refuse to sign them when they were presented to him; and time for performance of act sought to be compelled not having arrived, mandamus would not lie at behest of water district. West's Ann.Code Civ.Proc. §§ 1138-1140; West's Ann.Const. art. 6, § 4b.

Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for petitioner.

Edward M. McDonell, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Northridge Park County Water District, a county water district, has filed in this court a petition seeking to invoke our original jurisdiction by submitting to this court a controversy without action pursuant to Sections 1138, 1139 and 1140 of the Code of Civil Procedure. The petition also purports to contain sufficient allegations to invoke our original jurisdiction in mandamus. We issued an alternative writ and the proceeding was placed upon our February calendar for argument. However, argument was waived and the matter submitted upon the briefs on file. The pertinent code sections provide as follows:

Section 1138: "Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts, upon which the controversy depends, and present a submission of the same to any Court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real and the proceedings in good faith, to determine the rights of the parties. The Court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending."

Section 1139: "Judgment must be entered as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a

copy of the judgment constitute the judgment roll."

Section 1140: "The judgment may be enforced in the same manner as if it had been rendered in an action in the same court, and is in the same manner subject to appeal."

[1] We have concluded that this court has no original jurisdiction under the code sections which govern the submission of a controversy without action.

Our jurisdiction is prescribed by Article VI, Section 4b of the California Constitution. That section, after prescribing the appellate jurisdiction of the district courts of appeal, provides, in respect of original jurisdiction, that:

"* * * The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction."

1 Witkin, California Procedure, page 182, states:

"The jurisdiction of the Supreme Court and district courts of appeal is fixed in the Constitution. * * * The jurisdiction of the superior courts is also set forth in the Constitution * * *, though it is not 'fixed' therein in the same sense as is the jurisdiction of the higher courts. * * *

"The rule is well established that the constitutional provisions are not only a grant but a limitation, and that the Legislature has no power to enlarge the jurisdiction of these courts."

We quote the following from the same author, volume 1, page 244, under the heading "Original Jurisdiction":

"The original jurisdiction of the district court of appeal to issue writs of mandamus, certiorari, prohibition, habeas corpus, and other unspecified writs, is declared in the same language as that of the Supreme Court."

We think it is clear from a consideration of the constitutional provisions referred

to, along with the sections of the Code of Civil Procedure governing the submission of controversies without action, that this court has no original jurisdiction of such proceedings and cannot try and render judgment therein.

[2] Turning now to the consideration of the pleading as a petition in mandamus, we note that in *City and County of San Francisco v. Boyle*, 195 Cal. 426, 233 P. 965, 966, the Supreme Court said:

"This application for a writ of mandate was presented to this court upon an agreed statement of facts. The petitioners purport to make the application under the provisions of sections 1138 to 1140, inclusive, of the Code of Civil Procedure, which relate to the submission of controversies which might be the subject of a civil action to courts which would have jurisdiction of such action, upon an agreed statement of facts. It is not necessary to determine whether these sections of the code have application to the submission of causes to this court, since the facts set forth in the application herein would suffice to support the issuance of a writ of mandate if, as a matter of law, such writ should issue."

The same practice was followed by the Supreme Court in *California Toll Bridge Authority v. Wentworth*, 212 Cal. 298, 309, 298 P. 485, 489. Therein the court said:

"While the parties to the controversy sought to submit it to the court without action, under the provisions of sections 1138 to 1140 of the Code of Civil Procedure, we have elected to treat it as an application for a writ of mandate, following our action in *City and County of San Francisco v. Boyle*, 195 Cal. 426, 233 P. 965."

The agreed case as stated in the petition contains the following assertions: That petitioner is a duly organized county water district and that in the formation thereof the applicable statutory provisions were fully complied with; that there has been formed within petitioner district an im-

provement district in the formation of which all applicable statutory requirements have been complied with; that proceedings have been taken by the district whereunder there has been authorized the issuance of bonds to obtain funds wherewith to construct improvements within the improvement district necessary and convenient for the service of water to the lands within that district, the bonds to constitute a lien upon such lands; that these proceedings have progressed to the point where the issuance of bonds has been duly authorized but that at that point the respondent secretary of the water district has announced that, in his view, the bonds will be invalid and void for various reasons advanced by him, having to do with the legal existence of the water district itself, as well as the legality of the proceedings to form the improvement district therein, and the legality of proceedings taken for the authorization of the bonds. The agreed case meticulously traces all steps taken in the formation of the water district and of the improvement district and in the authorization for the issuance and sale of the bonds. The reasons why petitioner desires that this court accept original jurisdiction of the petition are set forth and it is asserted in the supporting briefs that, notwithstanding the bonds have not been printed or submitted to respondent for execution by him as secretary of the water district, that is, notwithstanding the fact that the time for the performance of the act herein sought to be compelled has not arrived, yet mandamus is warranted in view of the declarations of the respondent aforesaid. Says petitioner: "The bonds have not been printed and Respondent cannot therefore actually sign. However, Respondent has publicly announced his intention to refuse to sign and his reasons, and an adjudication by an appellate court of the questions he raises is essential if the bonds are to be successfully marketed with a merchantable legal opinion." Petitioner cites in support of the foregoing assertions 32 California Jurisprudence 2d, page 130, and *Imperial Mutual Life Insurance Co. v. Caminetti*, 59 Cal.App.2d 494, 498, 139 P.2d

693. The authorities cited do not sustain petitioner's contentions. We quote the following from 32 California Jurisprudence 2d page 130:

"* * * [M]andamus is never granted to compel performance of an act until there has been an actual, as distinguished from an anticipated, refusal."

The text cites in support of the foregoing the following cases: *George v. Beaty*, 85 Cal.App. 525, 260 P. 386; *McMullen v. Glenn-Colusa Irr. Dist.*, 17 Cal.App.2d 696, 62 P.2d 1083; *Friedland v. Superior Court*, 67 Cal.App.2d 619, 155 P.2d 90; *Palmer v. Fox*, 118 Cal.App.2d 453, 258 P.2d 30 and *Berkeley Unified School District of Alameda County v. City of Berkeley*, 141 Cal. App.2d 841, 297 P.2d 710.

In *Communist Party of United States of America v. Peek*, 20 Cal.2d 536, 540, 127 P.2d 889, 892, the court said:

"* * * Neither can the court's order sustaining general demurrers to the petition for a writ of mandate be challenged successfully. Plaintiffs sought in their petition to compel the performance of future acts which, it was alleged, the defendants would refuse to perform when performance became due. Mandamus will not lie to compel the performance of future acts, and for that reason the general demurrers to the petition for the writ were properly sustained."

Imperial Mutual Life Insurance Company v. Caminetti, supra, relied upon by petitioner, presented a situation which renders inapplicable here what was there said in respect of the matter now under discussion. The petitioning insurance company had been engaged in business from 1927, operating pursuant to a certificate of authority originally issued by the commissioner of insurance and renewed each year thereafter until 1940. The certificate expired annually on July 1st unless sooner revoked. Commissioner Caminetti had refused the renewal of the license for the period July 1, 1940 to July 1, 1941. By

stipulation he had extended the existing certificate from time to time, the last extension expiring June 15, 1941. During the time covered by the stipulation, a controversy arose which gave rise to litigation between the parties. On June 6, 1941, the petitioner applied for a renewal of its certificate for the period July 1, 1941 to July 1, 1942 and the commissioner refused any further extension after June 15, 1941. On June 13th the petitioner began the proceeding in mandamus. Responsive to Caminetti's assertion that, in so far as the petition for the writ applied to the fiscal year 1941-1942, the petition had been prematurely filed, the court, noting that the general rule was that the act sought to be compelled must be one to the performance of which the party was entitled at the time the proceeding in mandate was instituted, declared that the rule was subject to a kindred rule that mandate might be resorted to when it appeared from the conduct or declarations of the officer that he did not intend to comply with an obligation to renew a permit or grant a license when the time for such action arrived. Under those circumstances, and relying upon the general equity rule forbidding piecemeal litigation, the appellate court held the circumstance justified the peremptory writ since, before the trial, the time for the issuance of the renewal certificate had arrived. No comparable situation is presented here. No reason is given why the bonds, after authorization, had not been printed and presented to the secretary of the district for his signature. If and when those bonds are printed and presented the duty of the secretary of the district to execute them in the name of the district, if they have been legally authorized, will be a heavy duty, the refusal to perform which will call for a high degree of certainty on the part of the secretary that a refusal would be justified. We cannot assume that when the respondent secretary is presented with the bonds he will then refuse to sign them. Under the circumstances, our conclusion is that no peremptory writ can issue for the reasons stated.

Notwithstanding that the petition for the writ states no cause of action and that, therefore, this proceeding must end with a discharge of the alternative writ and a refusal to issue a peremptory writ, we have considered seriously the propriety of examining into the merits of the controversy in view of the alleged urgency, but have concluded that it would be improper for us to do so. We see no compelling reason for departing from the long established rule that courts will concern themselves only with issues which require a decision that can eventuate in a binding judgment.

For the reasons given, the peremptory writ is denied and the alternative writ heretofore issued is discharged.

SCHOTTKY and PEEK, JJ., concur.



158 Cal.App.2d 183

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Herman COLE, Defendant and Appellant.
Cr. 2772.

District Court of Appeal, Third District,
California.

March 4, 1958.

Defendant was convicted of grand theft. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgment and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Peek, J., held that testimony of proprietor of store as to circumstances from which theft of tape recorder by a colored man could be inferred was admissible to establish corpus delicti of the theft, though proprietor did not identify defendant as thief, and that thereafter defendant's extrajudicial state-

ment to officers was admissible to identify him as perpetrator of theft, and that such evidence was sufficient to support conviction.

Judgment and order affirmed.

1. Larceny Ⓒ23

Crime of "grand theft" is complete when a person takes property not his own with intent to take it, regardless of whether any one saw him take it.

See publication Words and Phrases, for other judicial constructions and definitions of "Grand Theft".

2. Criminal Law Ⓒ412(1)

Evidence that tape recorder was missing from store, that immediately prior to discovery of loss, proprietor saw a colored man carrying heavy object to parked automobile, that he had given no one permission to take recorder, and that recorder was recovered at barber shop whose proprietor stated to officers in defendant's presence without denial by defendant that he had purchased recorder from defendant established all essential elements of crime of grand theft prior to admission of defendant's extrajudicial statement to officers.

3. Criminal Law Ⓒ563

The corpus delicti may be established by circumstantial evidence and inferences that may be drawn therefrom.

4. Criminal Law Ⓒ26

Identity of offender is not a part of the corpus delicti.

5. Criminal Law Ⓒ412(1)

Where corpus delicti is established by independent evidence, defendant's extrajudicial statements may be used to show surrounding circumstances, establish degree of crime committed, and identify defendant as the offender.

6. Criminal Law Ⓒ406(1)

Larceny Ⓒ43

In prosecution for grand theft, proprietor's testimony that tape recorder was missing from store and that immediately prior to discovery of loss he saw a colored man carrying heavy object to parked auto-

mobile was admissible to establish corpus delicti of theft, though he did not identify defendant as thief, and thereafter defendant's extrajudicial statement to officers that he had stolen recorder was admissible to identify defendant as perpetrator of theft.

7. Larceny Ⓒ65

Evidence, including extrajudicial statement of defendant to officers, was sufficient to support conviction for grand theft.

8. Criminal Law Ⓒ1159(2, 4)

Weight of the evidence and credibility of witnesses are questions for jury and not for reviewing court on appeal.

9. Criminal Law Ⓒ553

Testimony of one witness, if believed by jury, though uncorroborated, may be sufficient to support conviction.

John P. Carson, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Defendant appeals from a judgment of conviction of grand theft, and from the order denying his motion for a new trial.

By an information filed by the district attorney of Sacramento County defendant was charged in Count I with burglary, in Count II with grand theft and additionally was charged with two prior felony convictions. He pleaded not guilty to the substantive offenses and admitted the prior convictions. At the conclusion of the trial the jury returned verdicts of guilty on each count. Probation was denied, as was his motion for a new trial. The motion of the district attorney to dismiss Count I was granted, and upon its own motion the court dismissed the two prior convictions.

Summarizing the evidence in the light most favorable to the respondent, it appears that a tape recorder was taken from a store operated by Herman Faig without his consent. His testimony was that as he walked

from the rear to the front of his store he noticed a colored man he could not identify just outside the front door. This person was carrying a heavy object which he placed in a car parked with its motor running at the curb. He described the car as a "beat up * * * about a 1940" sedan. In the car was another colored man he could not identify. Immediately thereafter he discovered that the tape recorder which had been on a table a few feet from the door was missing. Its retail price was \$254.95 and the wholesale price \$175. Later that morning the defendant and his companion were arrested by the police. The car in which they were riding was a dark bluish-green 1939 Chrysler sedan. When first questioned by the officers defendant denied the theft of the recorder. That same afternoon the officers recovered the tape recorder in a storage room in the rear of Jim Doyle's Barber Shop in Sacramento. The proprietor, when taken to the police station, identified the defendant as the person from whom he had purchased the recorder earlier that day. At this point the defendant stated to the officers, "Well, I am dead. I took it." The defendant then gave a statement to the officers in which he admitted that he and his companion had been driving in the Oak Park area of Sacramento that morning looking for something to steal; that he stole the particular recorder and took it to Doyle who purchased it for \$45. The defendant's companion related substantially the same story, and when the defendant was confronted with the statement it was not denied.

In defendant's opening brief which he filed on his own behalf it was contended that the court erred in admitting his extrajudicial statement to the officers prior to the establishment of the corpus delicti of the crime, and that the evidence was insufficient to sustain his conviction on the charge of grand theft since there was no identification and no evidence connecting him with the charge except his erroneously admitted statement.

[1,2] Defendant's argument in this regard is primarily addressed to the sufficiency

of the evidence to sustain a charge of burglary. Further argument along this same line is made in the supplemental brief filed by counsel who was appointed by this court pursuant to defendant's request. Even assuming the validity of such argument, the charge of burglary was dismissed, and hence defendant's contention is without merit. In his reply brief he applies the same argument to the charge of theft. The crime of grand theft is complete when a person takes property not his own with the intent to take it. *People v. Corenevsky*, 124 Cal.App.2d 19, 23, 267 P.2d 1048. Nor is it necessary that anyone see him take it. *People v. Lancellotti*, 147 Cal.App.2d 723, 729, 305 P.2d 926. Here the record shows conclusively that a tape recorder was missing from Mr. Faig's store. Immediately prior to the discovery of the loss Faig saw a colored man carrying a heavy object to a parked car; he had given no one permission to take the recorder; and the recorder was recovered at a barber shop whose proprietor stated to officers in defendant's presence that defendant had sold it to him. Defendant made no denial of the statement. It would thus appear that all of the essential elements of the crime were established (see *People v. Kross*, 112 Cal. App.2d 602, 247 P.2d 44) prior to the admission of the defendant's extrajudicial statement.

[3-7] It may also be noted that "the corpus delicti may be established by circumstantial evidence and inferences that may be drawn therefrom. [Citation.] The identity of the offender is not a part of the corpus delicti. [Citation.] Where the corpus delicti is established by independent evidence, defendant's extrajudicial statements may be used to show the surrounding circumstances and to establish the degree of the crime committed [citation] and to identify the defendant as the culprit [citation]." *People v. Sheeley*, 151 Cal.App.2d 611, 613, 311 P.2d 883, 885. It follows that Faig's testimony which is attacked because of his lack of identification of defendant was properly admitted to establish the corpus delicti of the theft as was, there-

after, defendant's extrajudicial statement to identify him as the perpetrator thereof, all of which was amply sufficient to support his conviction of the crime charged.

[8] Defendant also contends that the testimony of Officer McAlexander was untrue, contradictory and uncorroborated. Questions as to the weight of the evidence and credibility of the witnesses are matters for the jury and not for this court on appeal. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778.

[9] Defendant's further contention that the testimony was uncorroborated is likewise without merit since the testimony of one witness, if believed by the jury, was sufficient to support the conviction. *People v. Jones*, 153 Cal.App.2d 41, 314 P.2d 93.

The judgment and order are affirmed.

VAN DYKE P. J., and SCHOTTKY, J., concur.



158 Cal.App.2d 64

George T. MARTIN, a minor, by George L. Martin, his guardian ad litem, and George L. Martin, Plaintiffs and Appellants,
v.

The ROMAN CATHOLIC ARCHBISHOP
OF LOS ANGELES, a corporation sole,
Defendant and Respondent.

Civ. 22299.

District Court of Appeal, Second District,
Division 3, California.

Feb. 27, 1958.

Action for personal injuries sustained by youth while playing football on Saturday on school grounds maintained by private school. From adverse judgment of Superior Court, Los Angeles County, Maurice C. Sparling, J., and from order denying motion for a new trial, plaintiffs ap-

pealed. The District Court of Appeal, Parker Wood, J., held that there was no negligence on part of private school in placing boys on their honor to pull weeds on Saturday as disciplinary measure without supervision, and school was not liable for injuries sustained by youth who reported to pull weeds and who sustained injury while playing football on athletic field of private school.

Attempted appeal from order denying motion for new trial dismissed and judgment affirmed.

Schools and School Districts ↵5

There was no negligence on part of private school in placing boys on their honor to pull weeds on Saturday as disciplinary measure without supervision, and school was not liable for injuries sustained by youth who reported to pull weeds and who sustained an injury while playing football on athletic field of private school.

Wm. A. Wittman, South Gate, and Donald J. Pierce, Downey, for appellants.

Belcher, Kearney & Fargo, Louis E. Kearney, and Stevens Fargo, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action for damages for personal injuries sustained by plaintiff George T. Martin, a minor, while he was playing football on school grounds maintained by defendant. Plaintiff George L. Martin, the father of the minor plaintiff, sought recovery of money expended by him for medical care for the minor. The trial judge instructed the jury to return a verdict for defendant. Such a verdict was returned and judgment was entered thereon. Plaintiffs appeal from the judgment and the order denying their motion for a new trial.

George T. Martin, the minor, 14 years of age, was a pupil at the Pius X High School. One afternoon during the week preceding February 19, 1955, after classes for that day had been finished, George and

several other pupils (boys) were in their homeroom at the school, where they were to remain for a period of 10 minutes, awaiting the ringing of a bell which would dismiss them for the day. During that period the pupils were in assigned seats. When the bell rang, some of the boys (not George) rushed toward the door and a boy was pushed into a window glass and the glass was broken. The next morning when the boys were in a classroom a teacher told them that they would be punished for breaking the glass and that they should stay after school on week days and pull weeds at the football field, or they should go to the football field the following Saturday (February 19) and pull weeds. There was no evidence as to whether some of the boys decided to stay after school on week days or whether all of them decided to go to the field on Saturday. There was no evidence as to the length of time they were to pull weeds or what time on Saturday they should arrive at the field. One of the boys was told to "take roll" to see who came on Saturday. George arrived at the football field about 9 a. m. on Saturday, and no one was pulling weeds. At that time 15 or 20 boys were there getting ready to play football. The boys were pupils at the school but some of them were from a different homeroom of the school. One "side" chose George and then they started playing football. All the boys were about the same size. Some of them were on the regular team of the school. All of them were wearing street clothes—no one was wearing a football uniform, or helmet, or shoulder pads. George had played football and other games previously, but he had not played contact football at that school. On that Saturday he played on the line for a while, blocking the players. Then he played quarterback, running with the ball. While he was running with the ball, holding it with both hands and arms, a player "body-blocked" him or "tossed himself against" or under George's legs. George fell and broke his left arm. The accident occurred about 15 minutes after they began playing. No supervisor or

teacher was present while the boys were playing football. It was a private school. During the part of the school year preceding the day of the accident, George had been working in his father's television store on Saturdays from 10 a. m. to 4 p. m. George testified that he would have worked at the store on Saturday, February 19, if he had not gone to the school on that day; and that he had received permission from his father to go to the school.

Appellants assert that defendant was negligent in that no supervisor or teacher was present on the football field when the boys were there; and that whether such negligence was a proximate cause of the injury was a question of fact for the jury. They argue that the court did not give consideration to section 13229 of the Education Code which provides that teachers are required to hold the pupils to strict account for their conduct on the playgrounds. They also cite section 1007 of that code which imposes liability for negligence of a school district or its officers or members upon the governing board of the district, provided a verified claim is filed with the secretary of the district within 90 days after the accident. Those sections relate to public schools. As above stated, the school involved here is a private school. Furthermore, even if those sections were applicable to the private school, there was no evidence that a verified claim was filed as required by section 1007. It does not appear that there was any rule of the private school regarding the attendance of a supervisor on the playground during intermission or before or after school. The argument of appellants seems to be that if a supervisor or teacher had been present there would have been no football game and therefore George would not have been injured. There was evidence to the effect that football was a normal play activity at the school. Some of the boys who were playing in the game involved here were on the regular football team of the school. Whether a supervisor or teacher, if present, would have allowed the game to be played was a matter of speculation. If the game

had been played under supervision the players might have been required to wear uniforms, but there was evidence that there is no football uniform or equipment which would protect the arm of a football player. If a supervisor or teacher had been present and had allowed the game to be played, it cannot be said that the manner of running with the ball or of blocking the players would have been different. It does not appear that the game was played in an abnormal manner. In *Underhill v. Alameda Elementary School Dist.*, 133 Cal.App. 733, 24 P.2d 849, a pupil sought damages for personal injuries resulting from being struck by a bat during a baseball game (it is not clear whether plaintiff was playing the game). The court said at pages 735 and 736 of 133 Cal.App., at page 851 of 24 P.2d: "All of the above-mentioned games [baseball, basketball, volleyball and handball] contribute to the physical development of the pupils participating, and there is nothing inherently dangerous about any of them. They seldom result in injury to either the participants or spectators and are ordinarily played by school children of all ages without adult supervision. Nevertheless, it is also a matter of common knowledge that children participating in such games and in fact in any form of play may injure themselves and each other, and that no amount of precaution or supervision on the part of parents or others will avoid such injuries. The injuries which may result from the playing of said games are ordinarily of an inconsequential nature and are incurred without fault on the part of anyone. In such cases there is no liability and, of course, the fundamental rules governing liability remain the same, even though the particular injury may prove to be of a more serious nature. The law does not make school districts insurers of the safety of the pupils at play or elsewhere and no liability is imposed upon a district under the above-mentioned section, in the absence of negligence on the part of the district, its officers or employees." The case of *Forgnone v. Salvador Union Ele-*

mentary School Dist., 41 Cal.App.2d 423, 106 P.2d 932, cited by appellants, is distinguishable from the present case. In that case, while pupils were in a school-room at lunch time, a girl's arm was twisted and broken by another pupil. The court said at page 427 of 41 Cal.2d, at page 934 of 106 P.2d: "[I]f the supervisor had been present in the school room where the students were eating their luncheons, it would be expected that she would prevent the students from engaging in rough and dangerous scuffling which was likely to result in personal injuries to the students." In the present case it cannot be said that there was evidence which would support a finding that a supervisor or teacher would have forbidden the game or that he could or would have prevented the play which resulted in the injury. Furthermore, George, a 14-year-old pupil, was disobeying the direction that he go upon the grounds and pull weeds. In *Ford v. Riverside City School Dist.*, 121 Cal.App.2d 554, 263 P.2d 626, a 9-year-old pupil and another pupil, during recess at a public school when a supervisor was on the grounds, had disobediently gone, without the knowledge of the supervisor, into a shrub area on the school grounds and was there injured by a thorn which was pulled from a palm tree. In that case at page 562 of 121 Cal.App.2d, at page 631 of 263 P.2d, the court quoted from another case as follows: "The statute does not create a liability upon the district for injuries arising from the unlawful or wilful misconduct of its students." [*Weldy v. Oakland High School Dist.*, 19 Cal.App.2d 429, 65 P.2d 851.] Also in that case, the court said at page 563 of 121 Cal.App.2d, at page 632 of 263 P.2d: "The evidence shows that the school authorities had no knowledge or notice of any danger-

ous practice engaged in by the school students in connection with the palm tree. There is no evidence that any of the teachers could reasonably expect that the plaintiff would surreptitiously visit the shrub area during the recess period or that the yard supervisors had knowledge of his concealed presence at the palm tree."

In the present case there was no evidence indicating that the matter of pulling weeds involved a dangerous undertaking. Since the teacher told one of the boys to take the roll of those who came to the field to pull weeds, it might reasonably be inferred that the teacher was placing the boys on their honor to pull weeds in the absence of the teacher and it was not intended that a teacher or supervisor should be present. In view of the apparently nondangerous work of pulling weeds, which was assigned to the boys as a disciplinary measure in a minor matter (rushing toward a door when the dismissal bell rang and accidentally breaking a window glass), it would not be negligence on the part of defendant to place the boys on their honor to perform such work without supervision.

There was no evidence as to what time on Saturday the boys should arrive at the field or as to the length of time they were to pull weeds. Even if the teacher or supervisor intended to be present while the weeds were being pulled, if the boys arrived there and began playing football prior to the time scheduled for the arrival of the teacher or supervisor, the absence of the teacher or supervisor prior to the scheduled time would not constitute negligence.

The attempted appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

158 Cal.App.2d 58

LOMA VISTA INVESTMENT, Inc., a corporation, Lewis A. Crank, Ronald D. Thomas, Shirley M. Thomas, Albert T. Fuller, Barbara E. Fuller, Robert D. Michael, Lida Mae Michael, Gordon Platt Talcott, Elizabeth Patricia Talcott, Waldo Bedford Matheson, Vivian Louise Matheson, Garland F. Garrett, Gwenn M. Garrett, Fred L. Mitchell, Dolores R. Mitchell, Joseph D. Chaves, Eileen K. Chaves, Roy Anthony Balling, Doris Wanda Balling, E. Loopesko, Bonnie K. Loopesko, Rudolph J. Merrick, Molly Merrick, Howard B. Lawrence and Cecile W. Lawrence, Plaintiffs,

v.

The ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, a corporation sole, formerly the Roman Catholic Bishop of Los Angeles and San Diego, a corporation sole, Title Insurance and Trust Company, a corporation, Louis Sentous, Jr., John C. Sentous, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, and Seventh Doe, Defendants,

LOMA VISTA INVESTMENT, Inc., a corporation, Lewis A. Crank, Ronald D. Thomas, Shirley M. Thomas, Albert T. Fuller, Barbara E. Fuller, Robert D. Michael, Lida Mae Michael, Gordon Platt Talcott, Elizabeth Patricia Talcott, Waldo Bedford Matheson, Vivian Louise Matheson, Garland F. Garrett, Gwenn M. Garrett, Fred L. Mitchell, Dolores R. Mitchell, Joseph D. Chaves, Eileen K. Chaves, Roy Anthony Balling, Doris Wanda Balling, E. Loopesko, Bonnie K. Loopesko, Howard B. Lawrence and Cecile W. Lawrence, Appellants,

v.

The ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, a corporation sole, Respondent.

Civ. 22373.

District Court of Appeal, Second District,
Division 3, California.

Feb. 26, 1958.

Hearing Denied April 23, 1958.

Suit to quiet title to an alleged prior easement of a portion of a street and for declaratory relief. From a judgment of nonsuit in the Superior Court of Los Angeles County, Gerald C. Kepple, J., plaintiffs appealed. The District Court of Appeal, Vallée, J., held that a decree in a prior partition proceeding wherein a strip of land

was set apart by referee for a public way by its terms, created public roads and streets and did not create a private easement, and on vacation and abandonment of a portion thereof, it reverted to owner of the title in fee simple to that portion and abutting owner was not entitled to have street vacated.

Affirmed.

1. Municipal Corporations ⇨646

The word "street" in its usual and ordinary meaning denotes a public highway and it does not include a private way.

See publication Words and Phrases, for other judicial constructions and definitions of "Street".

2. Municipal Corporations ⇨657(7)

Vacation of a street when duly effected results not only in relinquishment of the public easement, but also involves a physical closing entitling the owner of the fee to take complete control of it, and title to the land previously subject to the public easement reverts to the owner, free of the public easement for street purposes.

3. Municipal Corporations ⇨657(7)

Partition ⇨116(1)

A decree in a prior partition proceeding wherein a strip of land was set apart for a public way by its terms created public roads and streets and did not create a private easement, and on vacation and abandonment of a portion thereof it reverted to the owner of the title in fee simple to that portion and abutting owner was not entitled to have street vacated. West's Ann.Code Civ. Proc. § 764.

R. D. Sweeney and John L. Mace, Los Angeles, for appellants.

Waters, Arditto & Waters, Mary E. Waters, and Wm. Marshall Morgan, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment of nonsuit in a suit to quiet title to an alleged prior easement of a portion of Hill

Street¹ in the County of Los Angeles, and for declaratory relief.

Augustin Machado, at the time of his death in 1865, owned an undivided one-fourth interest in Rancho La Ballona in the County of Los Angeles which he devised half to his wife, Ramona Machado, and half to his 13 children in equal shares. In 1868 the entire rancho was partitioned and a portion was allotted to Ramona and the 13 children. In 1876, at the suit of Ramona, the portion theretofore allotted to her and the children was partitioned. The decree in that suit is referred to as the Machado decree. The property partitioned consisted of 13,919.90 acres and presently comprises most of Culver City and Santa Monica, part of the city of Los Angeles, and county territory. The strip of land in dispute here was laid out and set apart as a street by the referee in the partition proceeding by metes and bounds corresponding with the boundaries of the adjacent tracts.

The property and the roads and streets adjudicated in the decree were platted and the plat thereof was recorded in the office of the county recorder of the County of Los Angeles on April 29, 1876.

In 1874 the following was added to section 764 of the Code of Civil Procedure:

"Before making partition or sale the referees may, wherever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart must not be assigned to any of the parties or sold, but must remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way."

Code Amdts. 1873-4, p. 325. The amendment for the first time authorized referees in partition proceedings to set apart a

portion of the property for a way, road, or street which "must not be assigned to any of the parties * * * but must remain an open and public way, road, or street."

Pursuant to the amendment, the decree contained this provision:

"It is furthermore ordered, adjudged, and decreed that the following described roads and streets are laid out and shall remain forever open for the common use & benefit of all the parties hereto, to-wit:—"

On July 5, 1889 the board of supervisors of the County of Los Angeles adopted a resolution declaring that all roads and streets theretofore platted and recorded were forthwith public highways of the county.

On January 30, 1950 plaintiff Crank wrote to the road commissioner of the County of Los Angeles stating he was interested in the abandonment of Hill Street by the county, that it had never been developed by the county; asking the road commissioner to prepare the necessary petition for abandonment; and stating he would obtain the necessary signatures to the petition for filing with the board of supervisors. On April 19, 1955 the board of supervisors adopted a resolution finding that the portion of Hill Street in controversy here "is unnecessary for present or prospective public use" and declared it vacated as a public highway.

Plaintiffs and defendants in their respective titles are successors by mesne conveyances to parties in the Machado decree. Plaintiff Lewis A. Crank acquired a tract of land included in the decree which abuts on portions of Hill Street but not on the portion involved in this suit. Retaining one portion, he conveyed the remainder of the tract to Loma Vista Investment, Inc., which caused it to be subdivided into two tracts. Some of the subdivided lots were conveyed to other plaintiffs and some are still owned by the corporation. Only four of plaintiffs own land abutting on Hill Street but their

1. Hill Street or Hill Road is not the well-known Los Angeles downtown thoroughfare but is located partly in the county

and partly in Culver City in the hills and valleys known as the "Rancho La Ballona."

lands do not abut on the portion over which plaintiffs claim the easement.

Defendant became the owner of a tract of land included in the decree. The land abuts on both sides of the portion of Hill Street over which plaintiffs seek to establish the easement. Defendant's land is a cemetery. The easterly terminus of Hill Street dead-ends in the cemetery. Thus the portion of Hill Street over which plaintiffs seek to establish an easement is a cul-de-sac; it is entirely surrounded by defendant's cemetery except at its west end. It is not paved or curbed but is a dirt road about 7 feet wide. The properties of plaintiffs and all means of ingress to and egress from their properties are to the west of the cemetery; that is, the property in suit is not and cannot be used as a means of ingress to or egress from their properties. Plaintiffs concede "that the easement sought to be established herein is not an easement of necessity; that is, that the plaintiffs do not find it absolutely necessary to use the portion of Hill Street here involved in going to or from their properties."

Plaintiffs assert the Machado decree was a grant of private easements; the easement in the portion of Hill Street in suit never became a public highway by dedication; the private easement has not been extinguished; and it existed in the public highway after the board of supervisors declared it to be a public highway contemporaneously with the public use, and survived the vacation of the public highway. Defendant asserts the Machado decree created public roads and streets under the authority of section 764 of the Code of Civil Procedure, and that on vacation of the portion in suit title vested in him as the owner of the contiguous property.

Machado v. Title Guarantee & T. Co., 15 Cal.2d 180, 99 P.2d 245, decides this suit. In that case the court construed the Machado decree. As we read the opinion, it held that the roads and streets laid out and set apart by the referee in the 1876 partition suit were public ways. The facts of that case material to this are related in the opin-

ion. The court stated (15 Cal.2d at page 182, 99 P.2d at page 245):

"This is a suit to quiet title to a strip of land which was set apart for a public way in a partition proceeding in 1876 but which was never accepted, used or improved for such purpose and was formally vacated and abandoned as a way by the board of supervisors in 1905. From a judgment for the defendants, the plaintiffs have prosecuted this appeal. * * *

"[15 Cal.2d at page 183, 99 P.2d at page 246.] The plaintiffs are the heirs at law of both Augustin Machado (the original owner of the tract) and Ramona Machado (his widow and grantor through whom one of the defendants claims) while the plaintiff Marie Machado is the heir at law of Jose Machado (the son and grantor through whom the other defendant derails title). * * *

"[15 Cal.2d at page 184, 99 P.2d at page 246.] At common law a referee in partition had no authority to lay out a public street but could only create and attach to one parcel of land a right of way or easement and impose such servitude on another parcel where required for the beneficial partition of the property. 47 Cor.Jur. 500, sec. 571. This was the rule under section 764, supra, prior to its amendment in 1874. Myers v. Daubenbiss, 84 Cal. 1, 5, 23 P. 1027. * * * The declaration in the code section, as amended, that the 'portion so set apart' as a street shall not be 'assigned to any of the parties' must here be held to apply to the easement for public use and not to the fee title and may well have reference to the settled proposition that no matter how clearly it may appear that an owner of a parcel of land holds fee title to the center of an adjoining street subject to the public easement, and that the boundary of his parcel is technically, therefore, the center of the street, he nevertheless has

no right to the possession or occupancy of any portion thereof while used as a street. But where, as here, the strip set apart was never accepted, used or improved as a street and was thereafter formally abandoned as such, such right of possession and occupancy may not be denied to the contiguous owners. We therefore find nothing in the cited code section that in any way tends to overcome or rebut the presumption 'highly favored in the law' that owners of lands adjacent to a road or street (even though abandoned) own to the center thereof. *Anderson v. Citizens Sav. & T. Co.*, 185 Cal. 386, 197 P. 113."

We may add that parts of the Machado decree not specifically mentioned in *Machado v. Title Guarantee & T. Co.*, 15 Cal.2d 180, 99 P.2d 245, clearly show that the decree created public roads and streets. In awarding separate parcels to the parties the decree said "it is furthermore hereby ordered adjudged and decreed that there is hereby set off and assigned to the respective parties hereto by virtue and in accordance with said partition the several tracts parts or parcels of said lands hereinafter described to be by said parties, their heirs executors, successors, administrators and assigns hereafter held in severalty together with all the rights, easements hereditaments and appurtenances, thereunto belonging." In setting apart the roads and streets the court did not award them to the parties but decreed that they be laid out for the common use and benefit of all the parties—not to "their heirs executors successors, administrators and assigns"—without designating them as private ways as required by section 764 of the Code of Civil Procedure. And there is nothing on the recorded plat indicating that the roads and streets were private ways. In both the decree and the recorded plat the roads and streets are designated as roads and streets and not as private ways. Section 764 as amended in 1874 said that a road or street set apart "must not be assigned to any of the parties." The roads and streets set apart in the Ma-

chado decree were not assigned to any of the parties. Section 764 said that the portion so set apart "must remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties * * * their heirs and assigns, in which case it shall remain such private way." The Machado decree did not set apart the roads and streets or any of them as a private way.

[1] The Machado decree laid out the strip of land in suit as a "street"—"Flower and Hill Streets each 50 links wide [metes and bounds description]." The word "street" in its usual and ordinary meaning denotes a public highway; it does not include a private way. *Schweitzer v. Adami*, 110 N.J.Eq. 193, 159 A. 529, 531; *B. & H. Transportation Co. v. Johnson*, 122 Cal.App. 451, 453, 10 P.2d 506; *Burns v. McDaniel*, 104 Fla. 526, 140 So. 314, 316; *Carlin v. City of Chicago*, 262 Ill. 564, 104 N.E. 905, 907; *Lord v. Gifford*, 67 N.J.L. 193, 50 A. 903, 904; *Commonwealth v. Boston B. & G. R. Co.*, 135 Mass. 550, 551; *Dougherty v. Kentucky, etc., Board*, 279 Ky. 262, 130 S.W.2d 756, 760; *Wray v. Norfolk & W. Ry. Co.*, 191 Va. 212, 61 S.E.2d 65, 69; *Banks v. State*, Okl.Cr., 285 P.2d 455, 458.

[2] It is conceded that defendant owns title in fee simple to the portion of Hill Street here involved. The vacation of a street, when duly effected, results not only in the relinquishment of the public easement but also involves a physical closing which entitles the owner of the fee of the land to take full and complete control of it; title to the land previously subject to the public easement reverts to the owner free of the public easement for street purposes. 25 Cal.Jur.2d 35, § 177.

[3] We conclude that the Machado decree created Hill Street as a public street and that it did not create a private easement; that on vacation and abandonment of the portion in controversy it reverted to defendant; that the court properly granted the judgment of nonsuit; and that defendant is the owner and entitled to the

possession of the portion of Hill Street described in the judgment.

Affirmed.

SHINN, P. J., and PATROSSO, J. pro tem., concur.



158 Cal.App.2d 69

NAPA UNION HIGH SCHOOL DISTRICT OF NAPA COUNTY, State of California, a School District organized and existing under and by virtue of the laws of the State of California, Plaintiff and Respondent,

v.

Paul T. LEWIS, also known as **Paul Lewis**, Defendant and Appellant.

Civ. 9180.

District Court of Appeal, Third District, California.

Feb. 27, 1958.

Rehearing Denied March 27, 1958.

Hearing Denied April 23, 1958.

Action by school district to condemn certain land owned by defendants. The Superior Court, Napa County, Percy King, Jr., J., entered a judgment from which defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that rulings of trial court, which in effect, told the jury that in considering value testimony, cost of subdividing and improving condemned 40 acres of a 245 acre tract should be considered as a unit, rather than treating the 245 acres as a unit, estimating the cost of its subdivision and improvement and then apportioning to the 40 acres its share of that cost, was prejudicial error, in that it was competent for defendant to show what it would cost to put his property to its highest and best use, to support his value witness' valuations of land taken, and in doing so he was not obligated to treat condemned land separately from the rest of his tract.

Judgment reversed.

1. Eminent Domain $\S$ 222(4), 262(5)

In action by school district to condemn certain land owned by defendants, rulings of trial court, which in effect told the jury that in considering value testimony, cost of subdividing and improving condemned 40 acres of a 245 acre tract should be considered as a unit, rather than treating the 245 acres as a unit, estimating the cost of its subdivision and improvement and then apportioning to the 40 acres its share of that cost, was prejudicial error, in that it was competent for defendant to show what it would cost to put his property to its highest and best use, to support his value witness' valuations of land taken, and in doing so he was not obligated to treat condemned land separately from the rest of his tract.

2. Eminent Domain $\S$ 131

Rules for determining value of land taken by condemnation cannot, from the nature of the case, be inflexible, but in each case just compensation is the goal, and where rigid application of even a settled rule will produce injustice it must be departed from so far as made necessary by circumstances of the case.

Coombs, Dunlap & Dunlap, Napa, for appellant.

Daniel K. York, Napa, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment awarding appellant the sum of \$48,000 as the value of 40 acres of land condemned by the respondent. The land taken was part of a larger tract owned by the appellant which contained 245 acres. No issue as to severance damage was presented in the case. There were three value witnesses, two called by appellant and one by respondent. All agreed that the highest and best use of the entire holding, as well as of the land taken, was subdivision for residential purposes. One value witness called by appellant testified that the value of the property taken was \$92,000; another witness for appellant testified the value was

\$116,500. Respondent's value witness testified that the land taken was worth \$40,000. All three witnesses testified that, considering the highest and best use of the property, they had arrived at their values by calculating the cost of subdivision and improvement so that lots could be sold for residential purposes. Appellant's witnesses, treating the 245 acres as a unit, estimated the cost of its subdivision and improvement and then apportioned to the 40 acres its share of that cost. By this method they proposed to arrive at a value per lot for the lots that would be produced within the 40 acres and to fix the value of the 40 acres as the total value of the lots. Respondent's value witness estimated the cost of subdividing and improving the 40 acres as a unit and then by arriving at approximately the same number of lots producible in the 40 acres, and by giving the lots approximately the same value as had appellant's witnesses, arrived at a value, which, as noted, was approximately one-half the value arrived at by appellant's witnesses. It was made obvious by all the testimony that the cost of subdivision and improvement of the 40 acres would be much greater per lot if the 40 acres should be subdivided and improved as a unit than it would be if the whole tract should be subdivided.

Without going into detailed references to the testimony of the several value witnesses, it may be said that this difference in view developed early in the case and was the subject of considerable argument by counsel addressed to the court, and that during the course of the trial the court, adopting the view of respondent, compelled appellant's value witnesses to adjust their testimony to the method approved by the court. The result was to largely destroy their testimony of the value of the land taken. In effect, the case was submitted to the jury in such a way that the jury, in considering the testimony of the witnesses as to value must have discounted the values arrived at by the methods used by appellant's witnesses and must have accepted the values arrived at by respondent's witness.

This is reflected in the jury's verdict since the verdict was only slightly higher than the value placed upon the land by respondent's witness. There was no material difference in the estimated cost of subdivision and improvement as to such necessary units as water mains, main sewers and the like, whether the 40 acres would be subdivided and developed alone or in conjunction with the whole tract; and there was not much difference between the testimony of the witnesses as to the value of the lots that would be produced. The result was that, with minor differences not material here, all the witnesses took the gross value of the lots to be produced in the 40 acres but the respondent's witness subtracted therefrom the cost of subdivision and improvement of the 40 acres considered by itself and then arrived at his figure of about \$40,000 as the value of the 40 acres. The appellant's witnesses sought to spread over the entire tract the cost of improving the whole, and to then subtract the amount apportioned to the 40 acres from the gross value of the lots to be produced therein, thus arriving at a much higher figure for the value of the land taken.

[1] The principal claim of error advanced by appellant has to do with the foregoing rulings of the court which, in effect, told the jury that in considering value testimony they were to adopt the view of respondent and the theory on which the value of respondent's witness rested. We are convinced that respondent's view was wrong and that in following it the court fell into prejudicial error with the result that the trial was not fair to appellant and the judgment must be reversed.

Nichols on Eminent Domain, Volume 4, Section 14.1(3) contains the following statement of the appropriate rule on the issue here:

"* * * It has been held that in determining the value of the part which is appropriated, the value of such part may not be considered as if it constituted an entire tract separate

and apart from others in the possession of the same owner. If, as a matter of fact, the parcel taken is part of a larger tract in the same ownership it must be so considered and any increased value which inheres in it as part of a larger tract must be reflected in the award."

The text cites in support of its statement *Yolo Water & Power Co. v. Hudson*, 182 Cal. 48, 186 P. 772. We quote again from *Nichols on Eminent Domain*, Volume 4, Section 14.1(2):

"* * * The owner is not limited to recovery of the value of only that part of the tract which was physically appropriated. The entire tract is considered as a whole and the effect of the condemnation and the projected use evaluated so that determination can be made of what he had prior to the proceeding and what he had left thereafter."

Counsel for respondent argues here as he did in the trial court that to permit appellant's value witnesses or the jury to consider value arrived at by unitary development of the entire tract would be to permit appellant to recover severance damages which were neither pleaded nor asked during trial. A very similar contention was made in *Yolo Water & Power Co. v. Hudson*, supra, 182 Cal. at page 54, 186 P. at page 775, from which we quote:

"Appellant claims that double damages were assessed against it for the reason that the jury was permitted, when assessing the value of the lands taken, to consider the value of such lands arising from their availability for use in conjunction with the lands not taken, and, on the other hand, when assessing the damage caused by severance to the lands not taken, it was permitted to consider the value of such lands arising from their availability for use in conjunction with the lands taken. Appellant's argument in this behalf is based upon the obvious fallacy that the value of the lands

taken resulting from the possibility of their use with the lands not taken is identical with the value of the lands not taken resulting from the possibility of their use with the lands taken. These respective values are, however, wholly separate and independent, and appellant was not subjected to double damages by reason of the fact that the jury was allowed to consider each of these values as separate and distinct from the other. Appellant's complaint on this score is unique and original. So far as we are aware, a similar contention has never been before urged in a court of last resort."

The rulings of the court also prevented effective proof by appellant of the availability of the land taken for its highest and best use. Testimony as to any facts showing the nature of the land in controversy and its adaptability for subdivision for residential purposes was admissible. *Sacramento Southern R. Co. v. Heilbron*, 156 Cal. 408, 411, 104 P. 979. It was competent for appellant to show how much it would cost to put the property to its highest and best use and to demonstrate to the jury the quality of the land for that use, thus supporting his value witness' ultimate valuations of the land taken. In doing that he was not obliged to treat that land alone.

[2] The rules for determining value of land taken by condemnation cannot, from the nature of the case, be inflexible. In each case just compensation is the goal; and where rigid application of even a settled rule will produce injustice it must be departed from so far as made necessary by the circumstances of the case. Respondent argues that the land taken must be considered alone as if so offered in the market. The fallacy of this contention is easily exposed. What market value would a 40 foot strip of land, though a mile square tract, have if its value was to be computed as if it stood alone? Obviously none. It would be useless and hence valueless.

In view of what has been said, we think it unnecessary to discuss the remaining contentions advanced by the appellant as grounds for reversal of the judgment.

For the reasons given, the judgment is reversed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR and SPENCE, JJ., dissenting.



158 Cal.App.2d 45

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ricardo ALONZO, Defendant and
Appellant.

Cr. 6082.

District Court of Appeal, Second District,
Division 2, California.

Feb. 26, 1958.

Prosecution for selling heroin. From adverse judgment of the Superior Court, Los Angeles County, LeRoy Dawson, J., and from order denying motion for new trial, the defendant appealed. The District Court of Appeal, Fox, P. J., held that evidence as to identification was sufficient to sustain conviction for selling heroin.

Judgment and order affirmed.

1. Criminal Law §566

Evidence as to identification was sufficient to sustain conviction for selling heroin. West's Ann. Health & Safety Code, § 11500.

2. Criminal Law §1159(2)

Before a judgment can be set aside on ground of insufficiency of evidence, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below.

3. Criminal Law §1144(13)

Reviewing court must assume in support of judgment the existence of every fact which arbiter of facts could reasonably deduce from the evidence.

4. Criminal Law §1159(3, 4)

It is province of trier of facts to pass upon credibility of witnesses and determine weight that should be given to their testimony and to resolve any conflicts and inconsistencies in their testimony.

5. Criminal Law §1159(2)

Test on appeal is whether there is substantial evidence to support conclusion of trier of fact, not whether guilt is established beyond a reasonable doubt.

Sam Bubrick, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

[1] Defendant was convicted of selling heroin in violation of section 11500, Health and Safety Code. He appeals from the judgment and order denying his motion for a new trial.

At approximately noon on April 23, 1957, Officer Anderson, of the Los Angeles Police Department, and a companion met defendant outside a cafe at Second and Hill Streets. The officer's companion went over and talked to the defendant for a couple of minutes. The officer and his companion then walked to Third and Hill Streets, where they got into the car of the companion. They waited there for possibly ten minutes when defendant, in company with another person, entered the back seat of the car. The person with Officer Anderson handed the defendant \$12 over the seat, at which time the man with defendant delivered to the officer's companion a small red balloon that contained five capsules of heroin.

Later Officer Anderson appeared before the grand jury, testified to this same incident, and, relying on a picture from a

"mug" book, identified a person other than the defendant as the one who made the sale. This resulted in an indictment being returned against the other person.

Soon thereafter defendant was arrested with two others and brought to the narcotics division. At the police line-up that followed Officer Anderson recognized the defendant as the person from whom the purchase of heroin was made at about noon on April 23d. The officer testified that there was no doubt in his mind that defendant was the person from whom the heroin in question was purchased.

The person with Officer Anderson was an informer, whom he had known for some four months, by the names of Johnny Morgan and Lewis Clyde. The officer did not know where he could be located.

Defendant denied any connection with the transaction.

Defendant's position is that "the evidence is not sufficient, as a matter of law, to support the judgment." He argues that the evidence of identification "is so weak as to constitute practically no evidence at all"; that it "does little more than create speculation as to his guilt," and "does not meet the burden placed on the People of proving him guilty beyond a reasonable doubt." He bases his argument on the fact that the officer identified another as the culprit in this transaction in his testimony before the grand jury.

[2-4] The rule is firmly established that before a judgment can be set aside on the ground of the insufficiency of the evidence it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. We must assume in support of the judgment the existence of every fact which the arbiter of the facts could reasonably deduce from the evidence. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. *People v. Frankfort*, 114 Cal.App.2d 680, 689, 251 P.2d 401. It is the province of the trier of the facts to pass upon the credibility of the wit-

nesses and determine the weight that should be given to their testimony; also, to resolve any conflicts and inconsistencies in their testimony, and this rule applies to conflicts and inconsistencies in the testimony of a particular witness. *Peterson v. Peterson*, 74 Cal.App.2d 312, 319, 168 P.2d 474; *Hansen v. Bear Film Co.*, 28 Cal.2d 154, 184, 168 P.2d 946.

Applying these principles, it is clear that the evidence is sufficient to sustain the judgment of conviction. Implicit in the court's judgment is the implied finding that defendant was the person that made the sale in question. This necessarily means that the trial judge gave credence to the officer's testimony in court relative to his identification of the defendant as a participant in the transaction and concluded that the officer had been mistaken in his testimony before the grand jury. The court may reasonably have felt that an identification based on personal observation of defendant, has actions and movements, was more trustworthy than one based merely on a picture, and that the officer had simply made an honest mistake in his earlier testimony. Thus we have the defendant positively identified as the person who sold the contraband. This evidence amply sustains the conviction.

[5] But, argues the defendant, the evidence does not meet the State's burden of proving him guilty beyond a reasonable doubt in view of the inconsistency of the officer's testimony in this case and that previously given before the grand jury on the question of identification. As above noted, the resolution of that conflict was for the trial court. Furthermore, as pointed out in *People v. Daugherty*, 40 Cal.2d 876, 885, 256 P.2d 911, 916, "The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. It is not whether guilt is established beyond a reasonable doubt." As said in *People v. Smith*, 35 Cal.App.2d 73, 76, 94 P.2d 633, 634, "it is a matter for the trial judge to be persuaded beyond a reasonable doubt and

not this court." *People v. Theus*, 136 Cal. App.2d 722, 725, 289 P.2d 534.

The judgment and order are affirmed.

HERNDON, J., and KINKAID, J. pro tem., concur.



158 Cal.App.2d 75

CITY OF ROSEVILLE, a Municipal Corporation, Petitioner,

v.

R. W. TERRY, Clerk of the City of Roseville, Respondent.

Civ. 9454.

District Court of Appeal, Third District,
California.

Feb. 27, 1958.

Hearing Denied April 23, 1958.

Mandamus proceeding to compel clerk of city to publish ordinance. The District Court of Appeal, Van Dyke, P. J., held that where city's freeholders charter provided that council might, after authorization by affirmative vote of a majority of electors voting on proposition at any regular or special election, issue revenue bonds, issuance of revenue bonds could not be made by council alone but required affirmative electoral action.

Alternative writ discharged, and pre-emptory writ denied.

1. Municipal Corporations ¶64

A city which is operating under provisions of a freeholders charter has full power over its municipal affairs unaffected by general laws on same subject matters, and it has such control whether its charter specifically provides for the particular power sought to be exercised, so long as power is exercised within limitations or restrictions placed in charter. West's Ann.Const. art. 1, §§ 6, 13, 13½.

2. Municipal Corporations ¶58, 64

A city's freeholders charter operates not as a grant of power, but as an instrument of limitation and restriction on exercise of power over municipal affairs which city is assumed to possess, enumeration of powers does not constitute an exclusion or limitation, and with respect to municipal affairs city is not subject to general law except as charter may provide. West's Ann.Const. art. 11, §§ 6, 13, 13½.

3. Municipal Corporations ¶57, 58

Where city is operating under provisions of freeholders charter, full exercise of power over all municipal affairs is permitted, except as clearly and explicitly curtailed by charter, and in construing charter a restriction on exercise of municipal power may not be implied. West's Ann.Const. art. 11, §§ 6, 13, 13½.

4. Municipal Corporations ¶918(1)

Where city's freeholders charter provided that council might, after authorization by affirmative vote of a majority of electors voting on proposition at any regular or special election, issue revenue bonds, issuance of revenue bonds could not be made by council alone but required affirmative electoral action. West's Ann.Const. art. 11, §§ 6, 13, 13½.

Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, L. Dewitt Spark, City Atty., Roseville, for petitioner.

Robert A. Boon, Roseville, for respondent.

VAN DYKE, Presiding Justice.

This is a petition for a writ of mandate to compel respondent R. W. Terry, as Clerk of the City of Roseville, to publish an ordinance subsequent to its adoption, as required by the charter of the city. Roseville is a municipal corporation which is operating under the provisions of a Freeholders Charter. For a considerable time it has owned and operated a city hospital. Recently, the city council passed an ordinance providing for the authorization and

issuance of hospital revenue bonds to expand the existing hospital facilities. Respondent refused to publish the ordinance subsequent to its adoption upon the ground that the city council had no power to provide for the issuance of revenue bonds without submitting the question to the electors.

[1-3] A city which has availed itself of the provisions of the Constitution, art. 11, §§ 6, 13, 13½, as amended in 1914 has full control over its municipal affairs, unaffected by general laws on the same subject matters. It has such control whether or not its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within the limitations or restrictions placed in the charter. The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. In respect to municipal affairs the city is not subject to general law except as the charter may provide. A construction in favor of the exercise of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated. The full exercise of the power is permitted, except as clearly and explicitly curtailed, and in construing a city's charter a restriction on the exercise of municipal power may not be implied. *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595, 599, 212 P.2d 894.

[4] Section 7.11 of the Charter of Roseville, under the heading "Power to Incur Indebtedness", contains specific provisions upon that subject matter. Concerning general obligation bonded indebtedness of the city it is provided that such indebtedness may not in the aggregate exceed the sum of 15 per cent of the total assessed valuation of property within the city. The section then excepts from the foregoing limitation such bonded indebtedness as had been

or would after the adoption of the charter be incurred in respect of municipally owned utilities. The section then takes up the subject of revenue bonds. It provides that revenue bonds and the interest accruing thereon shall be a charge upon and payable solely from the revenues derived from the operations of works, facilities or property acquired by the issuance and sale of revenue bonds. The charter further provides that revenue bonds shall not be a charge, lien, encumbrance, legal or equitable, upon nor furnish any recourse on account thereof against any other property of the city or upon or against any other income, receipts, revenue or funds of the city; that neither the credit nor the taxing power of the city shall be deemed to be pleaded to or charged with such payment and that the holders of any such bonds shall have no right to compel the exercise of any taxing power of the city. Having so provided, however, the charter further provides that: "The Council may, *after authorization by the affirmative vote of a majority of the electors voting on the proposition at any regular or special election* issue revenue bonds." (Emphasis added.) Here is a specific declaration, found within the charter itself, which requires not only council action but approval by the affirmative vote of the majority of the electors. We think the respondent clerk of the city is correct in his position that the issuance of revenue bonds cannot be made by the council alone, but must also receive affirmative electoral action. We cannot construe the language of the charter in any other way. Notwithstanding the declared rules as to the power of chartered cities over municipal affairs and the declared rules for construing such charters, we cannot, as petitioner would have us do, read out of the charter so plain a limitation on the council's authority. We do not doubt that the electors, when they approved the charter, understood the language thereof to place in their hands a check upon the issuance of revenue bonds. If that was not the purpose of the language used then it had no purpose.

The alternative writ heretofore issued is discharged. The peremptory writ is denied.

PEEK, J., and WARNE, J. pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



158 Cal.App.2d 101

Martha J. TAORMINA, Plaintiff and Respondent,

v.

Cosmo V. TAORMINA, Defendant and Appellant.

Civ. 22329.

District Court of Appeal, Second District,
Division 3, California.

Feb. 28, 1958.

Hearing Denied April 23, 1958.

Proceeding on husband's motion to set aside interlocutory judgment of divorce or, in the alternative, to correct alleged clerical mistakes in judgment on ground that, according to minute order, parties' home was to be wife's free and clear except for indebtedness, but that interlocutory judgment improperly included provision that husband was to pay such indebtedness. The Superior Court, Los Angeles County, Joe Raycraft, J., denied motion, and husband appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained finding that interlocutory judgment was approved by husband's attorney, that parties did not consider minute order to be an interlocutory judgment, and that interlocutory judgment, which was entered, correctly stated stipulation of parties and decision announced by judge.

Affirmed.

1. Divorce Ⓒ165(2)

Where husband, who had accepted property awarded him by interlocutory di-

vorce judgment and had remarried, filed motion to set aside or correct interlocutory judgment seven years after final judgment, husband had acquiesced in judgment and thereby evidenced a waiver and renunciation of any right to set it aside.

2. Divorce Ⓒ254

In proceeding on husband's motion to correct alleged clerical mistake in judgment of divorce on ground that according to minute order parties' home was to be wife's free and clear except for indebtedness, but that interlocutory judgment improperly included provision that husband was to pay, such indebtedness, evidence sustained finding that interlocutory judgment was approved by husband's attorney, that parties did not consider minute order to be an interlocutory judgment, and that interlocutory judgment, which was entered, correctly stated stipulation of parties and decision announced by judge.

Potruch & Lerten, Erwin Lerten, and Harlin M. Fuller, Los Angeles, for appellant.

David A. Fall and Kenneth W. Gale, San Pedro, for respondent.

PARKER WOOD, Justice.

Appeal by defendant from an order denying a motion to set aside an interlocutory judgment of divorce or, in the alternative, to correct a clerical mistake in the judgment.

Appellant contends that a valid (interlocutory) judgment was not rendered herein; that the interlocutory judgment which was entered is void; and that if a valid (interlocutory) judgment was rendered, such judgment was the minute order which was entered after the trial.

In October, 1947, Mrs. Taormina commenced an action for divorce. Mr. Taormina filed an answer and cross-complaint. On March 12, 1948, the matter was tried before Judge Still. At the conclusion of the trial, Judge Still announced his decision, and the parties waived findings. On

March 23, 1948, a minute order which was dated March 12, 1948, was entered. The minute order states, in part, that plaintiff is granted an interlocutory judgment of divorce and that "the real property * * * and furnishings [are] awarded to plaintiff as her sole and separate property; the real property now subject to a first trust deed in the sum of \$5,400 is to be plaintiff's, free and clear. Both parties, however, are to join in refinancing said property at the increased amount of \$500. The interest in the cafe is awarded to the defendant as his sole and separate property * * *." Subsequent to March 12, 1948, and prior to April 5, 1948, Judge Still became incapacitated by illness and he remained incapacitated until his death May 6, 1948. On April 5, 1948, the clerk of the court (Mr. Jasper Likes) presented to Judge Miller an interlocutory judgment of divorce which had been prepared by Mrs. Taormina's attorney. Judge Miller wrote at the lower left side of the judgment, as follows: "Approved Fred Miller Judge April 5, 1948." The initials "J. L." appear in the lower left margin of the judgment, opposite the signature of Judge Miller. On April 8, 1948, the interlocutory judgment was entered. That judgment provides, in part, that plaintiff "have as her sole and separate property the following described real property located at 1400 La Grande Terrace, San Pedro, California [legal description]"; and that defendant (Mr. Taormina) is ordered to make the payments "on said home until paid in full"; and that "an additional loan shall be made on said property not to increase the encumbrance over \$6,000, and both parties hereto are ordered to sign any papers necessary to complete the transaction." The judgment further provides "that defendant have as his sole and separate property that certain business known as Fisherman's Wharf Sea Food Grotto * * *." On April 9, 1949, at the request of Mrs. Taormina's attorney, and upon motion of the court, a final judgment of divorce was entered. The final judgment, which refers to the interlocutory judgment that was en-

tered on April 8, 1948, provides, in part, that plaintiff is granted a final judgment of divorce; and that "wherein said interlocutory judgment relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto."

On August 15, 1956, Mr. Taormina filed a notice of motion to set aside the interlocutory judgment or, in the alternative, "to correct a clerical mistake in the judgment entered so as to make it conform to the judgment actually rendered and directed herein." The alleged clerical mistake, according to Mr. Taormina, was that an interlocutory judgment should not have included a provision to the effect that he pay the indebtedness of approximately \$5,400 which was on the home property that was awarded to Mrs. Taormina. It seems to be his contention that, according to the minute order, the home which was subject to a \$5,400 trust deed was "to be plaintiff's free, and clear," except for the indebtedness of \$5,400.

In support of his motion, Mr. Taormina filed an affidavit of Harold L. Johnson, one of his present attorneys. In that affidavit, Mr. Johnson made substantially the same statements, as are hereinabove made, regarding the pleadings and proceedings.

In opposition to the motion, Mrs. Taormina filed affidavits of Julian P. Van Dyke (her attorney), Allan F. Bullard (attorney for Mr. Taormina at the trial), Joseph Likes (the court clerk), and herself.

Mr. Van Dyke stated in his affidavit: At the trial of the divorce action, Mrs. Taormina was granted a divorce and the parties stipulated "as to the payments of alimony, child support, divisions of property, and payments to be made thereon"; the stipulation was approved by the court and made part of the order pronounced by Judge Still at the time he granted plaintiff (Mrs. Taormina) a divorce; thereafter he (Mr. Van Dyke) prepared an interlocutory judgment of divorce and submitted it to

Allan F. Bullard for his approval as attorney for Mr. Taormina; Mr. Bullard approved the interlocutory judgment "as being an accurate reproduction of the order made by" Judge Still; the interlocutory judgment in the file in the action is the interlocutory judgment which was approved by Mr. Bullard; the minute order does not completely set forth the judgment as given by Judge Still; the interlocutory judgment does set forth the judgment which was rendered by Judge Still.

Mr. Bullard's affidavit was in substance the same as the affidavit of Mr. Van Dyke.

Mr. Jasper Likes, who was the clerk in the department of the court where the case was tried, stated in his affidavit: When an interlocutory judgment of divorce was presented for signing, he customarily compared it with the judgment previously rendered; if he found the judgment presented to be a correct copy of the judgment previously rendered, he placed his initials "J. L." in the left margin of the judgment; the initials "J. L.," appearing in the left margin of the interlocutory judgment entered in the present action, are his initials and were placed thereon after he had compared the judgment with "that" previously rendered by the court and he had determined that the judgment presented was correct.

Mrs. Taormina stated in her affidavit that after the entry of the final decree herein she had married a person other than Mr. Taormina, and that Mr. Taormina had married another person.

In a counter-affidavit filed by Mr. Taormina, he stated that after the action was called for trial Mrs. Taormina's attorney stated that a property settlement agreement had been reached; he (Mr. Taormina) did not recall the exact words of the attorney; he was certain the attorney "made no statement about my making the payments on the house."

In support of his contention that a valid interlocutory judgment was not entered and that the interlocutory judgment which was entered is void, appellant (Mr. Taormina)

states that at the time of trial of the action it was the procedure of the trial court to make a final decision by a formal interlocutory judgment and to provide therein that a final judgment would be entered after the lapse of one year from the entry of the interlocutory judgment. Appellant argues that since the minute order which was entered herein is not in the form of an interlocutory judgment and does not provide that a final judgment will be entered after the lapse of one year, it appears that Judge Still did not intend that the minute order should be his decision and he intended to make his decision by a formal interlocutory judgment; that since Judge Still did not sign the interlocutory judgment which was entered, he did not make a decision; and that since a litigant is entitled to have the decision made by the judge who tried the case, no valid decision was rendered and there is no judgment, and "the judgment entered" is void.

[1] Respondent (Mrs. Taormina) argues that since Mr. Taormina has acquiesced in the judgment and accepted its benefits, he cannot "come into Court nine years late * * * after the parties have relied upon the judgment by remarrying * * * and assert that there never was a judgment." In *Storke v. Storke*, 132 Cal. 349, at page 353, 64 P. 578, at page 580, the court, in quoting from another case, said: "It seems to be the law that a party cannot be relieved from a judgment of divorce after he has used the privilege of the judgment. Having availed himself of the benefits of the decree or judgment, he must bear its burdens." In *Union Bank & Trust Co. v. Gordon*, 116 Cal.App.2d 681, at page 684, 254 P.2d 644, at page 646, the court said: "It is established doctrine in this state that a spouse who remarries with knowledge of and in reliance on a decree of divorce secured by the other spouse, is estopped from contesting the validity of the decree." In *Wendell v. Wendell*, 111 Cal.App.2d 899, at page 902, 245 P.2d 342, at page 344, the court said: "The law is well settled in this state that one who remarries with knowledge of and in reliance on

a divorce secured by the other spouse, is estopped to deny the validity of the divorce." In *Rediker v. Rediker*, 35 Cal.2d 796, at page 805, 221 P.2d 1, at page 6, 20 A.L.R.2d 1152, the court said: "The validity of a divorce decree cannot be contested by a party who has procured the decree or a party who has remarried in reliance thereon * * *." In *Biggs v. Biggs*, 103 Cal.App.2d 741, 230 P.2d 32, upon the request of plaintiff's attorney, the action was dismissed with prejudice. The order therein dismissing the action was entered February 11, 1948. In that case plaintiff (acting through another attorney) made a motion on October 7, 1949, to set aside the dismissal. Plaintiff therein appealed from the order denying the motion, and contended that the dismissal was a nullity for the reason that the answer prayed for affirmative relief. The court, in affirming the order, said 103 Cal.App.2d at page 743, 230 P.2d at page 33: "When the order for dismissal was made, and when plaintiff acquiesced in it for so long a time, it evidenced a waiver and renunciation of any right to set it aside." In the present action, the interlocutory judgment was entered April 8, 1948. The final judgment herein, which assigned the property of the parties in accordance with the terms of the interlocutory judgment, was entered April 9, 1949. The motion to set aside or correct the interlocutory judgment was filed August 15, 1956. Mr. Taormina did not deny the statement made by Mrs. Taormina, in her affidavit, that he had remarried after the entry of the final judgment. Apparently he accepted the award provided for him in the interlocutory judgment that he have the Fisherman's Wharf Sea Food Grotto. Mr. Taormina relied on the interlocutory judgment and availed himself of its benefits. He acquiesced in the judgment for several years and thereby he evidenced a waiver and renunciation of any right to set it aside.

[2] Appellant (Mr. Taormina) also contends that if a valid interlocutory judgment was rendered herein, such judgment is the minute order. The appeal herein

is from the order denying his motion to set aside the interlocutory judgment which was entered or, in the alternative, to correct a clerical mistake in that judgment. It does not appear that he asserted in the trial court that the minute order was the judgment. Such contention is inconsistent with his assertion that a valid interlocutory judgment was not rendered and is inconsistent with his argument that Judge Still did not intend that the minute order should be an interlocutory judgment. The interlocutory judgment was prepared by Mrs. Taormina's attorney. The evidence was sufficient to support findings that the interlocutory judgment was approved by Mr. Taormina's attorney; that the parties did not consider the minute order to be an interlocutory judgment; that the interlocutory judgment, which was entered, correctly stated the stipulation of the parties and the decision announced by Judge Still.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



158 Cal.App.2d 74

**LASSEN COUNTY, a Political Subdivision
of the State of California, Petitioner,**

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF NEVADA, Sitting as a Juvenile Court, Respondent.

Civ. 9361.

District Court of Appeal, Third District,
California.

Feb. 27, 1958.

Proceeding on petition by Lassen County to compel the Superior Court of Nevada County to accept transfer to it of a juvenile court proceeding. The District Court of Appeal, Peek, J., held that

where Lassen County court acting pursuant to power conferred on it as a juvenile court determined that juvenile was a legal resident of Nevada County, conclusion as to both residence and subject matter was conclusive upon Juvenile Court of Nevada County and could not be attacked collaterally.

Writ issued.

1. Infants $\S$ 16.4

Where Superior Court of Lassen County, sitting as a juvenile court pursuant to proceedings to have a juvenile declared a ward of that court, found that juvenile was under the age of 21, that he was a legal resident of Nevada County, and ordered entire cause transferred to juvenile court of that county, determination of Lassen County court as to residence and subject matter became conclusive upon the Juvenile Court of Nevada County and could not be collaterally attacked. West's Ann.Welfare and Inst. Code, $\S\S$ 700, 880, 885.

2. Infants $\S$ 16.4

Where the Superior Court of Lassen County, sitting as a juvenile court pursuant to proceedings to have a juvenile declared a ward of that court, found juvenile to be under the age of 21 years, that he came within the provisions of statute, that he was a legal resident of Nevada County, and ordered entire cause transferred to juvenile court of the county, upon transfer of case to Superior Court of Nevada County it became that court's mandatory duty to take jurisdiction of the case, and if it wished to question the determination of residence its recourse was by direct attack on that order by appeal. West's Ann. Welfare & Inst.Code, $\S\S$ 880, 885.

James E. Pardee, Lassen County Dist. Atty., Susanville, for petitioner.

Harold Berliner, Nevada County Dist. Atty., Nevada City, for respondent.

PEEK, Justice.

By mandate, petitioner Lassen County seeks to compel the respondent superior court of Nevada County to accept the transfer to it of a juvenile court proceeding.

The petition alleges that the superior court of Lassen County, sitting as a juvenile court pursuant to proceedings to have a juvenile declared a ward of that court, found the juvenile to be under the age of 21 years; that he came within the provisions of subdivision (m) of section 700 of the Welfare and Institutions Code; that he was a legal resident of Nevada County; and ordered the entire cause transferred to the juvenile court of that county. Following the transfer the superior court of Nevada County, sitting as a juvenile court, made its order that the transfer previously ordered by the Lassen County court "* * * be, and the same is not accepted."

[1] While it may be said, as respondent contends, that the order of transfer did not strictly comply with the provisions relative to findings (section 880, Welfare and Institutions Code), nevertheless the Lassen County court, acting pursuant to the power conferred upon it as a juvenile court, determined the jurisdictional question as to residence and subject matter. Its conclusion thereon as to both matters was conclusive upon the juvenile court of Nevada County and could not be attacked collaterally. *County of Los Angeles v. Superior Court*, 128 Cal.App. 522, 526, 18 P.2d 112.

[2] Here, the Nevada County court assumed jurisdiction to redetermine the question of residence. It would appear wholly unnecessary to elaborate upon the vice so obviously inherent in such a practice. Under the provisions of section 880, upon the transfer of the case to the Nevada County court it became its mandatory duty to take jurisdiction of the case. If, however, the Nevada County court questioned the determination of residence as made

by the Lassen County court, its recourse was by direct attack upon that order by appeal. In re Gi, 134 Cal.App.2d 479, 482, 286 P.2d 364; see also section 885 of the Welfare and Institutions Code.

Let the writ issue.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



158 Cal.App.2d 156

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Henry C. RAMOS, Defendant and Appellant.
Cr. 6029.

District Court of Appeal, Second District,
Division 3, California.

March 3, 1958.

Prosecution for unlawful sale of marijuana. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and an order denying motion for new trial, and defendant appealed from such judgment and order. The District Court of Appeal, Vallée, J., held that refusal of trial court to compel alleged purchaser of marijuana to answer question directed to him as to what he did with balance of marijuana allegedly purchased from defendant on a certain date, was not prejudicial error, in view of fact defendant was acquitted of having sold marijuana to witness on such date, and answer if given would have had no bearing on question of whether defendant sold marijuana to witness on a subsequent date, and defendant's counsel did not advise trial court that purpose of question was to attack credibility of witness.

Judgment and order denying new trial affirmed.

1. Criminal Law §1170(1)

In prosecution for unlawful sale of marijuana, refusal of trial court to compel alleged purchaser of marijuana to answer question as to what he did with balance of marijuana allegedly purchased from defendant on a certain date, was not prejudicial error, in view of fact defendant was acquitted of having sold marijuana to witness on such date, and answer, if given would have had no bearing on question of whether defendant sold marijuana to witness on a subsequent date, and defendant's counsel did not advise trial court that purpose of question was to attack credibility of witness.

2. Criminal Law §661

In prosecution for unlawful sale of marijuana, where the cause was submitted on testimony taken at the preliminary examination, with each side reserving right to produce additional witnesses, trial court did not err in failing to order production of alleged buyer of marijuana who had testified at the preliminary examination, in view of fact defendant made no effort to produce such buyer.

3. Stipulations §14(7)

Where cause, in criminal prosecution, was submitted on testimony taken at preliminary examination, with each side reserving right to produce additional witnesses, defendant, by such submission and by failing to make any effort to secure attendance of such witness at trial waived right to further cross-examine a witness who testified at the preliminary hearing.

James S. Fitzpatrick, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was convicted of having on January 18 and 19, 1957, sold marijuana to John Jensen, a minor 17 years of age. On stipulation the cause was submitted on the

transcript of the preliminary examination, each side reserving the right to produce additional evidence. Defendant appeals from the judgment and the order denying his motion for a new trial.

On December 1, 1956 Jensen was introduced to defendant by a mutual acquaintance. Defendant sold Jensen a half pound of a plant-like substance which was represented to be marijuana for which Jensen paid him \$35. The substance was brownish in color and contained stems, seeds, and leaves. Jensen made and smoked about 150 cigarettes from the half pound. On January 18, 1957 Jensen telephoned defendant and told him he "wanted to score" and needed a pound. Defendant had half a pound which he sold to Jensen for \$35. The substance was similar in appearance to that purchased by Jensen on December 1, 1956 and contained the same materials. Jensen made and helped smoke about 65 cigarettes from this half pound. On January 19, 1957 defendant sold Jensen "a quantity of merchandise" for \$60. This was a better substance than those purchased previously; it did not contain as many stems or seeds and had more leaves. Jensen smoked about 85 cigarettes from this purchase.

On each occasion that Jensen smoked the substance he purchased from defendant he had a dry throat, hunger pains, lightheadedness, slower reactions, and unusual sound perceptions. He had smoked marijuana prior to the first purchase from defendant and had received the same effects as he received from the substances purchased from defendant. There was evidence that the effects Jensen received could only have been caused by marijuana; that it would not be possible to combine and obtain these effects from any drug except marijuana.

[1] On cross-examination Jensen was asked how long it took him to smoke the 150 cigarettes he made out of the first purchase on December 1, 1956. He replied that it took him that week and the following week. He said he "went to 150 cigarettes in two weeks instead of every week end" because he had the quantity there; he had

never had that quantity before. The following then occurred: "Q. What did you do with the balance of it? A. I won't say."

"Mr. Marks [attorney for defendant]: Well, your Honor.

"The Court: Not necessary. It is immaterial.

"Mr. Marks: Well, this is sort of a half and half. The defendant is testifying the things which might incriminate him, and when asked a further question—

"The Court: Neither goes to prove nor disprove any of the issues in this case." Defendant asserts the court erred in not compelling Jensen to answer. Defendant was not prejudiced by the refusal of the court to compel Jensen to testify with respect to what he did with the balance of the marijuana he purchased on December 1, 1956 since he was acquitted of having sold it to Jensen on that date; it had no bearing on the question whether defendant had sold marijuana on January 18 and 19, 1957. Further, defendant's counsel did not make an offer of proof or in any way enlighten the court as to the purpose of the question. He now says it was for the purpose of attacking Jensen's credibility. If so, he should have so advised the trial court.

[2] As stated, the cause was submitted on the testimony taken at the preliminary examination, each side reserving the right to produce additional evidence. The cause was thus submitted on April 3, 1957 and at that time was continued to April 30, 1957. On April 30, at the request of defendant, the cause was continued to May 10, 1957. On May 10, again at the request of defendant, the cause was continued to May 17. Again on May 17, at the request of defendant, the cause was continued to May 29. On May 29 two witnesses called by defendant and defendant testified. At the conclusion of defendant's testimony his counsel said he thought the "Court ought to have the opportunity of observing this juvenile [Jensen], who said he made a buy off of the defendant." The following then occurred:

"The Court: Why drag these things along? This case has been pending—

"Mr. Umann [attorney for defendant]: They didn't bring him back.

"The Court: They would have brought him back if you had requested him at any time.

"Mr. Umann: I assumed they were going to bring him back. I didn't anticipate he would not be here, so the Court could study him. * * *

"Mr. Umann: I inquired, and I was told he wasn't here.

"The Court: I have no way of knowing whether he was brought here or not.

"Mr. Umann: I would like to have him here. I think in view of the aggravated nature of the charge, he should be here for the Court to see.

"The Court: Well, I don't think I should be called upon to continue the case again.

"Mr. Umann: Perhaps we can get him here this afternoon. We have no way of knowing where he is.

"The Court: I don't know whether the People know where he is.

"Mr. Pachtman: As far as we know, I don't know where he is right offhand.

"Mr. Umann: I think he should be here." The court declined to continue the cause.

[3] Defendant asserts the court erred in not ordering the production of Jensen. There was no error. Defendant made no effort to produce Jensen between April 3 and May 29, 1957, but "assumed they [the prosecution] were going to bring him back." He had no right to so assume. Having waived the right to further cross-examine Jensen by submitting the cause on the preliminary transcript and having failed to make any effort to secure his attendance at the trial, defendant may not complain.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PATROSSO, J. pro tem., concur.

Lucille B. RICE, Allen H. Stumpf, Helen Stumpf, Edward J. Stumpf and Joyce Dacus Stumpf, Plaintiffs and Appellants,

v.

Edward L. HEGGY et al., Defendants and Respondents.

Civ. 22296.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1958.

Rehearing Denied March 24, 1958.

Hearing Denied April 23, 1958.

Action by owners of certain lots for declaratory relief adjudicating that erection of multiple unit dwellings would not constitute such a violation of single family restrictions in their deed as to be actionable by defendants. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., entered judgment for defendants and owners appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that changes in neighborhood did not make it inequitable or oppressive to give effect to deed restrictions in question, and that purpose for which such deed restrictions were created could still be carried out and given effect notwithstanding the changes.

Judgment affirmed.

1. Covenants ⇐72

In action by owners of certain lots for declaration that erection of multiple unit dwellings would not constitute such a violation of single family restrictions in their deed as to be actionable by defendants, evidence sustained finding that changes in neighborhood did not make it inequitable or oppressive to give effect to deed restrictions, and that purpose for which restrictions were created could still be carried out notwithstanding the changes.

2. Covenants ⇐72

Rezoning of certain lots did not require a trial court, in an action for declaration that erection of multiple unit dwellings would not constitute such a violation of single family restrictions in certain deeds as to be actionable by defendants, to declare

that owners were entitled to construct multiple unit dwellings which would violate the deed restrictions.

3. Covenants $\S$ 72, 108(2)

Action of a trial court in modifying a set-back restriction where it appeared that other houses had encroached was a proper exercise of judicial discretion, and did not prevent enforcement of single unit restrictions contained in deeds.

Julius A. Leetham, Los Angeles, for appellants.

James L. Grubbs, Santa Monica, for respondents.

DORAN, Justice.

Plaintiffs-appellants, as the owners of certain lots, instituted the present action for declaratory relief, seeking an adjudication that the erection of multiple unit dwellings would not constitute such a violation of single family restrictions in the deed as to be actionable by the defendants. It was plaintiffs' contention that certain violations of the deed restrictions had occurred within the contract and that there had been important changes in the character of the nearby properties and the population usage.

It was defendants' theory that any violations or changes which had occurred were of insufficient character to warrant relief, and that it was not inequitable or oppressive to enforce compliance with the deed restrictions. The trial court found in favor of defendants.

[1] The appellants now contend that "The subject deed covenants and restrictions are not enforceable as a matter of law", either as equitable servitudes or as covenants running with the land, and that "The Chancellor should have invalidated" the restrictions. It is asserted that "it is oppressive and inequitable to restrain plaintiffs from erecting the multiple-residential unit structures permitted them by the applicable zoning ordinances, particularly in view of the changes of character in the neighborhood and the actual past disregard of restrictions".

No merit is discovered in any of appellants' contentions. As pointed out in the respondents' brief, the trial court heard detailed testimony offered in support of the various points and personally viewed the tract in question. From this evidence the judge determined that although certain changes had taken place in the neighborhood and there had been an increase in motor and pedestrian traffic, such facts "do not make it inequitable or oppressive to give effect to said deed restrictions", and "That the purpose for which said deed restrictions, covenants and conditions were created can still be carried out and given effect to, notwithstanding the changes".

Such decision, as in all similar cases, involves a determination of questions of fact, and each case must be decided upon its own merits. The record discloses substantial evidence in support of the trial court's findings and, as said in *Robertson v. Nichols*, 92 Cal.App.2d 201, 209, 206 P.2d 898, 902, "The findings of fact of the trial court in a case such as this are entitled to the same weight as in any other case. Its findings of fact, if based on any substantial evidence, are final, and his conclusions, sitting as a chancellor in equity, are entitled to great weight". In such a situation as is here presented, there can be no appellate interference with the determination reached by the trial court.

The *Robertson* case just cited applied the test of an equitable servitude to deed language similar to that of the present case, and found that such a servitude existed. There, as here, after the recordation of a tract map the owner sold and conveyed the lots by deeds "which noted that the transferee was subject to and bound by each and all of the restrictions, covenants and conditions; and (2) each deed provided that the above mentioned conditions shall operate as covenants running with the land for the benefit of owners of all such lots in said tract * * * and the breach * * * may be enjoined, abated or remedied by appropriate proceedings by any or either of such owners".

[2] Appellants stress the point that some of the property in question has been re-

zoned to R-2 since the making of the deed restrictions, and argue that this rezoning should override the restrictions. The contention is untenable and such rezoning by no means compelled the trial court to declare that appellants were entitled to construct multiple unit dwellings which would violate the deed restrictions.

The situation in *Wilkman v. Banks*, 124 Cal.App.2d 451, 455, 269 P.2d 33, 35, is analogous to that of the present case. The reviewing court there says: "Appellants cry with alarm against the enforcement of an agreement they and their predecessors had made to preserve the home-like character of their community * * *. We know of no authority to warrant the ruthless renouncement of a contract made to preserve and protect the rights of the contracting parties. The fact that the City of Los Angeles had rezoned tract 9854 to allow the construction of hospitals and sanitariums therein is not authority to violate the restrictive covenants".

[3] It is likewise argued that the trial court should have invalidated the restrictions for the reason that there had been departures from other provisions contained in the conveyances, such as restrictive racial covenants, and set-back restrictions. There is no merit in such contentions. The trial court's action in modifying the thirty-five-foot set-back restriction where it appeared that houses had encroached to within thirty feet of the lot lines, was a proper exercise of judicial discretion; nor did it prevent enforcement of the single unit restrictions contained in the deeds.

Appellants have filed an "Application to Produce Evidence", supported by the affidavit of appellants' attorney stating "That your affiant has personally inspected deeds of conveyance issued both before the trial and after the trial of the within cause and has found that said deeds of conveyance of realty within Tract 1676 do not contain the subject restrictive covenants or any reference thereto", a list of such deeds and photostatic copies of three of them, being appended thereto. In this connection appellant has cited cases such as *Wedum-Aldahl Co. v. Miller*, 18 Cal.App.2d 745, 64 P.2d

762, holding that "The omission from deeds within a tract of all reference to covenants and restrictions may be sufficient to constitute a waiver of the same", and that this is one of the factors to be considered in weighing enforceability.

In opposition to this application respondents have pointed out that in the instant case "there has not been any challenge to the fact that the original grantor of Tract 1676 included the covenants and conditions in all of the deeds to all of the lots in the Tract", and that here appellants are seeking to produce deeds which do not make reference to covenants, which were made long after all of the covenants had been imposed, and which have nothing to do with the question.

Respondents also call attention to the fact, supported by the record, that the case was tried upon the theory that the restrictions were valid but that appellants sought to avoid enforceability on the ground of alleged changed conditions. It is likewise asserted that even if validity of the deed restrictions was an issue, the proposed evidence would be irrelevant.

In appellants' application to produce evidence, it is stated that "an issuable feature of the litigation was the observance of restrictions by various landowners within Tract 1676". It is difficult to see, as respondents point out, "how subsequent deeds of conveyance, after the restrictions were established, would in any manner tend to show whether the land owners were or were not observing the already recorded restrictions". Nor would such subsequent deeds throw any light on the question whether the subject matter of the original restrictions "fulfilled the legal pattern of enforceable restrictions".

The findings are supported by substantial evidence; the judgment is supported by the findings, and no reversible error is apparent.

Appellants' application to produce additional evidence is denied and the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

157 Cal.App.2d 822

Robert C. TITUS, Petitioner and Appellant,
v.

LAWNDALE SCHOOL DISTRICT, a public corporation, Frank T. Hogan, Marvin D. Haggberg, Milan P. Kissinger, Gordon E. Williams, Emery F. Hokanson, Leon J. Darley and Martha R. Hunt, Defendants and Respondents.

Civ. 22433.

District Court of Appeal, Second District,
Division 2, California.

Feb. 24, 1958.

Rehearing Denied March 24, 1958.

Hearing Denied April 23, 1958.

Proceeding for writ of mandate requiring a school district and its board members to reinstate petitioner to his position as superintendent of schools and to pay him his salary as such. From a judgment of the Superior Court of Los Angeles County, Bayard Rhone, J., for the defendants, the petitioner appealed. The District Court of Appeal, Ashburn, J., held that where petitioner was elected for four year term and given a contract for the same period, he was not subject to dismissal during that term without his consent; that mandamus was the appropriate remedy; and that the petitioner was entitled to prevail although he did not prove that he had properly performed the contract up to the time of prevention of further performance.

Judgment reversed and cause remanded for further proceedings.

1. Schools and School Districts ⇨133.11

A superintendent of schools who had not served a full year when charges were filed had a potential permanent status where he had been elected for four full years and if permitted to serve would have acquired tenure as a classroom teacher. West's Ann.Education Code, §§ 13101, 13102, 13529, 13530, 13081-13104.

2. Schools and School Districts ⇨133.6

"Tenure" is right which teacher enjoys to continue in the position in which he has become elected under the statute.

See publication Words and Phrases, for other judicial constructions and definitions of "Tenure".

3. Schools and School Districts ⇨63(1)

A "probationary employee" under the School Code is one employed from year to year who has not served in a certificated job for three successive years and been elected for the fourth. West's Ann.Education Code, §§ 13101, 13102.

See publication Words and Phrases, for other judicial constructions and definitions of "Probationary Employee".

4. Schools and School Districts ⇨63(1)

A probationary employee under the School Code cannot be discharged during the school year except for cause, as in the case of permanent employees, but positions of such employees may be terminated at the end of the school year by mere service of notice under the statute. West's Ann. Education Code, §§ 1303.1, 13581, 13582, 13611, 13631.

5. Schools and School Districts ⇨133.11, 141(2)

Superintendent of schools cannot be regarded as a "probationary employee" except for the purpose of computing the accrual of his right to permanent status as a schoolroom teacher and he may not be discharged at will, since he alone may be elected for four years and given an effectuating contract. West's Ann.Education Code, §§ 1303, 1306, 13002, 13582.

6. Schools and School Districts ⇨141(5)

If good cause for discharge of superintendent of schools exists and is proved in defense of any action brought by the superintendent, the district is exonerated from any further obligation, but if the proof shows prevention of performance by wrongful interference of the district board, the district becomes amenable to any appropriate form of redress. West's Ann.Education Code, § 13005.

7. Mandamus ⇨79

Although teaching positions are acquired by contract, permanent status is guaranteed by the statute, and the position is therefore a "right" or "office" within

meaning of the mandamus statute. West's Ann.Code Civ.Proc. § 1085.

See publication Words and Phrases, for other judicial constructions and definitions of "Office" and "Right".

8. Mandamus ⇨10

Mandamus is appropriate where restoration of a status growing out of statute as well as contract is the objective. West's Ann.Code Civ.Proc. § 1085.

9. Mandamus ⇨79

Mandamus would be appropriate remedy requiring a school district to reinstate a school superintendent to his position and pay him the salary as such, where the petitioner was elected pursuant to the statute and contract followed as an implementation of that election and the status thus conferred by law, and a money judgment could not adequately compensate him for the destruction of retirement and other rights growing out of that permanent status by wrongful discharge. West's Ann.Code Civ. Proc. § 1085.

10. Courts ⇨89

Mandamus ⇨63

The court is not bound by precedent in determining what facts and circumstances compel the issue of writ of mandamus, but the writ will issue as against a public body wherever law and justice require such action.

11. Mandamus ⇨79

Mandamus would lie to require a school district to reinstate the superintendent of schools in his position as superintendent and to pay him the salary as such, though petitioner did not prove that he had properly performed the contract up to the time of prevention of his further performance, since the district's prevention of performance by the petitioner relieved him from the necessity of proving that he had properly

fulfilled his contract to that date. West's Ann.Education Code, §§ 13088, 13089; West's Ann.Gov.Code, § 3060.

12. Courts ⇨107

Language used in an opinion must be understood in the light of the facts and the issue then before the court.

13. Courts ⇨107

Expressions used in judicial opinions are to be construed and limited by reference to matters under consideration, and they cannot safely be applied in their largest and most universal sense to dissimilar cases.

S. V. O. Prichard, Hollywood, for appellant.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, James W. Briggs, Deputy County Counsel, Los Angeles, for respondents.

ASHBURN, Justice.

Petitioner Robert C. Titus appeals from a judgment denying his prayer for writ of mandate requiring the Lawndale School District and its board members to reinstate him in his position as Superintendent of Schools of said district and to pay his salary as such.

Pursuant to § 1303, Education Code,¹ petitioner was elected superintendent of said district for a term of four years² beginning July 1, 1955. The statute provides (§ 1306) that the superintendent, in addition to other powers and duties granted to or imposed upon him, (a) shall be the chief executive officer of the governing board of the district, (b) except where otherwise provided by the board shall prepare and submit the budget, and (c) subject to approval of the board shall assign all certificated employees to positions in which they are to serve.

plicable language is the following: "Any district superintendent of schools, associate superintendent of schools, or deputy city or district superintendent of schools, or assistant city or district superintendent of schools may be elected for a term of four years."

1. All references to code sections point to the Education Code unless otherwise indicated.

2. This section also applies to associate superintendents, deputy superintendents and assistant superintendents. The ap-

(As amended in 1957 § 1306 also requires the superintendent to enter into contracts on behalf of the district as contemplated by § 18071, also enacted in 1957.) Pursuant to this election the board made a written contract of January 20, 1955, with petitioner employing him as superintendent for the four-year term at a salary of \$10,000 per annum, adjustable upward but not otherwise. It contains this paragraph: "The duties of the district superintendent shall be to serve as District Superintendent in charge of all educational and financial matters pertaining to the operation of the school district and to serve as chief executive officer of the Board of Trustees." Though required to have a school administration certificate and a teacher's certificate (§ 1304), the superintendent is not hired as a teacher but as a supervisory and executive functionary. His position in the school system is unique, as will be shown presently.

While statutory methods are prescribed for discharging permanent employees (§ 13521 et seq.), and probationary employees (§§ 13581-13582), there is no provision for discharging a superintendent holding a contract for a term of years; on the contrary, § 1303.1 authorizes termination, by mutual consent only, of "the term of employment of, and any contract of employment with, the superintendent of schools" effective on the next succeeding first day of July, and his reelection and reemployment upon other mutually agreed terms and conditions. Section 1303.2 provides that six months advance written notice must be given the superintendent if the board decides not to renew his contract, failing which the superintendent shall be deemed reelected for a term equal to the existing one and upon the same conditions.

On January 5, 1956, six months after the beginning of his term, the school board undertook to discharge appellant, did so without affording a hearing, and thereafter prevented him from discharging any of the duties or exercising any of the prerogatives of superintendent of schools. The board members went through the form of filing charg-

es against petitioner, gave him five to ten minutes to answer the charges, which he declared to be insufficient time, as was manifestly true. No evidence was produced or tendered in support of the charges. Then the board adopted the following resolution: "A motion was made that the Board relieve Robert C. Titus of all duties and responsibilities as Superintendent of the Lawndale Elementary School District effective immediately and that Mr. Titus be placed on paid inactive leave through February, 1956, at which time Mr. Titus' contract as Superintendent and his employment with the District be terminated." On February 2, 1956, appellant made written demand for a hearing on the charges pursuant to § 13522, which relates to dismissal of a permanent employee. This the board denied upon the ground that said section was inapplicable. The board held no hearing and filed no suit pursuant to § 13529 (quoted *infra*). Thereupon appellant filed his mandamus suit on March 23, 1956. This was followed on April 19, 1956, by a notice from the board to appellant purporting to terminate his services as a "probationary employee": "You are hereby notified that your services as a probationary employee in the Lawndale School District will not be required during the ensuing year (1956-1957 school year)."

The trial judge ruled: "I think the case of Board of Education [of City of Los Angeles] v. Swan, 41 Cal.2d 546 [261 P.2d 261] and Holbrook v. Board of Education in 37 Cal.2d 316 [231 P.2d 853], are determinative; that the Board of Education can cancel a contract of the superintendent at any time, subject, of course, to his remedy, if any, for breach of contract. * * *

The petitioner's rights to work for the Board of Education were by virtue of his contract with the Board and not by virtue of statute under which most civil service and certificated personnel are employed. Furthermore, his rights as a probationer, that is to say a probationer who has been hired because of the fact that he had to have a certification, in fact two certificates, were in my opinion cut off by the notice of

May of 1956." The formal findings say: "[T]he court makes no finding with respect to whether or not petitioner performed any or all conditions of the contract to be performed on his part, the determination of this mandamus proceeding being without prejudice to petitioner's right to bring an action for breach of contract; the court specifically makes no finding with relation to the allegations set forth in paragraph V of the Amended Petition and paragraph II of the Answer thereto." Said paragraph V is an averment of full performance by petitioner until prevented from further rendition of services by respondents. Paragraph II of the answer denies that allegation and specifies numerous alleged failures and refusals on petitioner's part to properly perform his contract.

The major questions presented by this appeal are whether a school board may discharge a superintendent whom it has hired for a four-year term; if so, what method should be pursued; and what, if any, remedy does the superintendent have if wrongfully ousted from office.

[1,2] Correct solution of these questions requires studious recognition of the difference between the superintendent's contract rights and his potential tenure rights under the teachers' tenure act (§§ 13081-13104). Teachers fall into four classifications,—permanent (§§ 13081, 13084), probationary (§ 13101), substitute (§ 13103), and temporary (§ 13104). A permanent employee is one employed in a district having average daily attendance of 850 or more (which Lawndale does have), who, having been employed for three successive school years in a position requiring certification qualifications, is reelected for the next school year in a like position (§ 13081). Such an employee cannot be discharged without filing of charges of misconduct, incompetency or the like (§ 13521), with an

opportunity to demand a hearing. If this is done, "the governing board shall have the option either (a) to rescind its action, or (b) to file a complaint in the superior court of the county in which the school district or the major part thereof is located, setting forth the charges against the employee and asking that the court inquire into the charges and determine whether or not the charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of the employee, under the provisions of this code, and for judgment pursuant to its findings." § 13529. "If the board elects to file a complaint, the complaint shall be filed within 30 days from the date of the employee's demand for hearing. If the complaint is not filed within such period the board's action shall be deemed to be rescinded and all charges dismissed." § 13530. This procedure could not apply to appellant, for he had not served a full year when charges were filed, and it takes three years of service with an election for a fourth year to ripen into permanent status. He did have a potential permanent status, however, for he had been elected for four full years and if permitted to serve would have acquired tenure³ as a classroom teacher (*Holbrook v. Board of Education*, 37 Cal.2d 316, 333-334, 231 P.2d 853).

[3,4] A probationary employee is one employed for the school year in a position requiring certification qualifications, who has not been classified as a permanent or a substitute employee (§ 13101); the classification is made at the time of employment and thereafter in the month of July of each year (§ 13102). In other words, a probationary employee is one employed from year to year, who has not served in a certificated job for three successive years and been elected for a fourth. Appellant was not employed from year to year, but had been elected for four years and given a contract

3. The term "tenure" is thus defined in *Klein v. Board of Education*, 1 Cal.2d 706, 710, 37 P.2d 74, 76: "[T]his right of tenure is a right which the teacher enjoys to continue in the position or positions to which he has become elect-

ed under the statute—i. e., in a position or positions of a *rank* and *grade* equivalent to that occupied for the probationary period and to which the teacher has thus become "elected" under the statute."

for the same period. A probationary employee cannot be discharged during the school year except for cause, "as in the case of permanent employees" (§ 13581), which language connotes a necessity of following the same procedure as in case of dismissal of a permanent employee. *Comstock v. Board of Trustees*, 20 Cal.App.2d 731, 732, 67 P.2d 694. However, such employees may be terminated at the end of the school year by mere service of notice under § 13582, which reads: "On or before the fifteenth day of May in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year. * * *" No attempt was made to dismiss appellant under § 13581, and, as later shown, the effort to pursue § 13582 provided abortive.

[5] Did the legislature express in this statute an intention that a superintendent who has been hired for a term of years may be dismissed during that term without his consent? Express means to that end are prescribed in the case of permanent and probationary employees, as just shown; also with respect to substitute (§ 13611) and temporary employees (§ 13631). Nowhere is a superintendent mentioned in such connection except in § 1303.1, which expressly requires his consent to terminate his contract or his term of service. As he is chief executive officer of the board, in charge of assignment of teachers and other certificated employees and at times in charge of the budget (§ 1306), he alone may be elected for four years and given an effectuating contract;⁴ other certificated persons are elected from year to year (§ 13002). Provision for their discharge is made, but none for the superintendent. Permanence of service for the designated term is the dominant thought expressed in the legislation concerning the superintendent. The procedure for terminating a probationary employee at the end of any school year cannot apply to him for it is directly opposed to the more pertinent pro-

vision for a four-year employment; the special provision of § 1303 to this effect must prevail over the generalities of § 13582. The superintendent cannot be regarded as a probationary employee except for purpose of computing the accrual of his right to permanent status as a schoolroom teacher.

The notion that he may be discharged at will is fallacious. Respondents rely upon the statement in *Stewart v. Eaves*, 84 Cal.App. 312, 324, 257 P. 917, 922: "If the board has full power in the management and control of the school, it must be vested with the power to make contracts and unmake contracts." The court was there considering the matter of mutual rescission, upheld the power of the board to enter into one, and the case seems to have been the progenitor of § 1303.1. There is nothing in the opinion to sustain a claim that a school district may make a unilateral rescission of a four-year contract. The controlling principle is stated in *California Highway Comm. v. Riley*, 192 Cal. 97, 107, 218 P. 579, 583: "A private individual may grant authority to an agent to execute in his behalf a contract for a certain improvement, but it does not follow therefrom that the agent has authority to commit his principal to a breach of such contract and thus subject the principal to liability for damages. * * * A grant of authority to an agent to execute a contract in behalf of his principal contemplates the performance of such contract, not its breach, and authority to breach a contract is not implied from a mere grant of authority to execute such contract.

"The rule that a state in its contract with individuals is subject to the same rules and liabilities as individuals is itself subject to certain limitations. * * * When, however, the state empowers an officer or board to enter into a contract on its behalf, whereby it is to have certain rights and liabilities, and the officer or board has entered into such contract, no officer or board may

4. That is, only he, or his associate, deputy or assistant superintendent may be elected for such term.

thereafter act or speak for the state in the matter of such contract, either for the enforcement or termination thereof, unless expressly or impliedly authorized by the state so to do. By the execution of such an authorized contract the state acquires certain legal rights and incurs certain liabilities which are fixed and ascertained, or ascertainable. Thereafter no one can either increase or diminish the rights of the state or increase or reduce its liabilities thereunder unless he has been vested with authority so to do by express grant or clear implication. The state having directed or authorized the making of the contract contemplates its performance, and, as in the case of private individuals, the authority to breach such a contract is not to be implied from the mere grant of authority to execute the same." The specific holding of the case was that the highway commission could not rescind a highway construction contract, even by consent, for the purpose of entering into a new and more lucrative contract in favor of the contractor.

In *Housing Authority of City of Los Angeles v. City of Los Angeles*, 38 Cal.2d 853, 243 P.2d 515, the city of Los Angeles attempted to rescind its prior approval of a low rent housing project and to abrogate a cooperation agreement entered into in accordance with applicable law. The Housing Authority sought and procured a writ of mandate directing the city to perform its agreement. At page 860 of 38 Cal.2d, at page 518 of 243 P.2d, the court said: "The matter presents to this court the question whether the city had the right to rescind the approval of the projects and to abrogate the cooperation agreement under which it had pursued the obligations thereby assumed for a period of over two years." At page 868 of 38 Cal.2d, at page 523 of 243 P.2d: "In this as in the other respects the general principle applies that the state grant of the powers and the authority to execute and enter into the contract to exercise those powers contemplates performance of the contract and implies no authority to breach it. California High-

way Comm. v. Riley, 192 Cal. 97, 107-108, 218 P. 579." See, also, *Cope v. County of Sutter*, 206 Cal. 445, 454(3), 274 P. 750.

[6] Although we find no statutory authority for discharge of a superintendent before the expiration of his contract term, especially where it is a four-year period, we do not consider that the district is remediless in cases of misconduct of a superintendent amounting to a substantial breach of the express or implied terms of his contract. At this point the present controversy moves over into the field of general contract law. If good cause for discharge exists and is proved in defense of any action brought by the superintendent, the district is exonerated from any further obligation. If, on the other hand, the proof shows prevention of performance by wrongful interference of the district board, the district becomes amenable to any appropriate form of redress. Division 7 of the code embraces the subject of School Employees and § 13005 says: "Nothing in this division shall be construed in such manner as to deprive any person of his rights and remedies in a court of competent jurisdiction on a question of law and fact."

[7] One of the commonest applications of mandamus is restoration of a school teacher to a position from which he or she has been wrongfully ousted. (See, 23 Cal.Jur. § 100, p. 137; 32 Cal.Jur.2d § 23, p. 168.) "Although teaching positions are acquired by *contract*, permanent status is guaranteed by *statute*, and the position is therefore a 'right' or 'office' within the meaning of Cal.Code Civ.Proc. § 1085." (24 Cal.Law Rev. p. 442(9).)

[8, 9] Respondents' argument that mandamus will not lie to compel mere performance of a contract cannot prevail here because it overlooks the fact that the instant application seeks restoration to a status created by statute as well as contract. Appellant was elected pursuant to § 1303 and the contract followed as an implementation of that election and the status thus conferred by law. The distinction is drawn in *Elevator Operators and Starters' Union*, etc.

v. Newman, 30 Cal.2d 799, 808, 186 P.2d 1, 6: "His claim was based, not on breach of contract, but on the theory that he had a right to reinstatement to the office. It is settled that mandamus does not lie when there is no cause of action for reinstatement to a position, but merely a claim for damages for breach of contract." It is well established that the writ is appropriate in those instances where restoration of a status growing out of statute as well as contract is the objective,—this for the reason that a money judgment is not an adequate remedy. In the case at bar appellant's election and contract assure him of permanent status as a schoolroom teacher if he successfully performs for three years, he having been elected already for a fourth year. A money judgment could not adequately compensate for the destruction of retirement and other rights and perquisites that grow out of permanent status.

That this is a proper case for mandamus follows from a consideration of the apposite authorities. 34 Am.Jur. § 203, page 974: "Since mandamus does not generally lie to determine mere contract rights, the writ will not be awarded to compel reinstatement of a schoolteacher who has been removed and whose relation to the school officers rests wholly in contract. But where the teacher by positive provision of law has a fixed tenure of office, or can be removed only in some prescribed manner, and where, consequently, the removal is not authorized, mandamus will issue, even though another teacher has been selected to fill the position. So, also, the remedy will lie to compel reinstatement of a teacher who has been removed in violation of statutory rights." The language just quoted fairly reflects California law. The leading cases are Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042; Saxton v. Board of Education, 206 Cal. 758, 276 P. 998, and Holbrook v. Board of Education, supra, 37 Cal.2d 316, 231 P.2d 853.

In Kennedy the principal teacher of a certain grammar school sought mandate to restore her to that position after she had been transferred to a school of lower grade,

carrying a reduced salary. It having been held that petitioner was wrongfully removed, the court passed upon the propriety of invoking mandamus. At page 491 of 82 Cal., at page 1044 of 22 P., it said: "The writ of *mandamus* may issue in this state 'to compel the admission of a party to the use and enjoyment of a *right* or *office* to which he is entitled, and from which he is unlawfully precluded.' Code Civ.Proc., § 1085. It may be conceded that a right to hold the position of teacher in the public schools would not be a 'right,' within the meaning of this section, if such right depended solely upon a *contract* with the board of education, and the term for which such position should be held were not fixed by the statute. But such is not the case. As we have seen, the term for which the respondent was entitled to hold her position was not fixed by any contract with the appellant. The duration of her term of service is fixed by the *statute*; and her removal from it was not merely a violation of a contract, but of an *express provision of law forbidding such removal*. Although her right to take the position depended upon the act of the appellant, the right to continue in it was preserved to her by the statute; and to take it from her was to deprive her of a right given her by law, and to which she has a right to be restored by *mandamus*. People v. Van Siclen, 43 Hun [N.Y.] 537. The object being to restore her to a right given her by law, *mandamus* is the proper remedy." So at bar the term of the contract was fixed by an election under an applicable statute and does not depend solely upon the ensuing contract; appellant's removal from that employment was impliedly forbidden by the same law, as above held. Kennedy upholds the right to mandamus in the instant case.

Saxton v. Board of Education, supra, 206 Cal. 758, 276 P. 998, was a proceeding brought by a teacher who was classified as a permanent employee and sought mandamus to restore her to her position, from which she claimed wrongful expulsion. The writ was granted and the ruling affirmed. At page 766 of 206 Cal., at page

1001 of 276 P., the opinion says: "On the other hand, the courts of this state have frequently held that *mandamus* is the proper remedy to be invoked by a teacher, wrongfully dismissed from his position, and who holds it, not under contract, but by virtue of statutory authority. * * * The case of *Kennedy v. Board of Education*, supra, contains an apt and comprehensive statement of the law upon the subject, which we think is virtually conclusive of the present action." The court then quoted from the *Kennedy* opinion as we have done supra. At page 768 of 206 Cal., at page 1002 of 276 P., it further said: "The trial court having found that plaintiff had been wrongfully dismissed from her position, under the authority of *Kennedy v. Board of Education* and kindred cases, was authorized to compel by writ of *mandamus* her reinstatement to the position from which she had thus wrongfully been dismissed."

In *Holbrook v. Board of Education*, supra, 37 Cal.2d 316, 231 P.2d 853, the Supreme Court directed the issuance of *mandamus* (which had been denied below) to compel the Board of Education to restore petitioner to the position of a full time certificated employee. In considering the status of petitioner it was said, 37 Cal. 2d at page 331, 231 P.2d at page 861: "The relationship between respondent board and appellant is that of employer and employee and this relationship is created by contract. * * * The result of the tenure statutes 'was not to make the relation any the less one originating in contract, but to annex to contracts of employment when repeated for a sufficient time certain legal consequences.'" The ultimate holding is well summarized in syllabus 14, viz.: "*Mandamus* lies to compel a district school board to reinstate an employee to his prior position and to employ him as a full time employee in a position or positions requiring certification qualifications of a proper grade, where he establishes that he had been employed in such position or positions requiring such qualifications for three consecutive years, and that he was reelected to such position or positions for the fourth year,

and that he is entitled to a full time permanent position in the district."

[10] *Housing Authority of City of Los Angeles v. City of Los Angeles*, supra, 38 Cal.2d 853, 870, 243 P.2d 515, 524: "[T]he court is not bound by precedent in determining what facts and circumstances compel the issuance of the writ but that the writ will issue as against a city or other public body or officer wherever law and justice require such action."

We hold that *mandamus* lies in the instant case.

[11] Respondents' counsel argued orally that, assuming the propriety of *mandamus*, appellant cannot succeed upon this appeal because he did not prove below that he had properly performed the contract up to the time of prevention of his further performance. The assertion that this burden rested upon him is not well founded. *Hooper v. Wickes*, 88 Cal.App. 535, 263 P. 853, 855, is in point. It was an action for damages growing out of plaintiff's wrongful dismissal as principal of a certain high school district. He prevailed, although there was no evidence at the trial that he had properly performed, nor, on the contrary, was there any that defendants had any just cause to dismiss him. After quoting that portion of § 1609, Political Code, which is now § 13005, Education Code, the court said, in part: "That is equivalent to saying that none of the provisions contained in section 1609 of the Political Code shall be so construed as to prevent a teacher from bringing an action for a violation of a contract held by him with a board of school trustees which necessitates the further holding, as would be the case in any ordinary action, that all that is necessary for a plaintiff to do is to prove the contract of employment, his readiness to perform and the breach by the opposite party. That is one of the rights included and referred to in subdivision 5 of said section 1609, because it is one of the rights given to a teacher just the same as to any other party to maintain an action for a violation of contract. The language

of said subdivision of said section is also equivalent to saying that in such an action it is incumbent upon the party disavowing the contract to show that he is justified in such disavowal, as the rights guaranteed by said subdivision give to the teacher the same rights that are vouchsafed to other parties occupying contractual relations.

"The form of the action does not appear to us to be at all decisive of the rights of the parties or as to proofs sustaining the action of either of the parties to the contract. That is to say, in any case a party breaching a contract must show good cause therefor. This is further illustrated in the case of *Goldsmith v. Board of Education*, 66 Cal.App. 157, 225 P. 783, where the subject matter of the dismissal of a school teacher was elaborately considered by this court in an opinion written by Mr. Justice Hart. A consideration of that opinion shows that * * * the action was one praying for a writ of mandate * * *. While in form an action for a writ of mandate, all the testimony bearing upon the truthfulness of the charges preferred against the teacher was placed before the trial court just as we hold it should have been done in this case. It is not incumbent upon the plaintiff to prove a negative. As we have stated, occupying a contractual relation, all he was called upon to do in the first instance was to introduce proof showing employment, the term of the employment, his readiness to perform, and the breach on the part of the defendants, or their refusal to permit performance, and the burden of showing justification or excuse for such refusal was then cast upon the defendants. In other words, it was their duty to introduce testimony showing the truth of the charges upon which they had acted." (88 Cal. at pages 542-543, 263 P. at pages 855, 856.) To the same effect, see *Bowden v. Board of Education*, 264 Ill. App. 1, 11; *Compton v. School Directors of District No. 14*, 8 Ill.App.2d 243, 131 N.E. 2d 544, 552; *Seher v. Woodlawn School Dist. No. 26*, 79 N.D. 818, 59 N.W.2d 805, 811; 78 C.J.S. Schools and School Districts § 212(b), p. 1119. Reference has

been made herein to the trial judge's express declination to make any finding upon the subject of the quality of petitioner's performance, although he did find, "that at all times since the 6th day of January, 1956, except as hereinafter indicated, petitioner has held himself out as being ready, able and willing to perform his duties as Superintendent of said Lawndale School District, and has offered to perform the same, but at all times said Board of Trustees has refused to recognize the petitioner as the Superintendent of Lawndale School District;" the exception relates to appellant's acceptance of employment in New Mexico after his discharge.

The *Hooper* case, *supra*, 88 Cal.App. 535, 263 P. 853, merely applies general law pertaining to actions for breach of contract. Section 1512, Civil Code, says: "If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties." Defendants' prevention of performance by petitioner relieved him from the necessity of proving that he had properly fulfilled his contract to that date. There being no evidence on the subject, any justification for dismissing him stands unproved and he is entitled to a reversal of the judgment.

The cases of *Holbrook v. Board of Education*, *supra*, 37 Cal.2d 316, 231 P.2d 853, and *Board of Education of City of Los Angeles v. Swan*, 41 Cal.2d 546, 261 P.2d 261, upon which respondents rely, are not opposed to the foregoing views. They deal with right of tenure. Neither *Holbrook* nor *Swan* was relying upon a statutory contract for a term in excess of one year. Each was advancing a claim to tenure appertaining to an administrative or supervisory position. Both cases hold that tenure does not accrue to such a position and is confined to permanence of employment as a classroom teacher. In fact, § 13089 so declares: "A person employed in an administrative or supervisory position requiring certification qualifications upon completing a probationary period, including any time served as a classroom teacher, in

the same district, shall, in a district having an average daily attendance of 850 or more pupils, be classified as and become a permanent employee as a classroom teacher.
* * *

Holbrook, *supra*, sounded in mandamus. Petitioner, who had no contract other than that following an election for a yearly period, had devoted three-fourths of his time to administrative work and one-fourth to teaching. The school board classified him as a permanent one-fourth time director of adult education and three-fourths time as business manager non-certificated. The board later resolved to discontinue his services as business manager and to employ him for one-fourth time only to direct adult education. He then sought mandate to compel reinstatement to full time employment in the district. The Supreme Court held, 37 Cal.2d at page 333, 231 P.2d at page 862: "Having been elected to a full time position for three consecutive school years, some of the duties of which required certification qualifications, appellant is entitled to permanent full time employment in the district if he was reelected for the fourth year in a position requiring certification qualifications." At 334 of 37 Cal.2d, at page 863 of 231 P.2d: "While the present statute makes it clear that a principal or other supervisory employee need not perform any teaching services in order to be entitled to tenure, there has been no change in the provision that such persons become permanent employees as classroom teachers after the probationary period is served. See *Griffin v. Los Angeles City H. S. Dist.* (1942), 53 Cal.App.2d 350, 127 P.2d 939. Accordingly, appellant is entitled to be classified as a permanent classroom teacher. This does not, of course, affect our conclusion that respondent board exceeded its authority in purporting to reduce appellant to part time employment." The citation of the *Griffin* case shows that this language was intended to mean that tenure does not apply to administrative or supervisory functions, but that one who performs them, having the necessary certificate or certificates, earns in due course a right

to tenure as a schoolroom teacher. *Griffin* specifically so holds with respect to a school principal. As above pointed out, Holbrook decides that mandamus is an appropriate remedy to preserve or restore tenure of an aggrieved certificated employee.

[12, 13] Board of Education of City of Los Angeles v. Swan, *supra*, 41 Cal.2d 546, 261 P.2d 261, was not a mandamus case, nor was the applicability of that remedy considered or discussed. The action was brought by the Board of Education under § 13529 for a judgment permitting it to dismiss defendant and terminate her employment as a permanent teacher because of insubordination and other forms of misconduct. Defendant was qualified as teacher and principal. She refused to comply with an order of the board relieving her of the duties of principal and assigning her to teaching. Defendant relied, among other things, upon a right of tenure in the status of principal. She did not claim any statutorily authorized contract for more than one year and did not rely upon contract as distinguished from a right of tenure. Concerning this phase of the case the court said, 41 Cal.2d at page 555, 261 P.2d at page 267: "Defendant argues that after her years of service as a principal, she was not obliged to accept, without a hearing, teaching assignments from the Superintendent of Schools acting under plaintiff's order. But so far as defendant's demotion from the position of principal to teacher was concerned, plaintiff acted within its authority. Principals do not secure tenure in that capacity, Ed. Code, §§ 13088-13089, and the governing board may cancel their contracts as principals at any time, subject, of course, to a possible judgment for damages in an action at law in the event the board fails to justify the dismissal of the principal from such position. *Griffin v. Los Angeles City High School Dist.*, 53 Cal.App.2d 350, 351, 127 P.2d 939. Having no tenure in her employment, as a principal, defendant was indisputably guilty of insubordination in declining to accept the teaching assignments and was subject to dismissal." This lan-

guage is to be read in the light of the issue under discussion, which was not that of remedy but one of alleged right. "It is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court." *Porter v. Bakersfield & Kern Elec. Ry. Co.*, 36 Cal.2d 582, 590, 225 P.2d 223, 228. "But it is a familiar rule that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimilar cases." *City of Pasadena v. Stimson*, 91 Cal. 238, 250, 27 P. 604, 606. The *Swan* decision does distinctly hold that principals "do not secure tenure in that capacity," meaning permanence of status, and that defendant was guilty of insubordination rendering her subject to dismissal for declining to accept a teaching assignment. But the question of what other rights or remedies might exist or be available was not before the court. The statement that "the governing board may cancel their contracts as principals at any time, subject, of course, to a possible judgment for damages in an action at law in the event the board fails to justify the dismissal of the principal from such position," carries a plain recognition of the fact that a principal's services cannot be terminated without good cause and if that is attempted the employee is entitled to damages. Whether that would be the exclusive remedy was not being considered; specifically, whether mandamus would lie to effect reinstatement to permanent classroom status was not within the confines of the discussion. The quoted language cannot be fairly construed to mean that mandamus will not lie to restore the position of one who has a fixed status for four years created by statutory election and implementing contract. If it were so interpreted it would be dictum and opposed to the considered cases of *Kennedy*, *Saxton* and *Holbrook*, above discussed.

In view of our conclusion that petitioner is entitled to a reversal because of what

appears from the record now before us to have been a wrongful dismissal, it becomes unnecessary to discuss appellant's claim that he is a public officer whose removal can be effected only pursuant to a grand jury presentment under § 3060, Government Code.

Upon a retrial the court should determine whether good cause existed for discharge of appellant from his position as superintendent of schools.

The judgment is reversed and the cause remanded for further proceedings not inconsistent herewith.

FOX, P. J., and KINCAID, Justice pro tem., concur.



157 Cal.App.2d 797

Billy Don BLUNDELL, etc., Plaintiff and Appellant,

v.

The ATCHISON, TOPEKA and SANTA FE RY. CO., Defendant and Respondent.

Civ. 22231.

District Court of Appeal, Second District,
Division 1, California.

Feb. 24, 1958.

Action under Federal Employers' Liability Act for injuries to 15 year old railroad employee. The Superior Court, Los Angeles County, Bayard Rhone, J., rendered judgment for employee, and employee appealed. The District Court of Appeal, Doran, J., held that question of damages was for jury's determination.

Affirmed.

I. Appeal and Error — 1056(1), 1067

In action under Federal Employers' Liability Act for injuries sustained by rail-

road employee, exclusion of evidence, offered to explain expected impeachment of employee's testimony that he was only 15 years of age at time of accident, and tending to show that railroad had waived its policy prohibiting employment of persons under 18 by habitual and recurrent employment of minors under 16, and refusal to instruct jury on that subject was not prejudicial error. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Master and Servant ⇨88(1), 230(3)

Where 15 year old boy claimed to be 18 years of age in obtaining employment and was injured in his employment, misstatement of age was not contributory negligence but was fraudulent act in inducing employer to enter into employment contract.

3. New Trial ⇨40(2)

Where action under Federal Employers' Liability Act proceeded to trial on theory of employer's failure to provide proper supervision and equipment, failure to warn employee regarding use of equipment, and otherwise failing to provide a reasonably safe place to work, employee was not entitled to change theory on motion for new trial and show, as basis for complaint as to exclusion of evidence, that employer illegally employed employee who was probably under 18 years of age and that therefore employer should be liable for any and all injuries incurred. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Trial ⇨251(8)

In action under Federal Employers' Liability Act for injuries to railroad employee, wherein assumption of risk was not urged as a defense and counsel for both parties indicated that it was not in issue, refusal of employee's requested instruction that he did not assume risk of his employment was not improper. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

5. Appeal and Error ⇨1067

Refusal to give an instruction on matter not in issue is not reversible error.

6. Trial ⇨260(8)

In action under Federal Employers' Liability Act for injuries sustained by 15 year old railroad employee, refusal of employee's requested instruction that an employer owes to youthful and inexperienced employees a duty to warn them of dangers to be encountered in work and to instruct them about defects and dangers of which employer knows and of which employee is without actual or constructive knowledge, was not improper in view of fact that other instructions adequately apprised jury as to care railroad owed to employee, of relative nature of term negligence, and of fact that conduct in question must be considered in light of circumstances. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

7. Release ⇨59

In action under Federal Employers' Liability Act for injuries sustained by 15 year old railroad employee, refusal to give employee's requested instruction that minor's release could not waive any rights under Federal Employers' Liability Act, was not improper in view of fact that written release signed by employee's parents expressly reserved to employee all rights possessed under that act. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

8. Damages ⇨208(1)

In action under Federal Employers' Liability Act for injuries sustained by railroad employee, question of amount of damages sustained was for jury's determination. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

9. Damages ⇨132(15)

Negligence ⇨97

Award of \$8,500, under Federal Employers' Liability Act, which permits application of comparative negligence rule, to 15 year old railroad employee who suffered lifetime disabling injuries to throat and larynx that interfered with normal breathing and speaking and who would never be able to perform heavy labor or exertive physical activities was not inadequate.

Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

10. Master and Servant — 267(1)

In action under Federal Employers' Liability Act for injuries sustained by 15 year old railroad employee, testimony showing that railroad knew or should have known that employee was under 18 years of age in spite of sworn statements of his parents to effect that he was 18 years of age was properly excluded, where employee's offer of proof failed to show that employer or any responsible agent had any such direct knowledge and would only show a suspicion or an inference. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

Steinmetz & Murrish, Wm. B. Murrish, Raoul D. Magana, Daniel C. Olney, Los Angeles, for appellant.

Robert W. Walker, J. H. Cummins, Los Angeles, for respondent.

DORAN, Justice.

After a trial by jury, plaintiff, aged fifteen years at the time of the accident, was awarded a judgment for \$8,500 and costs against the respondent railway company. Plaintiff now appeals from that judgment.

Plaintiff, the son of a Santa Fe employee, was working during the summer vacation, as an ice handler at the respondent's railway ice house located at Needles. Plaintiff had been directed to operate a capstan or car puller, by which cars were pulled into position for icing. The capstan, or winch, turned clockwise and operated by taking three or four loops around the spool with a rope attached to the car, holding the rope taut and then turning on the electric power. In this manner plaintiff was attempting to pull two cars at the time of the accident.

The record discloses that, while engaged in this operation, the rope sagged because the towed cars moved faster than the rope being pulled by the capstan. Plaintiff held

up the rope so that it would not fall off the capstan spool; along came a knot in the rope, and in attempting to guide the knot and rope, the thumb of plaintiff's left glove became caught, pulling him into the coils of rope winding around the capstan.

In consequence of the accident, plaintiff suffered lifetime disabling injuries. Throat and larynx injuries interfere with normal breathing and speaking, and there was medical evidence to the effect that plaintiff would never be able to perform heavy labor or exertive physical activities. The verdict of \$8,500 is deemed inadequate by the appellant.

Plaintiff's action was brought under the Federal Employers' Liability Act, involving the comparative negligence rule rather than the usual common law negligence rules. The defendant railroad is charged with negligence in failing to provide adequate and proper supervision, and proper and safe equipment to be used in pulling the cars. Negligence is also charged "in providing a knotted rope which could not be surged or turned freely on the capstan"; in "failing to warn plaintiff regarding the use of said defective rope", and in "otherwise failing to provide a reasonably safe place for plaintiff to work". The defendant denied any negligence, alleging negligence by the plaintiff, and unavoidable accident.

Among other things, the evidence disclosed that in obtaining employment, plaintiff had falsely claimed to be 18 years of age, and that his parents had made a similar written statement as to the son's age, consenting to the employment and waiving any claim for damages in case the son should be injured. There was also evidence that plaintiff had disobeyed instructions to stand away from the capstan, and was violating a rule against the wearing of gloves.

Appellant contends that the trial court erroneously excluded evidence tending to show that the defendant employer had waived its rule or policy prohibiting employment of persons under 18 by the habitual and recurrent employment of minors under 16, and likewise erred in refusing

to instruct the jury on that subject. The appellant asserts that such evidence was admissible "because, such waiver, if believed, would render plaintiff's violation of such rule no longer contributory".

[1,2] As pointed out in respondent's brief, when this evidence was offered, appellant advised the court that impeachment of plaintiff's testimony that he was only 15 at the time of the accident, was expected, and that such impeachment would be explained by showing waiver of the age requirement by the common practice of hiring younger boys, whereupon the trial court sustained an objection to the evidence offered for such stated purpose. In this there appears to have been no prejudicial error. It may be noted that plaintiff's misstatement of age would not be negligence but an intentional, fraudulent act in inducing the defendant to enter into an employment contract.

It is argued that "Plaintiff's evidence of defendant's habitual, recurrent employment of minors under 16 was also admissible because constituting a violation of the Federal Child Labor Law, and being conduct, therefore, not subject to claim of contributory negligence or negligence by plaintiff".

[3] This contention was made on appellant's motion for a new trial, and was properly disposed of by the trial judge as follows: "It appears that * * * plaintiff is attempting to change the theory of liability. The action was one under the Federal Employers' Liability Act and proceeded to trial for the alleged failure of the defendant to provide adequate and proper supervision * * * proper and safe equipment * * * an adequate rope; in failing to warn the plaintiff regarding the use of a defective rope, and in otherwise failing to provide a reasonably safe place for plaintiff to work. By the motion for a new trial the plaintiff attempts to show that the defendant illegally employed the plaintiff who probably was under 18 years of age; and, therefore, the defendant should be liable for any and all injuries incurred * * *. This certainly was not the

theory of the lawsuit set out in the pleadings, and it would be improper to permit the plaintiff to change the theory of his action at this time".

[4,5] It is also contended that "the trial court erred in refusing and denying plaintiff's requested instruction that plaintiff did not assume the risk of his employment". As hereinbefore noted, the defendant's answer pleaded no negligence on its part but the existence of negligence on plaintiff's part, and unavoidable accident. Assumption of risk of any kind by the plaintiff was not urged as a defense, and in argument, counsel for both parties indicated that this was not an issue. Refusal to give an instruction on a matter not in issue cannot be deemed reversible error.

[6] Likewise, no prejudicial error was committed in refusing to give plaintiff's requested instruction that "an employer of labor owes to his youthful and inexperienced employees a duty to warn such youthful employees of dangers to be encountered in the conduct of the work which such * * * employees may not be expected to know, and further to instruct such * * * employees about defects and dangers of which the employer knows about and of which the * * * employee is without actual or constructive knowledge," etc. Other instructions adequately apprised the jury as to the care defendant owed to the plaintiff, of the relative nature of the term "negligence", and the fact that the conduct in question must be considered in the light of the circumstances.

[7] The same may be said in reference to the trial court's refusal to give plaintiff's requested instruction that the minor's release could not waive any rights under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. As respondent points out, the written release signed by the parents expressly reserves to the plaintiff son all rights possessed under that Act. There was thus no reason for the court to give the requested instruction.

[8-10] In short, the record discloses no prejudicial error committed by the trial

court. The real basis for the appeal appears to be the alleged inadequate damages. This was a matter for the jury's determination, and was further considered by the trial court on plaintiff's motion for a new trial. In a written memorandum the judge indicated that an award of \$5,000 would have been adequate. The contention that "plaintiff should have been permitted to introduce testimony showing that the defendants knew or should have known that the plaintiff was under 18 years of age in spite of the sworn statement of plaintiff's parents is also deemed untenable since the offer of proof failed to show "that the defendant or any responsible agent had any such direct knowledge. At most it would only show a suspicion or an inference".

The appellant seems to have been accorded a full and fair trial of all pertinent issues; the verdict and judgment are supported by substantial evidence.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



157 Cal.App.2d 842

Julian RODRIGUES and Marla Rodrigues,
Plaintiffs and Appellants,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT,
etc., et al., Defendants,

San Jose Unified School District, a municipal corporation, Defendant and
Respondent.

No. 17527.

District Court of Appeal, First District,
Division 1, California.

Feb. 25, 1958.

Rehearing Denied March 27, 1958.

Action by parents against school district for death of first grade child who fell from horizontal bar on playground. After jury verdict, the Superior Court, Santa

Clara County, Harold Holden, J., entered judgment for school district, and parents appealed. The District Court of Appeal, McMurray, J. pro tem., held that presumption that child was exercising ordinary care at time of and immediately preceding the accident did not require conclusion that child exercised due care in getting on the bar in view of evidence that child who was subject to seizures knew that he should not get on the bar, and that child's death was caused by injuries sustained in fall from the bar.

Affirmed.

1. Schools and School Districts ⚡122

In action by parents against school district for wrongful death of first grade child who fell from horizontal bar on playground, question whether school district was negligent in not providing closer supervision for child who was subject to seizures which affected his vision and caused tremors to his hands was for jury.

2. Schools and School Districts ⚡89

Statute requiring public school teacher to hold pupils to strict account for their conduct does not make school districts insurers of safety of pupils at play or elsewhere. West's Ann.Education Code, § 13229.

3. Schools and School Districts ⚡122

Whether or not a school district is negligent in affording supervision of pupils on playground is question of fact unless there is no evidence which is compatible with exercise of due care under all facts in case. West's Ann.Education Code, §§ 1007, 13229.

4. Schools and School Districts ⚡122

In action by parents against school district for wrongful death of first grade child who fell from horizontal bar on playground, failure of child's teacher to inform others that child was subject to seizures and type of supervision furnished to first grade play area, one teacher overseeing 75 to 100 children in space approximately 75 feet by 110 feet, were proper for jury's consideration on issue of negligence. West's Ann.Education Code, §§ 1007, 13229.

5. Schools and School Districts ⇨89.11, 89.12

Purpose of law requiring supervision of pupils on playgrounds and on school property during school hours is to regulate their conduct so as to prevent disorderly and dangerous practices which are likely to result in physical injury to immature scholars. West's Ann.Education Code, §§ 1007, 13229.

6. Schools and School Districts ⇨89.11

The mere lack of supervision or inadequate supervision may not necessarily create liability on part of a school district to compensate for injuries sustained by a pupil. West's Ann.Education Code, §§ 1007, 13229.

7. Schools and School Districts ⇨89.11

In determining whether school district is liable for injuries sustained by a pupil, it may not be material whether a supervisor was present at time of act complained of if it appears that a supervisor could not have reasonably anticipated or prevented conduct of fellow students which resulted in injuries. West's Ann.Education Code, §§ 1007, 13229.

8. Schools and School Districts ⇨125

On appeal by parents from adverse judgment in action against school district for wrongful death of first grade child who was found lying unconscious on ground under horizontal bar on playground, school district's argument that it was only assumption that child was on the bar, had a seizure and fell was untenable in view of record wherein both parties put into evidence reports that child fell because he had a seizure while on the bar.

9. Schools and School Districts ⇨122

In action by parents against school district for wrongful death of first grade child who fell from horizontal bar on playground, questions as to adequacy of supervision afforded by school district to child who was subject to seizures and as to whether such supervision or lack thereof was proximate cause of child's death were for jury.

10. Trial ⇨260(8)

In action by parents against school district for wrongful death of first grade

child who fell from horizontal bar on playground, trial court's refusal to give plaintiffs' requested instruction was not prejudicial to plaintiffs where jury was fully instructed on principles of law involved and jury, even under requested instruction, might have found that proximate cause of accident was not any act or dereliction attributable to school district.

11. Evidence ⇨555

In action by parents against school district for wrongful death of first grade child who fell from horizontal bar on playground, expert testimony of two witnesses as to number of pupils one person could properly supervise was not objectionable as without proper foundation or as relative to supervision in other schools only where both experts were qualified to testify generally as to supervision of playgrounds and their testimony was general in nature and restricted in great part to usual school conditions.

12. Schools and School Districts ⇨122

In action by parents against school district for wrongful death of first grade child who fell from horizontal bar on playground, weight and credibility to be given expert testimony of two witnesses who testified as to number of pupils one person could properly supervise were for jury.

13. Schools and School Districts ⇨121

In action by parents against school district for wrongful death of first grade child who fell from horizontal bar on playground, customs testified to by experts in connection with supervision of pupils were not objectionable as being below standard required by law.

14. Negligence ⇨124(3)

If evidence of customs does not measure up to standard required by law, it is inadmissible.

15. Schools and School Districts ⇨89.11, 122

In determining whether school district was negligent in affording supervision of its pupils, there is no absolute rule as to number of pupils one supervisor may adequately oversee, nor is there any fixed

standard of supervision; question is for jury under facts of particular case.

16. Trial $\S$ 296(3)

In action by parents against school district for wrongful death of first grade child who fell from horizontal bar on playground, trial court's instruction that school district had duty to furnish reasonably safe facilities as well as instruction and supervision, and type of facilities, instruction and supervision were to be measured in quality by what an ordinary school of same type would have furnished under same or similar circumstances, was not prejudicially erroneous, even if instruction was defective standing alone, in view of correct instruction given on same subject and instruction that jurors were to view instructions as a whole and each instruction in light of all other instructions.

17. Schools and School Districts $\S$ 122

In action by parents against school district for wrongful death of first grade child who fell from horizontal bar on playground, evidence that mother of child who was subject to seizures had asked teacher not to tell others of child's physical condition, since he knew how to take care of himself, required submission of question of parents' contributory negligence to jury.

18. Appeal and Error $\S$ 882(14)

On appeal by parents from adverse judgment in action against school district for wrongful death of child, parents who submitted to trial court certain instructions which were given on question of child's contributory negligence could not raise issue for first time on appeal that question of child's contributory negligence should not have been submitted to jury because it was not pleaded by school district.

19. Death $\S$ 58(1)

In action by parents against school district for wrongful death of first grade child who fell from horizontal bar on playground, presumption that child was exercising ordinary care at time of and immediately preceding the accident did not require conclusion that child exercised due care in getting on the bar in view of evidence that child, who was subject to

seizures, knew that he should not get on the bar, and that child's death was caused from injuries sustained in fall from the bar.

20. Evidence $\S$ 318(1)

In action by parents against school district for wrongful death of first grade child who fell from horizontal bar on playground, trial court properly excluded as hearsay parts of deposition of expert witness where such excluded parts were conclusions relating to surfaces of playground contained in report of committee of which expert witness had been a member.

Edwin H. Williams, San Jose, for appellants.

Weinstock, Anderson, Maloney & Chase, San Francisco, for respondent.

McMURRAY, Justice pro tem.

Bobby Rodrigues, a six year old, first grade pupil in the Horace Mann Elementary School, which is in defendant's district, was found lying unconscious on the blacktopped playground under a horizontal bar which was a piece of playground apparatus in the first grade play area of the school; this was during the noon recess and Bobby was bleeding from a head injury. He was taken to the emergency hospital and died some three and a half hours later as a result of his skull injury.

Mr. and Mrs. Rodrigues, the parents of the deceased boy, sued seeking damages for his wrongful death and this appeal is from a judgment in favor of defendant entered upon a jury verdict.

[1] Appellants first assert that respondent's negligence is established as a matter of law by uncontroverted evidence. There is evidence that Bobby suffered from a type of cerebral palsy and from congenital heart disease, and that he would occasionally have seizures which would affect his vision and cause tremor of the hands which conditions were noticed by his first grade teacher. This teacher had discussed these seizures with Bobby's mother who stated that he could take care of himself and

asked the teacher not to tell others of the boy's condition. The teacher had also talked with Bobby who stated that he should not climb on things.

If this testimony were believed by the jury and it felt that the teacher acted as a reasonable person under these circumstances in not communicating Bobby's physical deficiency to others charged with his supervision, appellants' assertion that by reason of Bobby's condition respondent was negligent as a matter of law in not providing him closer supervision fails.

[2-4] Although Education Code, section 13229, provides in part, "Every teacher in the public schools shall hold pupils to a strict account for their conduct * * * on the playgrounds, or during recess," this does not make school districts insurers of the safety of pupils at play or elsewhere (*Goodman v. Pasadena City H. S. Dist.*, 4 Cal.App.2d 65, 68, 40 P.2d 854). A district's liability is predicated upon Section 1007 of the Education Code which provides that a district is liable for damages for injuries arising because of the negligence of the district, its officers or employees and whether or not a district is negligent in affording supervision of pupils on the playground is a question of fact (*Tymkowicz v. San Jose, etc., School Dist.*, 151 Cal.App.2d 517, 521, 312 P.2d 388) unless there is no evidence which is compatible with the exercise of due care under all of the facts in the case. The failure of Bobby's first grade teacher to inform others of his condition was a proper subject of consideration by the jury to determine whether or not this was negligent; furthermore, the type of supervision furnished to the first grade play area—one teacher overseeing 75 to 100 children in a space approximately 75 feet by 110 feet—also presented a matter for the jury's consideration. The statement of these conditions does not foreclose the possibility that such action and supervision might not be proper under the facts.

Appellants cite many cases to support their assertion that respondent was charge-

able with negligence as a matter of law, but none are sufficiently similar in their facts as to be controlling here.

[5-7] The language cited by appellants in *Forgnone v. Salvador U. E. School Dist.*, 41 Cal.App.2d 423, 426, 106 P.2d 932, 934:

"We assume that the purpose of the law requiring supervision of pupils on the playgrounds and on the school property during school hours is to regulate their conduct so as to prevent disorderly and dangerous practices which are likely to result in physical injury to immature scholars under their custody. It is true that the mere lack of supervision, or inadequate supervision may not necessarily create liability on the part of a school district to compensate for injuries sustained by a pupil. If it appears that a supervisor could not have reasonably anticipated or prevented the conduct of fellow students which resulted in injuries, it might not be material whether they were present at the time of the act complained of, or not," is a fair statement of the law. But appellants' argument that because of Bobby's defect the school was bound to anticipate that he would use apparatus which he himself had acknowledged he should not use the very morning of the accident and by extremely rigid supervision keep him off such apparatus would impose a greater burden of care upon the school than we deem was necessary under the facts before us.

[8] Respondent urges that appellants failed to show that Bobby's death was a direct and proximate result of the negligence of respondent, arguing that it is only assumption that Bobby was on the bar, had a seizure and fell. In view of the record wherein both parties put into evidence reports that Bobby fell because he had a seizure while on the bar this argument of respondent is untenable.

[9] The questions as to the adequacy of the supervision afforded by respondent and as to whether such supervision or lack thereof was the proximate cause of

Bobby's death were factual matters to be determined by the jury.

[10] In line with the above aspect of the case, but presented as a separate argument, appellants complain that it was error for the court to refuse to give a certain instruction submitted by them which read:

"If you find that it was dangerous for Bobby Rodrigues to use the monkey bar, because of his physical handicap, and that his teacher at the Horace Mann School knew that it was dangerous for him to do so, then it was the duty of the Defendant School District to use reasonable efforts to prevent Bobby Rodrigues from using the bar. Failure to perform this duty constituted negligence on the part of the School District."

Appellants state that if the jury had received and followed this instruction a finding of negligence on the part of the defendant would have been certain to follow.

The jury was well and fully instructed on the principles of law involved in the case and the failure to give this particular instruction was in no wise prejudicial to appellants. Even under the proposed instruction the jury might well have found that the proximate cause of the accident was not any act or dereliction attributable to the district.

[11-15] During the trial expert testimony of two witnesses was admitted as to the number of pupils one person could properly supervise. Appellants contend that since much of this testimony was relative to supervision in other schools and was without proper foundation it was prejudicial to allow such testimony.

From the record it appears that both experts were qualified by years of experience and study to testify generally as to supervision of playgrounds. Neither witness stated dogmatically the number of pupils one person could properly supervise and neither testified in such manner as to eliminate from consideration special problems which might be involved in any particular instance. Their testimony was

general in nature and restricted in great part to usual school conditions. The case of *Charonnat v. San Francisco Unified School Dist.*, 56 Cal.App.2d 840, 133 P.2d 643, is relied upon by appellants to show that one witness' testimony was in error. That case reveals unusual facts and differs completely from the one here considered. Appellants' arguments as to the expert testimony are directed against its weight and credibility. These were matters for the jury to consider. Appellants at the time of trial cross-examined these witnesses, and appellants' present contention that the customs testified to by the experts were below the standard required by law and hence inadmissible arise from the same view of the evidence as that presented in their first argument. Granting that if evidence of custom does not measure up to the standard required by law it is inadmissible, nevertheless, there is nothing in the expert testimony here which shows a custom that was of a lower standard than that required by law. There is no absolute rule as to the number of pupils one supervisor may adequately oversee, nor is there any fixed standard of supervision; the question as to compliance with the law is one for the determination of a jury under the facts of the particular case.

Here the jurors were free to determine the weight to be given the expert testimony and were free to disregard it if they found it to be unreasonable and they were so instructed.

[16] Appellants' next contention is that the court erred in giving the following instruction:

"It was the duty of the Defendant to furnish reasonably safe facilities as well as instruction and supervision and the type of facilities made available as well as the instruction and supervision furnished is measured in quality by what an ordinary school of this type would have furnished under the same or similar circumstances."

It is argued that it does not appear what an ordinary school would have furnished

under the same or similar circumstances without resort to the expert testimony heretofore mentioned and, further, that the instruction is not in accordance with the law under *Reagh v. San Francisco Unified School District*, 119 Cal.App.2d 65, 259 P.2d 43.

Standing alone it might well be that the instruction is defective, but when viewed, as it must be, in conjunction with all the other instructions given the instruction was not prejudicially erroneous, particularly in view of correct instructions given on the same subject and the instruction that the jurors were to view the instructions as a whole and each in the light of all the others.

[17] Appellants next complain that it was error to submit the question of the contributory negligence of the parents to the jury, contending that there was no evidence to justify instructions on that subject. Appellants herein fail to consider the testimony of Bobby's first grade teacher to the effect that Bobby's mother told her that she need not tell others of his condition since he knew how to take care of himself. That testimony alone would require the jury to consider the contributory negligence of the parents in the light of all other facts in the case. We hold that under the pleadings and the facts here the question of the contributory negligence of the parents was properly submitted to the jury.

[18] Insofar as the question of the contributory negligence of Bobby himself is concerned appellants argue vigorously that such question should not have been submitted to the jury since it was not pleaded although assumption of risk was pleaded.

Here, however, appellants submitted to the court and the court gave certain proper instructions upon the subject. It is too late to raise that matter in this court. 35 Cal.Jur.2d, p. 776, § 239.

[19] The jury was properly instructed that:

"The law presumes that Robert Rodrigues, now deceased, in his conduct at the

time of and immediately preceding the accident here in question, was exercising ordinary care.

"This presumption is a form of prima facie evidence and, in the absence of evidence to the contrary, which is sufficient to outweigh the force of this presumption, you should find that Bobby Rodrigues was not guilty of contributory negligence," and

"The burden of proof is on the Defendant to prove the defenses of contributory negligence and assumption of risk by the preponderance of the evidence.

"The presumption of law that Bobby Rodrigues was exercising due care at the time of the injury, is a species of evidence and unless the force of these presumptions is overcome by evidence of more convincing force you should find that Bobby Rodrigues was not guilty of contributory negligence and did not assume any risk."

By appellants' own evidence it is shown that Bobby knew he should not get on the bar and further by the death certificate introduced by appellants that he was injured by falling from a bar. Their argument that the presumption of due care requires that the conclusion that he exercised due care in getting on the bar does not impress us. There was certainly sufficient evidence before the jury to justify a finding based on reasonable inference that Bobby was negligent in getting on the bar or assumed any risk attendant on doing so.

[20] The last point raised by appellants is that the court erred in excluding certain evidence contained in a deposition of appellants' expert witness. The matters excluded were the conclusions relating to surfaces under playground apparatus in a report of a committee of thirty persons of which the witness had been a member, and the court in making its ruling striking certain portions of the deposition based upon this report expressly allowed the experts' own opinions and conclusions to remain for the jury's consideration. The ruling of the court in this matter was proper. The witness could have testified to

the same ultimate effect as the conclusions contained in the report of the committee, but to attempt to have an expert give his opinion by adopting a group conclusion as his expert opinion would extend the scope of opinion evidence unduly. The report was hearsay, the court's ruling on its admissibility was correct and, in not allowing appellants' counsel to read certain portions of the experts' deposition to the jury in argument, the court was properly exercising its discretion in the conduct of the trial. Where parts of a deposition are admitted in evidence and other parts excluded the court was well advised to exercise its discretion as it did.

Appellants have vigorously and ably presented their position, but have not shown prejudicial error in the trial. The judgment appealed from is affirmed.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.



Nick VANGEL and Ernest Vangel,
Plaintiffs and Respondents,

v.

Charles VANGEL, Defendant and Appellant.*
Civ. 22734.

District Court of Appeal, Second District,
Division 1, California.

Feb. 27, 1958.

Rehearing Granted March 27, 1958.

In proceeding for an accounting in connection with the dissolution of a partnership. From a judgment of the Superior Court, Los Angeles County, Clarence M. Hanson, J., finding the amount due one of the partners, that partner appealed. The District Court of Appeal, Drapeau, J. pro tem., held that it was bound by decisions on prior appeals on issue of propriety of forfeiture of partner's interest, that part-

ner was not entitled to interest on his claim but that enhancement in value of partnership property subsequent to date of dissolution should have been considered in fixing amount of his interest.

Judgment reversed.

1. Appeal and Error ⇨1097(1), 1195(1)

Where precise question has been decided in former appeal under substantially same set of facts, parties are estopped from again litigating question in subsequent proceeding either before trial or appellate courts.

2. Appeal and Error ⇨1097(1)

Court of appeal was bound by decisions on former appeals that partner's conduct merited penalty of forfeiture of his interest in partnership, and argument that such result was manifestly unjust was to be addressed to Supreme Court. West's Ann.Corp.Code, § 15038(2) (b).

3. Partnership ⇨75

On an accounting in connection with dissolution of partnership, trial judge properly refused to allow interest in computing amount due one of partners for his interest where case was not tried upon that theory and partner's claim was unliquidated. West's Ann.Corp.Code § 15042.

4. Partnership ⇨306

In determining amount due partner on dissolution of partnership, the court in fixing partner's share of profits since dissolution should consider enhancement in value of partnership property subsequent to dissolution. West's Ann.Corp.Code, § 15042.

Pacht, Ross, Warne & Bernhard, Isaac Pacht, Harvey M. Grossman, Los Angeles, for appellant.

Harold M. Heimbaugh, Los Angeles, Geo. W. Rochester, La Habra, for respondents.

DRAPEAU, Justice pro tem.

In 1944 three brothers purchased the Cascade Ranch in the mission district in the San Fernando Valley. There are

* Opinion vacated 327 P.2d 136.

about 360 acres in the ranch, 160 devoted to citrus orchards, and the rest rolling farming lands—all in the path of converging freeways and within the stupendous growth of population of the Los Angeles metropolitan area.

The three brothers agreed that title to the ranch was to be vested in their individual names; that each would own a one-third interest in it; and that they would hold and farm it as partners.

But the partnership resulted in unfortunate wrangles among the brethren, and in these protracted legal proceedings. For this case has been tried in the Superior Court four times. Two of the brothers are plaintiffs, and the other brother, Charles Vangel, is defendant.

The first trial was in 1947; but the trial judge granted a motion for a new trial.

In the second trial judgment of the Superior Court was affirmed in 1953 by the District Court of Appeal (*Vangel v. Vangel*, 116 Cal.App.2d 615, 254 P.2d 919) as to all of the issues among the partners, except that the case was sent back to the Superior Court for a new accounting only.

Among these issues affirmed was that Charles wrongfully caused dissolution of the partnership, because he prevented his brothers from participating in the management and operation of the ranch. Upon this finding the Superior Court adjudged dissolution of the partnership, and inflicted upon Charles the harsh and drastic penalty of forfeiture of his interest in the partnership. This included his one-third interest in the ranch. See section 15038 (2) (b) of the Corporations Code.

By this judgment Charles' brothers were given the right to purchase Charles' interest in the partnership, as provided in the code section referred to. The court fixed the value of this interest at \$58,600.-25.

No one petitioned the District Court of Appeal for a rehearing of this decision.

It is to be noted, however, that the District Court of Appeal also determined that Charles' right to share in the prof-

its of the partnership could not be terminated prior to winding it up (116 Cal.App.2d at page 628, 254 P.2d at page 928). And that section 15042 of the Corporations Code provides that the retiring partner as against the partners continuing the business "shall receive * * * an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option * * * in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership." In this connection the District Court of Appeal comments: "From the position defendant has taken on this appeal it is fair to say that he has elected to take profits rather than interest on the value of his share in the partnership." 116 Cal.App.2d at page 629, 254 P.2d at page 928.

The third trial resulted in a judgment finding the amount due Charles, as directed by the District Court of Appeal. This judgment was affirmed by the District Court of Appeal; but the Supreme Court took over the case. *Vangel v. Vangel*, 45 Cal.2d 804, 291 P.2d 25, 55 A.L.R.2d 1385.

Reference is made to the opinions in these two cases—in the Supreme Court and in the District Court of Appeal—for more complete statements of the facts in this litigation.

The Supreme Court held that Charles was entitled to compensation for his services as manager of the property after the partnership was dissolved, and also to his share of the profits until its final winding up. The Supreme Court directed a new trial as to these issues only. In the opinion it is stated (45 Cal.2d at page 810, 291 P.2d at page 29), "In all other respects the judgment is affirmed."

The fourth trial was had in the Superior Court in 1956, and Charles appeals from the judgment in that trial finding the amount due him from the partnership.

Charles contends on appeal:

(1) That it was error to terminate his "right to participate in profits or receive

interest on the balance due him as of May 12, 1953."

(2) "The trial court erred in allocating to Charles only 23.96 per cent of the partnership assets and the post-dissolution profits."

(3) "The procedures set up in Section 15038(2) (b) of the Corporations Code were improperly invoked in the instant case."

As we read the decisions of the District Court of Appeal and of the Supreme Court, there is only one issue that may now be considered in this case. That is whether or not the evidence on the fourth trial in the Superior Court supports the findings and judgment fixing the amount due Charles.

All of the other matters argued in the briefs were at the time of the fourth trial the law of the case.

[1] Our Supreme Court states the rule in *Penziner v. West American Finance Co.*, 10 Cal.2d 160, at page 169, 74 P.2d 252, at page 256, as follows:

"It is clearly established by the decisions in this state that when the precise question before the court has been decided in a former appeal in the same action and under substantially the same state of facts, the parties are estopped from again litigating this question in any subsequent proceeding either before the trial or appellate courts."

[2] Charles' argument that he has been unjustly deprived of his property by the infliction upon him of the forfeiture provisions of the Corporations Code has, in our opinion, great merit. But we are of the opinion that we are bound by the decisions of the District Court of Appeal and of the Supreme Court in this case; and that argument that the final result here is a manifestly unjust decision (*England v. Hospital of Good Samaritan*, 14 Cal.2d 791, 97 P.2d 813) must be addressed to our Supreme Court.

On the fourth trial the judge found that an accountants' report in evidence correctly sets forth the interests of the three brothers in and to their partnership assets. He also

found \$58,915.68 due Charles, plus compensation for his services "allocable from the business," \$8,200; with a total of \$67,115.68.

[3] The trial judge properly refused to allow interest in computing the amount due Charles, for two good reasons: First, the case was not tried upon that theory, and, secondly, his claim against the partnership was unliquidated. In such circumstances interest is not allowed. *Lineman v. Schmid*, 32 Cal.2d 204, 209, 195 P.2d 408; *Cox v. McLaughlin*, 76 Cal. 60, 67, 18 P. 100.

But as we read the record here, we still do not have a judgment for Charles for his share of the profits since dissolution of the partnership. This measure is clearly set forth by the Supreme Court in *Vangel v. Vangel*, supra, 45 Cal.2d at page 810, 291 P.2d at page 29: "The amount of profits attributable to the use of Charles' share of the assets and also those allocable to his services in the continuing business should have been considered in the apportionment."

The accountants' determination of the shares of the partners in and to the assets of the partnership, received in evidence, was no more than the yardstick to use in apportioning the profits. As the Supreme Court points out, this is a case in which the principles of equity apply. In "balancing the equities," as the Supreme Court used the phrase, Charles is entitled to his share of the profits of the ranch for each year of its operation since the partnership was dissolved.

[4] Charles is entitled to more than that. He is entitled to have the Superior Court determine how much, if any, the ranch has enhanced in value from the date of dissolution of the partnership until the next trial of the case, and to have his portion of that sum also apportioned to him.

It was error for the trial judge to sustain plaintiffs' objection to Charles' offer of proof in this respect.

Finally, the trial judge awarded Charles \$200 a month for his services, rather than

\$750, which he claimed. It is true that one of Charles' brothers testified that in his opinion such services as he rendered could have been had for \$100 a month. Another witness (for Charles) testified to the effect that Charles' services were reasonably worth \$750 a month.

In view of the fact that the issues directed to be determined by the Supreme Court will have to be re-tried, we think both should be remanded for rehearing.

The judgment is reversed.

WHITE, P. J., and FOURT, J., concur.



158 Cal.App.2d 107

WESTWOOD BUILDING MATERIALS CO., a California Corporation,
Plaintiff and Appellant,

v.

Edward L. VALDEZ and Irving M. Litz,
Defendants,

Irving M. Litz, Respondent.

Civ. 22471.

District Court of Appeal, Second District,
Division 3, California.

Feb. 28, 1958.

Materialman's action to enforce lien. The Superior Court of Los Angeles County, Otto J. Emme, J., rendered judgment in favor of defendant, and plaintiff appealed. The District Court of Appeal, Patrosso, J. pro tem., held that materialman had been at least under duty of inquiring of owner as to his intention with respect to application of funds represented by checks made payable jointly to subcontractor and materialman, and held that having failed to do so, materialman could not be heard to say, that owner should bear loss which materialman had sustained as result of its own imprudence in failing to have proceeds of checks applied in payment for materials furnished by it and used for construction of building upon property of owner, notwithstanding

fact that joint checks bore no indorsement, or notation thereon, to effect the proceeds thereof, insofar as necessary, were to be applied by materialman in payment of materials furnished.

Affirmed.

Mechanics' Liens ⇐240

Materialman was at least under duty of inquiring of owner as to his intention with respect to application of funds represented by checks made payable jointly to subcontractor and materialman, and, having failed to do so, materialman could not be heard to say, in its action to enforce lien, that owner should bear loss which materialman had sustained as result of its own imprudence in failing to have proceeds of checks applied in payment for materials furnished by it and used for construction of building upon property of owner, notwithstanding fact that joint checks bore no indorsement, or notation thereon, to effect the proceeds thereof, insofar as necessary, were to be applied by materialman in payment of materials furnished.

George W. Burch, Jr., Los Angeles, for appellant.

Alfred R. Meyers, Beverly Hills, for respondent.

PATROSSO, Justice pro tem.

This is an appeal by plaintiff from a judgment in favor of the defendant Litz in an action to foreclose a mechanic's lien.

There is no dispute with respect to the facts. Defendant Litz, respondent here, as owner entered into a contract with Pelton and Zahler, whereby the latter agreed to construct 21 houses upon a tract owned by respondent. The general contractors in turn entered into a subcontract with defendant Valdez under which the latter agreed to furnish the labor and material necessary to perform all of the plastering and stucco work required under the general contract. Plaintiff, pursuant to an oral contract with Valdez under which the latter agreed to pay for the same by the 10th of the following month, furnished materials

required by the subcontractor in the performance of his contract of the reasonable value of \$10,637.55. Claiming a balance due thereon of \$5,268.49, plaintiff filed a claim of mechanic's lien therefor and instituted this action to enforce the same.

During the course of the performance of the work, respondent paid to Valdez the total sum of \$21,500 in full payment of all sums due under his subcontract. Such payment was made by the medium of eight checks of the respondent, the first four being made payable to Valdez alone and the last four being made payable jointly to Valdez and the appellant. The last four checks were in the sums of \$2,500, \$2,800, \$2,000 and \$5,580, respectively, and were delivered to Valdez who in turn delivered them to the appellant. The first three of these checks were endorsed by the appellant and by it returned to Valdez who endorsed and obtained payment thereon, no portion thereof being received by the appellant. The check for \$5,580 was endorsed by Valdez and delivered to appellant which received payment thereof and in turn issued its check to Valdez for \$580, the balance of \$5,000 being credited by appellant to Valdez' account. These joint checks bore no endorsement or notation thereon to the effect that the proceeds thereof, insofar as necessary, were to be applied by appellant in payment of Valdez' indebtedness to it, and aside from the fact that the checks were payable jointly to Valdez and appellant, respondent did not communicate to appellant his intention with respect to the application of the proceeds thereof.

The trial court found that respondent paid to appellant a sum in excess of \$10,637.55, the total value of materials furnished by appellant; denied appellant a lien, and ordered judgment in favor of appellant against Valdez in the sum of \$5,268.49. The sole question presented is whether the issuance of the four checks in question made payable jointly to Valdez and appellant operated to discharge respondent's liability to appellant or to bar appellant's right to claim a lien upon respondent's property.

Appellant concedes that if respondent had made plain his intention that the proceeds of the checks were to be first applied to the satisfaction of Valdez' obligation for the materials furnished by appellant and used upon respondent's property, the appellant would have been under the duty to so apply such proceeds. Appellant insists, however, that in the absence of an express direction or notation to this effect upon the face of the checks or by a covering letter so stating, appellant was at liberty to apply the proceeds of the checks in such manner as it and its copayee might agree. We do not agree. However, we see no necessity for extended discussion as all of the appellant's arguments are effectively answered in the two California cases now to be noted.

In *Edwards v. Curry*, 1957, 152 Cal.App. 2d 726, 313 P.2d 613 (hearing denied) plaintiff Edwards was a roofing subcontractor on a school job for the defendant Curry, the general contractor. Cross-defendant Schirm Company was the material dealer supplying Edwards. At the request of Schirm defendant made all payments due Edwards under his subcontract, payable to Schirm and Edwards jointly. These checks as issued from time to time were endorsed by the payees and deposited in Schirm's bank account and a portion of one check was credited to an account of Edwards for material furnished on another job. Also pursuant to an agreement between the payees and unknown to Curry, a portion of the proceeds of these checks was by Schirm returned to Edwards for the payment of labor employed by him and for his living expenses. The joint checks would have fully paid the bill for materials furnished on the school job if Schirm had not returned a portion of the proceeds thereof to Edwards for other purposes. After the completion of the job Schirm filed a stop notice with the school district alleging that \$5,109.95 of its account with Edwards had not been paid and by reason thereof the district retained this amount under its contract with Curry. In the litigation which ensued, Curry filed a cross-complaint in declaratory relief, asking, among other

things, that it be adjudged that he was not indebted to Schirm and that Schirm was not entitled to the amount withheld by the school district. The trial court held that as between Curry and Schirm the latter had been paid in full for material furnished to Curry on the school job and that Curry was entitled to a release of the stop notice, or upon Schirm's failure to release the notice that Curry have judgment against Schirm for the amount withheld by virtue of the notice. In affirming the judgment and answering contentions similar to those advanced by the appellant here, the court said, 152 Cal.App.2d 730, 313 P.2d at page 615:

"It is Schirm Company's contention that under section 1192.1 et seq. of the Code of Civil Procedure the general contractor, Curry, is liable to it for materials furnished Edwards which went into the school building; that Curry must have known that the checks made payable to Schirm and Edwards jointly were not intended to be solely applied to the payment of Schirm's bill; and that the laborers must be paid from these payments; that since Curry consented to this joint check arrangement he impliedly agreed to whatever application of the funds was made by Edwards and Schirm, and the fund due from the school district to Curry is liable for the unpaid material bill of Edwards and Schirm, citing *Modesto Lbr. Co. v. Wylde*, 217 Cal. 421, 19 P.2d 238; and *Hollywood Wholesale Elec. Co. v. John Baskin, Inc.*, 121 Cal.App.2d 415, 263 P.2d 665. In the *Modesto* case the check was made payable solely to the materialman. The court held that the contractor's orders to apply the funds to accounts other than the one intended was (sic) without authority. In the instant case Schirm Company claims a check made payable jointly to the subcontractor and the materialman would not operate as a payment of the account of the materialman.

"From the findings and judgment roll it would be reasonable for Curry and the court to believe that the materialman was interested in seeking security for the pay-

ment of its claim and if any balance remained it would remit it to the subcontractor; that when the subcontractor endorsed the checks and they were turned over to the materialman, and he placed the funds in the materialman's general account, so far as the general contractor was concerned, and in the absence of a showing of any other agreement, it was, to that extent, a payment of and should be applied to the account of materials furnished; and that in so far as the general contractor was concerned, it released him as a guarantor. If the materialman, through some private arrangement with the subcontractor, cared to return a part of that money to the subcontractor for his personal use, or place it as payment of an older account or return it for payment of labor, that was a matter resting solely within the discretion of the materialman."

In *Modesto Lumber Co. v. Wylde*, 1933, 217 Cal. 421, 19 P.2d 238 the plaintiff lumber company furnished materials to one Bates as contractor, which materials were used by him in erecting a residence upon property of the defendants. The *Modesto Building and Loan Association* furnished by way of a loan to the owners the funds necessary to erect the building and agreed with the owners to disburse the funds in such manner as to protect itself and them. The Association issued its check made payable directly to the plaintiff lumber company and entrusted its delivery to Bates with instructions that it be applied on account of the materials furnished for the construction of the building on the property of the defendants. Contrary to these instructions, Bates delivered the check with directions that it be applied on the payment of his personal account with the plaintiff and this was done. Bates failing to pay for the materials furnished, the plaintiff filed its mechanic's lien and brought suit to enforce the same. In holding that it was under a duty to apply the amount of this check upon account of its claim for material used in the construction of the building, the Supreme Court said (217 Cal. at page 425, 19 P.2d at page 239):

"The majority rule seems to be that, where the materialman is furnishing at the same time materials to a contractor for the construction of buildings upon the property of different owners, the materialman may, in the absence of notice of the source of the funds, accept the same from the contractor and apply them upon any agreed account or as specified by law, even if in such case it develops that the contractor has violated his trust while using the funds of A to pay for materials used on the property of B. See note, Ann.Cas.1917C, page 588; note, L.R.A.1916D, page 1259. But it seems equally clear that, where the materialman does have knowledge of the source and ownership of the funds delivered to him by the contractor, he may not apply them on the account of any other than the true owner, even though the contractor may have consented to their application elsewhere. See authorities just cited and also *Hanson v. Cordano*, 96 Cal. 441, 31 P. 457. The concurring opinion of Mr. Justice McKee in the case of *Goss v. Strelitz*, 54 Cal. 640, 644, asserts a doctrine as against the materialman even stronger than the above rule.

"[3] But in the case before us we have a situation somewhat different from either the general rule or the exception thereto above noted. Here the materialman had notice that the loan association was financing more than one building, and it knew, of course, that the contractor Bates was also constructing more than one structure being so financed. With this knowledge, and with a check payable directly to it and not to the contractor, how could the materialman escape the duty of inquiring of the loan association as to the application of the funds? The check not being made to the contractor was notice to the materialman that the contractor was without authority to determine finally the application of the funds. The agency conferred upon the contractor by intrusting the check to him was merely that of a messenger."

And continuing in 217 Cal. at page 427, 19 P.2d at page 240:

"We likewise find a situation quite similar in principle to the case before us in *Petersen v. Shain et al.*, 4 Cal.Unrep.Cas. 122, 125, 33 P. 1086. There Shain, a contractor, sublet to Petersen & Co., as subcontractors, a portion of the construction work of a building. Mooser, a materialman, furnished materials to Petersen & Co., used on this building, and at the same time had other accounts with Petersen & Co. for similar work at other places. Shain, as part of his settlement with Petersen & Co., for the work done, made two checks payable to that company but delivered them, not indorsed, to Mooser, who in turn procured their indorsement by Petersen & Co., and cashed them, applying the proceeds to other accounts than those in which Shain was interested. It was held that Mooser could not do this to the prejudice of Shain, and that in law said proceeds were to be credited to the Petersen job in which Shain was interested.

"In the case of *Bowles Co. v. Clark*, 59 Wash. 336, 109 P. 812, 31 L.R.A.,N.S., 613, we have almost an exact parallel to the case before us. There the proceeds of a check drawn by the owner in favor of the supply house for the estimated cost of plumbing supplies was by the payee applied as follows: A part to cover the cost of supplies already furnished, a part to balance an older account against the contractor and the remainder of the money was paid to the contractor himself. The supply house later furnished additional materials and filed a lien. It claimed to have received the check in due course. The fact that the check was drawn by a stranger to the supply house was held to be enough to show a property in the check in the drawer. The court there said: 'But we think it too much to say that these circumstances were of such a nature as to warrant the belief that the property in the check was the property of Fraser (the contractor). The check itself contained a distinct warning to the contrary. It was made payable to the respondent (the supply house), a stranger to the drawer, and not to Fraser, and it is not reasonable to suppose that Fraser would

have accepted payment of an obligation due himself in a form which he could not use without the consent and co-operation of a third person.' The above ruling was expressly approved in *Hughes & Co. v. Flint*, 61 Wash. 460, 112 P. 633, 634."

Here, as in the cases cited, if appellant had applied the proceeds of the checks in payment of the materials furnished by it and used in the construction of the buildings upon the property of the respondent, its bill would have been paid in full. If it may reasonably be said, as appellant's argument assumes, that a material dealer, such as the appellant, could be so naive as to fail to understand the purpose and intention of an owner in making checks payable jointly to it and his subcontractor, its customer, appellant was at least under the duty of inquiring of respondent as to his intention with respect to the application of the funds represented by the checks. This appellant admittedly failed to do, and it may not now be heard to say that respondent should bear the loss which it sustained as a result of its own imprudence.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



158 Cal.App.2d 140

The PEOPLE of the State of California,
Respondent,

v.

Robert Carmen PARRELLA, Appellant.
Cr. No. 3384.

District Court of Appeal, First District,
Division 1, California.

March 3, 1958.

Defendant was convicted in the Superior Court of Santa Clara County, William F. James, J., of forceful rape and burglary while armed with deadly weapon, and he appealed. The District Court of

Appeal, Peters, P. J., held that where defendant improperly volunteered testimony that he had offered to take a lie detector test, prosecutor's cross-examination of defendant on such offer and attempt to introduce result of test in evidence, constituted error but such error was invited and was not prejudicial where trial court carefully warned jury to ignore lie detector, and repeated warning when prosecutor mentioned the matter in closing argument, and evidence of guilt was strong.

Affirmed.

1. Burglary $\S$ 41(1)

Rape $\S$ 51(4)

Evidence sustained conviction of forceful rape and burglary while armed with deadly weapon.

2. Criminal Law $\S$ 388

Evidence about results of lie detector test is inadmissible.

3. Criminal Law $\S$ 351(1), 1169(5)

An accused's willingness or unwillingness to take a lie detector test is inadmissible, and error in admission of such evidence is not cured by warning instruction.

4. Criminal Law $\S$ 1170½(6)

Witnesses $\S$ 277(5)

Where defendant improperly volunteered testimony that he had offered to take a lie detector test, prosecutor's cross-examination of defendant on such offer and attempt to introduce result of test in evidence, constituted error but such error was invited and was not prejudicial where trial court carefully warned jury to ignore lie detector, and repeated warning when prosecutor mentioned the matter in closing argument, and evidence of guilt was strong.

5. Witnesses $\S$ 270(1)

Legitimate cross-examination does not extend to matters improperly admitted on direct examination.

6. Witnesses $\S$ 270(1)

Immaterial and irrelevant testimony cannot be brought before jury under guise of legitimate cross-examination.

7. Criminal Law Ⓒ683(4)

In prosecution for rape and burglary, testimony of another woman into whose home defendant had made a similar but unsuccessful attempt to gain admittance on the same morning was admissible to rebut defendant's alibi evidence that he was at home on the morning in question, though probably inadmissible to show plan or design.

8. Criminal Law Ⓒ1037(1)

In absence of objection at trial, defendant could not object for first time on appeal to improper argument of prosecutor, in absence of unusual circumstances.

9. Criminal Law Ⓒ1038(3)

Where defendant made no request for a limiting instruction, court was not required to give it of its own motion and objection could not be raised for first time on appeal.

10. Criminal Law Ⓒ714

Where defendant flew into a rage and yelled at adverse witness in open court, in such manner as to attempt, by threats, to suppress her evidence, prosecuting attorney was properly permitted to read about such outburst from transcript during closing argument.

11. Criminal Law Ⓒ489

Where expert had identified partial palm print, general question on cross-examination, on whether experts may disagree on interpretation of same prints was improper as not relating to the specific print involved nor to expert's qualifications.

12. Criminal Law Ⓒ1037(1)

Failure to object to statement in prosecutor's argument at time it was made, precluded objection on appeal.

13. Criminal Law Ⓒ720(8)

In prosecution for rape and burglary, comment in prosecutor's argument, which explained defendant's failure to plead guilty by possibility that defendant's family might still stand by him even if he were found guilty, was a reasonable inference from evidence and within realm of fair comment.

Elliot Wax, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was charged and convicted of forceful rape and of burglary while armed with a deadly weapon. Judgment was entered accordingly, and from that judgment and from the order denying the motion for a new trial the defendant appeals.

The offenses occurred on November 28, 1956. On that day the prosecuting witness, who lived in Mountain View with her husband and two children then aged two years and two months respectively, saw her husband off to Stanford University where he was a graduate student and laboratory assistant, and then went about her normal household tasks. At about 11:30 a. m. she went outside to call her two-year old son to lunch. There she was accosted by a man she had never seen before who asked her about a non-existent address, and then asked her if she knew a "Domonico" or "Dominquez" family in the neighborhood. When the prosecuting witness replied that she did not, the stranger asked if he could look at a telephone book. She agreed to get it, went into the house, got the book and gave it to the stranger, and went back in the house with her son, leaving the stranger outside. Several minutes later the doorbell rang, and she opened the back door to get the telephone book. The stranger grabbed the door and forced his way into the house. He had an open pen knife in his right hand which he held at the level of the prosecuting witness' face. He threatened: "Don't make any noise or I'll kill your little boy." The stranger then forced the prosecuting witness into the bathroom and closed the door. The two-year old son was in the room. He then ordered the prosecuting witness to disrobe, holding the knife in a threatening position. She did so. He ripped some of her clothing, bound her hands behind

her back, gagged and blindfolded her, and then ordered her to lie on the floor. She did so, and he then raped her. He then took her son into the kitchen, but returned in a few moments, and raped the prosecuting witness again. While performing this act the stranger placed his knife at her throat. He then inquired where she kept her money. She told him. He left the bathroom, walked around the house for a while and then left.

The prosecuting witness was able to free herself. She telephoned her husband and called the police. When the police arrived the witness still had the cloth on her wrists and around her neck that had been used to gag and bind her. She gave the police an excellent description of her assailant and of his clothing. She then went to her family doctor who testified that there had been sexual penetration within several hours of the examination. The husband of the prosecuting witness testified that he had not had intercourse with his wife on the day of the attack or on either of the preceding two days.

As already pointed out, the prosecuting witness gave a complete description of her assailant to the police, and also described in detail the clothing he was wearing. The description fits that of defendant.

On Sunday, December 16, 1956, the prosecuting witness went to church in Mountain View. As she was leaving the church she saw her assailant outside, apparently waiting to attend the next Mass. She went to the priest's house and had him call the police. When the police arrived she accompanied an officer and the priest to the choir loft where she could observe the entire congregation. She immediately identified and pointed out appellant as her assailant, and then collapsed. The appellant was arrested outside the church. The prosecuting witness positively identified appellant in a police line-up and unequivocally identified him as her assailant at the time of trial.

In addition to the fact that the description given to the police after the attack

fitted appellant, there were other corroborating details. At appellant's home were found pants, a jacket and a pocket knife similar to the clothes worn and knife used by the assailant. Of even more significance, on the bathroom floor where the attack occurred was found a partial palm print from a man's left hand. An expert from the State Bureau of Criminal Investigation testified that unquestionably this print was that of appellant.

Appellant's defense was an alibi. He, his wife, his mother-in-law and a neighbor testified that appellant was home with his family all of the morning of November 28, 1956. In rebuttal the prosecution called a Mrs. Trout who testified that between 10 and 11 a.m. on that morning the appellant appeared at her home in Mountain View. In response to his request, she gave him her telephone book and left her apartment to take some laundry downstairs. She unintentionally locked herself out of her apartment. Appellant then left. Mrs. Trout positively identified appellant as the man involved. She also testified that the clothing found in appellant's home was similar to the clothing worn by appellant that morning. On the evening of November 28, 1956, she had given a description of the man involved to the police, and that description fitted appellant. When Mrs. Trout identified appellant in open court as the man involved he flew into a rage and, among other things, yelled at the witness: "You better get out of here before I come over there and really do something. Mr. Schatz [prosecuting attorney]: May we take an adjournment? The Defendant: Better take her with you too. Don't you accuse me. I'm no animal. The Witness: I know you're the one. I wouldn't say it if you weren't. The Defendant: Didn't do nothing, nothing. I was home * * *. In jail because of two women."

[1] No direct attack is made on the sufficiency of the evidence. In view of the positive identification by the prosecution witness and the palm print such attack would necessarily be unsuccessful. The

evidence in support of the conviction is clear, substantial and convincing.

The first contention of appellant is that prejudicial error occurred in connection with certain evidence relating to a lie detector test given appellant. The first mention of this test came into the record during the direct examination of appellant by his own counsel under the following circumstances:

"Q. Did you remain in that cell all that day and night? A. Up until that night. I volunteered for a lie test, I wanted to take a lie test, wanted to clear it. That was the only time I was out of the cell that day.

"Q. Did you take that test? A. Right.

"Q. On that day? A. Right."

The prosecutor made no objection to this evidence, but on cross-examination the following occurred:

"Q. All right. And while you were at the police station, you told them that you weren't guilty of this heinous offense, isn't that correct? A. I did.

"Q. And that you wanted a lie detector test, isn't that right? A. That's right.

"Q. And they took you up to Berkeley to give you a lie detector test? A. I think it was Berkeley.

"Q. You know it was Berkeley? A. Yes.

"Q. That was the Berkeley Police Department there, wasn't it? A. Right.

"Q. Where they gave you the lie detector test? A. Right.

"Q. Do you know the results of the lie detector test? A. No.

"Mr. Racanelli: Counsel knows better. I don't care what the results are, for or against, it's not allowed in any Municipal Court of law. I ask he be cited for misconduct.

"Mr. Schatz: I will offer the report at this time marked for identification just so there will be no question about it.

"Mr. Racanelli: I'm not concerned about the report. I'm concerned about the question as to the results.

"Mr. Schatz: I asked no questions of any witnesses, police officers, about any lie detector test. On his own, this defendant brought it out on direct testimony. He said, 'I offered to take a lie detector test,' and I think the jury is entitled to know what the results of that was under these particular circumstances.

"Mr. Racanelli: That is the viciousness of that statement, 'entitled to know.' Counsel well knows the law in this state regarding the admissibility of so-called lie detector tests. I'm going to ask, Your Honor, that, as this is detrimental to my client's interests I'm going to ask Counsel be admonished and the jury be admonished in this regard.

"The Court: The witness on the stand testified on direct that he had offered to take a lie detector test.

"Mr. Schatz: He did.

"The Court: Then on cross-examination has he not a right to follow that up and ask if he did and what the results of it was or anything of that sort?

"Mr. Racanelli: I submit, Your Honor, as Your Honor knows, the law is clear in this state and I don't know what the lie detector is, for or against, to be quite frank, Your Honor, but it's inadmissible in any event and this may delude the jury into thinking it should be produced and there's some reason why it isn't, all to the detriment of the defendant.

"The Court: Of course, a lie detector test is not admissible in evidence.

"Mr. Schatz: That is true. I would never have brought it up if it wasn't offered in his direct testimony. The man said he wanted a lie detector test. Mr. Racanelli: He can ask any question about that, he cannot ask any question about what the results are.

"Mr. Schatz: I will withdraw the question.

"Mr. Racanelli: Once it's inserted, the damage is done. I ask the jury be asked to disregard the comments of Counsel.

"The Court: Ladies and gentlemen of the jury, the question of lie detector has

no place in the case. It has been determined that lie detectors are not admissible in evidence in a trial of a case. Now, the question that the District Attorney has been asking this witness up to date was proper because the witness on direct examination stated that he offered to take a lie detector test and the District Attorney then had a right to ask him whether he had taken it or not. But beyond that, we can't go. So just confine your consideration of the matter to those two questions.

"Mr. Schatz: If Your Honor please, without going into the results of that examination, may I ask the witness if he was given more than one lie detector test inasmuch as he's introduced the subject.

"Mr. Racanelli: No objection to that.

"The Court: Ask that question.

"Q. (By Mr. Schatz) Were you given more than one detector test? A. Yes.

"Q. Were you given several? A. Yes.

"Q. They all were given by the Berkeley Police Department? A. Right."

In the closing argument of the prosecutor the following occurred:

"Then comments were made by Counsel about the lie detector test. So there will be no misunderstanding between us, I want to talk about this for just a little bit. I think it's pretty clear by now that the results of a lie detector test aren't admissible in evidence. But now, consider this position that we were in, if you please. Think about this. Here's a witness who sits on the witness stand on direct examination. Remember, I never asked the Chief, I never asked the officer, anybody, about anything to do with the lie detector test. Give us some credit for knowing some of the law. We don't profess to be perfect but we know some of it. It was the defendant himself sitting there on the witness stand and I have forgotten just how it came about and he says, 'I voluntarily took a lie detector test.'

"Aha! There is something the prosecution didn't tell us about. And I can hear Mr. Racanelli now if I hadn't offered it in evidence and made sure that you ladies

and gentlemen knew that we had a record and had nothing to hide. Mr. Racanelli stood before you then—

"Mr. Racanelli: Your Honor, I'm sorry. I really dislike interrupting Counsel. It breaks the continuity. I dislike doing it. Comments like that is getting right back to the objectionable matter. He is arguing inferences from something inadmissible. I ask the jury be admonished.

"The Court: I think I explained to the jury during the trial and I will instruct you now, you are not to consider any question about lie detector. It is not admissible and whether it was good, bad or indifferent makes no difference and when you go into the jury room, I don't want anyone to mention or think of any lie detector test. Now, that settles that. There's no lie detector business in this case.

"Mr. Schatz: That is the point. So long as there is no speculation about it, that is all we are interested in.

"The Court: No speculation about it."

[2, 3] There can be no doubt that evidence about the results of the lie detector test was inadmissible. *People v. Carter*, 48 Cal.2d 737, 312 P.2d 665; *People v. Porter*, 136 Cal.App.2d 461, 288 P.2d 561; *People v. Porter*, 99 Cal.App.2d 506, 222 P.2d 151; *People v. Wochnick*, 98 Cal.App.2d 124, 219 P.2d 70; *People v. Aragon*, 154 Cal.App.2d 646, 316 P.2d 370. It is also the law that an accused's willingness or unwillingness to take such a test is not admissible. *People v. Carter*, 48 Cal.2d 737, 312 P.2d 665. Generally, the admission of such evidence is error and such error is not cured by a warning instruction. *People v. Wochnick*, 98 Cal.App.2d 124, 219 P.2d 70.

There would seem to be little doubt that appellant's statement that he had volunteered for and taken such a test was inadmissible. Had the prosecution objected the objection should have been sustained. But the prosecution did not object, but on cross-examination inquired into the subject more fully, and even offered to introduce the result of the test. After the court had

ruled, properly, that the results of the tests were not admissible, the prosecution agreed to withdraw the question.

[4-6] In so proceeding the prosecutor undoubtedly committed error. The law is clear that legitimate cross-examination does not extend to matters improperly admitted on direct. Immaterial and irrelevant testimony cannot be thus brought before the jury under the guise that it is legitimate cross-examination. *People v. Heckford*, 149 Cal.App.2d 250, 308 P.2d 497; *People v. McDaniel*, 59 Cal.App.2d 672, 140 P.2d 88. But admitting it was error, was the error prejudicial? The trial court carefully warned the jury when the evidence was improperly admitted that "the question of lie detector has no place in the case," and when the prosecutor mentioned it in his closing argument the court told the jury that it was "not to consider any question about lie detector. It is not admissible and whether it was good, bad or indifferent makes no difference and when you go into the jury room I don't want anyone to mention or think of any lie detector test. Now that settles that. There's no lie detector business in this case."

Under such circumstances the error was not prejudicial. It was not only invited error, but the trial court carefully, correctly and fully warned the jury about such evidence. Moreover, the evidence of guilt is strong. The prosecuting witness positively identified appellant. Mrs. Trout unequivocally refuted appellant's alibi. The state expert placed appellant in the bathroom with his testimony about the palm print. Under such circumstances there was no prejudice to the appellant in admitting the evidence or in the comments of the prosecutor.

Appellant next complains of the admission of the testimony of Mrs. Trout, claiming it was not admissible to show common scheme, design or plan, and that the jury should have been informed by a limiting instruction that the evidence was only admissible to refute the alibi of appellant. This error was compounded, so it is contended, when the prosecuting attorney in

his argument referred to Mrs. Trout's testimony in the following fashion: "She was the one who came in and testified that the defendant came to her house somewhere between 10:00 and 11:00 the same morning he raped Mrs. Landgraf, the same morning that he came to her home. She remembers that she gave him a telephone book. Of course, we couldn't go into what the conversation was. She remembers the same morning she gave him a telephone book and I think she might say a little prayer thanking God Almighty that the door locked behind her and it wasn't intentional, it was only accidental. There was the first victim, there was the first victim, and don't make any mistake about it. Thank God the door locked behind her."

[7] Of course, Mrs. Trout's testimony was admissible to rebut appellant's alibi. He, and his wife, and his mother-in-law, and a neighbor had testified that he was at home on the morning in question. The testimony of Mrs. Trout was admissible to rebut this evidence. Even though the evidence may not have been admissible to show plan or design, it was still admissible to rebut the alibi. *People v. Green*, 15 Cal.App.2d 608, 59 P.2d 824; *People v. Wheaton*, 64 Cal.App. 58, 220 P. 451.

[8] Moreover, so far as the argument above quoted is concerned, appellant made no objection at the trial. In the absence of an assignment of misconduct appellant is precluded, except in unusual cases of which this is not one, from raising the point for the first time on appeal. *People v. Hampton*, 47 Cal.2d 239, 302 P.2d 300; *People v. Johnson*, 153 Cal.App.2d 564, 314 P.2d 751.

[9] The point that the trial court failed to give a limiting instruction cannot be raised for the first time on appeal. Appellant made no request for such an instruction. The court was not required to give it of its own motion. *People v. Johnson*, 153 Cal.App.2d 564, 314 P.2d 751.

[10] Appellant complains that the prosecuting attorney was permitted to read, during his closing argument, from the transcript about the outburst in open court

made by appellant while Mrs. Trout was testifying. This was proper argument. Appellant's outburst amounted to an attempt, by threats, to suppress evidence. Thus, it was admissible and the proper subject of comment. *People v. Chin Hane*, 108 Cal. 597, 41 P. 697; *People v. Kendall*, 111 Cal.App.2d 204, 244 P.2d 418; *People v. Moore*, 70 Cal.App.2d 158, 160 P.2d 857. The jury heard this outburst. The incident was indelibly impressed on their minds. How could reading verbatim from the transcript have adversely affected the rights of appellant? It did not.

Appellant next complains that his cross-examination of the expert from the Bureau of Criminal Identification was unduly curtailed. That expert had identified the partial palm print found on the bathroom floor as being that of appellant. On cross-examination appellant asked: "In your experience in this type of work, isn't it true that in more than one occasion, to your own knowledge, two different experts have disagreed on the interpretation of the same prints under question?"

[11] The trial court properly sustained an objection to this general question. Appellant could have rebutted the testimony of this witness by producing an expert of his own, or by cross-examining about his identification of the particular handprint. Neither course was pursued. Instead, appellant sought to ask the question about experts, generally, in this field, differing in their interpretations. The fact that experts may sometimes disagree as to the interpretation of some prints, has no relevancy as to whether experts could disagree as to the interpretation of this print. Insofar as it failed to relate to the specific print involved, the question was not material. It had no relation to the qualifications of the expert. There was no error in sustaining the objection.

[12,13] The appellant next contends that the prosecutor was guilty of prejudicial misconduct in making the following statement to the jury: "But, you say, if the evidence against the defendant was so

overwhelming, why didn't he plead guilty. If he is guilty, why does a guilty man stand trial. For one thing, that is a constitutional right. For another, place yourself in his shoes. If he pleaded guilty, he also confesses his faithlessness to his family. If he stands trial, indeed, even when found guilty, the possibility exists that his family might still stand by him." No objection was made to this statement at the time it was made. This precludes an objection on appeal. *People v. Johnson*, 153 Cal.App. 2d 564, 314 P.2d 751. The jury was fully instructed on the presumption of innocence and the burden placed on the prosecution. Moreover, the comment would appear to be a reasonable inference from the evidence, and so within the realm of fair comment. *People v. Sieber*, 201 Cal. 341, 257 P. 64.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



158 Cal.App.2d 48

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Frank MAGDALENO, Defendant and
Appellant.**

Cr. 6104.

District Court of Appeal, Second District,
Division 2, California.

Feb. 26, 1958.

Defendant was convicted of unlawful possession of heroin. The Superior Court of Los Angeles County, H. Burton Noble, J., entered judgment and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Ashburn, J., held that whether defendant was aware of

presence of heroin found under rug in unlocked transient room of hotel approximately three hours after defendant had rented it and of its narcotic character and whether it was in his possession were questions of fact for trial court under the evidence.

Judgment and order affirmed.

1. Poisons ☞4, 9

In prosecution for unlawful possession of narcotics, it is necessary to show that defendant had knowledge of presence of narcotics, but such possession need not be exclusive, and may be shown by circumstances as well as by direct evidence, and may be constructive as well as physical. West's Ann.Health & Safety Code, § 11500.

2. Poisons ☞9

To sustain conviction for unlawful possession of narcotics, prosecution must prove possession of narcotics and knowledge of presence and narcotic character of the article allegedly possessed, but such essential facts may be established by circumstantial evidence and reasonable inferences that may be drawn therefrom. West's Ann. Health & Safety Code, § 11500.

3. Poisons ☞9

Proof that narcotics, though not found on person of defendant, were deposited in a place under the possession and control of defendant is sufficient to show possession in prosecution for unlawful possession of narcotics. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law ☞554

In prosecution for unlawful possession of heroin, defendant's testimony was impeached as it was given by fact that he was a convicted felon on parole after burglary conviction, and trial court was free to reject any part of such testimony. West's Ann.Health & Safety Code, § 11500.

5. Poisons ☞9

In prosecution for unlawful possession of heroin found under corner of rug in unlocked transient room of hotel approximately three hours after it had been rented

by defendant, whether defendant was aware of presence of heroin in his room and of its narcotic character and whether it was in his possession were questions of fact for trial court under the evidence. West's Ann. Health & Safety Code, § 11500.

6. Criminal Law ☞1144(13), 1159(2)

Reviewing court must assume in favor of verdict the existence of every fact which trier of fact could have reasonably deduced from the evidence and then determine whether such facts are sufficient to support verdict, and if the circumstances reasonably justify verdict, opinion of reviewing court that such circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of trier of fact

7. Poisons ☞9

Evidence and reasonable inferences to be drawn therefrom were not insufficient, as a matter of law, to support conviction for unlawful possession of heroin. West's Ann.Health & Safety Code, § 11500.

Ernest Best, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent

ASHBURN, Justice.

Having been convicted of possession of heroin (Health & Safety Code, § 11500), defendant appeals from the judgment and an order denying his motion for new trial. He claims that the evidence is insufficient to support the verdict in that it does not show that he knowingly possessed a narcotic. Any contention of unlawful search or seizure was disclaimed in the trial court and insufficiency of the evidence is the sole ground urged on appeal.

Appellant rented a transient room, No. 115, at the Kendrick Hotel at 322 South Spring Street, Los Angeles, at about 10:00 a.m. on June 25, 1957. The room had been vacant the day before, but had been rented the two days prior to that day. Defendant

was given no key to the room, and left the hotel with the room unlocked. He returned to the room two or three times prior to his arrest which occurred about 1:00 p.m. On that occasion he started into the room, saw two police officers there, slammed the door and ran out of the hotel. He was apprehended on the sidewalk and returned by the officers to the room which was then searched. Officer Durrell, in the presence of Officer Estes and the appellant, found eight white paper wrapped bindles in a small pile underneath the corner of the rug. The contents were later identified as heroin. Officer Estes testified that, when interrogated, appellant told him that he knew nothing about the heroin and that he was returning to the room to take a shower; that appellant also told him he had been to the room about three times since he rented it, each time to take a fix, and that he was a user of narcotics; that when he saw the officers in the room he ran away for fear he might be arrested because he had marks on his arm; however, the officer stated from his personal observation that the marks were old and did not indicate defendant had taken a recent fix.

Appellant testified that he had rented the room because he had made a date to bring a girl, a prostitute, there later that day. He stated that he never took a fix in the room, and denied telling the officers that he had done so. According to his version each trip to the room had been for the purpose of taking a shower, at least two of them, apparently in preparation for the meeting with the prostitute. Appellant further testified that there was nothing in the room that belonged to him, that there was no equipment found there, and nothing was found on his person. He stated that he worked as a part-time presser making \$40-\$45 per week. When arrested he had \$111 in his pocket. He testified that his mother had sold one of her houses and had given him \$100 to buy clothes for his child.

Appellant contends that there is absolutely no evidence that connected him with the narcotics or proof to show he knew of its presence in the room. His main argument

is that the room which he had rented was a transient room and others had access to it, that it was open and unlocked and the officers had been in it in his absence.

[1-3] "While it is necessary, on a possession charge, to show knowledge on the part of the defendant [citation], such possession need not be exclusive, and may be shown by circumstances as well as by direct evidence, and may be constructive as well as physical. [Citations.] Certainly finding heroin in a mattress of the bed of the accused, or in his shirt pocket, or in and about his room, raises a reasonable and permissible inference that the heroin was his, even though another person, such as his wife, may share the bed or room with him." *People v. Van Valkenburg*, 111 Cal. App.2d 337, 340, 244 P.2d 750, 752; *People v. Robarge*, 151 Cal.App.2d 660, 667-668, 312 P.2d 70, 74: "The law is now well settled that to sustain a conviction in the instant case [possession], the prosecution must prove possession of the narcotic and knowledge of the presence and narcotic character of the article allegedly possessed. [Citations.] These essential facts may, however, be established by circumstantial evidence and reasonable inferences that may be drawn therefrom (*People v. Lunbeck*, 146 Cal.App.2d 539-541, 303 P.2d 1082). And, 'In regard to the question of possession, the cases hold that the narcotics need not be found on the person of the defendant, it being sufficient if such articles are deposited in a place under the possession and control of the accused. (Citing cases.)' *People v. Vice*, 147 Cal.App.2d 269, 274, 305 P.2d 270." *People v. Flores*, 155 Cal.App.2d 347, 318 P.2d 65, 66: "Possession and knowledge may be proved circumstantially and the evidence at bar is sufficient to support those inferences. Exclusive possession of the premises is not necessary nor is physical possession of the drug of the essence. *People v. Ross*, 149 Cal.App.2d 287, 289, 308 P.2d 37; *People v. Van Valkenburg*, 111 Cal.App.2d 337, 340, 244 P.2d 750; *People v. Bagley*, 133 Cal. App.2d 481, 484, 284 P.2d 36." See also, *People v. Denne*, 141 Cal.App.2d 499, 510-

511, 297 P.2d 451; *People v. Lunbeck*, 146 Cal.App.2d 539, 541, 303 P.2d 1082.

In *People v. Stanciell*, 121 Cal.App.2d 798, 799, 264 P.2d 576, a case involving possession of heroin, it was said: "The case presents only the familiar conflict of evidence which is for the trier of fact to resolve. Appellant argues that where two persons have equal access to and occupancy of premises the mere finding of narcotics therein will not support a conviction of possession. There is ample additional evidence here to sustain the finding that appellant knowingly possessed the heroin found in her bedroom. 'To show such knowing possession the conduct of the parties, admissions or contradictory statements and explanations are frequently sufficient.' *People v. Foster*, 115 Cal.App.2d 866, 868, 253 P.2d 50, 51."

[4] Defendant was a convicted felon, being on parole after a burglary conviction; his evidence was thereby impeached as it was given. The court was free to reject any part of it. The alleged three or four hour preparation by this married man for a rendezvous with a prostitute does not bear the earmarks of truth. His explanation to the police that the three trips they saw him make to the room were for the purpose of taking a fix misfired when it appeared that his arms bore evidence of old injections but no recent ones. Moreover, the fact that no equipment for preparing or administering the drug was found on defendant's person or in the room brands the explanation of the trips to the room as false. By trade appellant is a clothes presser, working three or four days a week and earning \$40-\$45 per week. When arrested he had been unemployed for two days or more but had \$111 in small bills on his person. A family man, he ordinarily would not have such a sum on him after a two-day layoff. If he were engaged in making sales of heroin cached under the rug of room 115 the presence of the money would be a normal result.

[5] When appellant saw the police officers in his room he knew there was no

equipment for an injection there, and no prostitute. He slammed the door and ran, evidencing a consciousness of guilt. Guilt of what? Possession or trafficking in narcotics is the logical answer. The claim that he ran for fear of being arrested on the basis of old injection scars—remote felonies at best—does not commend itself to reason and it was disbelieved by the trial judge who rejected the defendant's story as untrue in its entirety. He called no corroborating witnesses. When his testimony thus fell, the case rested on circumstantial evidence strongly indicative of trafficking in narcotics, certainly substantial enough to warrant a reasonable inference that the narcotic found in his room was in his possession and its character known to him. Whether appellant was aware of the presence of the narcotic in his room was a question of fact for the determination of the trial court under all of the circumstances presented. *People v. Gory*, 28 Cal.2d 450, 170 P.2d 433; *People v. Brown*, 102 Cal. App.2d 60, 62, 226 P.2d 609; *People v. Brown*, 92 Cal.App.2d 360, 366, 206 P.2d 1095; *People v. Torres*, 98 Cal.App.2d 189, 193, 219 P.2d 480.

[6, 7] *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 780, requires a court of review to "assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict." If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." Applying the principles of *People v. Newland*, supra, it cannot be said that the evidence and the reasonable inferences to be drawn therefrom are not, as a matter of law, sufficient to support the judgment.

Judgment and order denying new trial are affirmed.

FOX, P. J., and HERNDON, J., concur.

158 Cal.App.2d 53

Joseph W. FAIRFIELD, Plaintiff, Respondent and Appellant,

v.

AMERICAN PHOTOCOPY EQUIPMENT COMPANY, a corporation, Defendant, Appellant and Respondent.

Civ. 22346.

District Court of Appeal, Second District, Division 3, California.

Feb. 26, 1958.

Action for injunction and compensatory and punitive damages occasioned by defendant's unauthorized use of plaintiff's name in advertising defendant's product. The Superior Court, Los Angeles County, McIntyre Faries, J., awarded plaintiff compensatory and punitive damages. Defendant made motion for new trial, which was ordered granted unless plaintiff agreed to remit punitive damages, plaintiff filed remission, but appealed from order requiring him to remit punitive damages, and defendant appealed from judgment for compensatory damages. The District Court of Appeal, Shinn, P. J., held that award of \$1,500 compensatory damages was not excessive and that by filing remission plaintiff waived his right to appeal.

Affirmed.

1. Damages ⇨130(1)

Award of \$1,500 compensatory damages for unauthorized use of lawyer's name in advertising defendant's photocopy machine was not excessive, although no one accused lawyer of unethical conduct or criticized him, and his professional standing was not impaired in minds of his friends.

2. Appeal and Error ⇨154(4)

Where defendant's motion for new trial was ordered granted unless plaintiff agreed to remit punitive damages awarded and ordered denied if plaintiff filed the remission, plaintiff, who filed remission, waived his right to appeal from order requiring him to remit punitive damages.

3. Appeal and Error ⇨154(4)

By agreeing to reduce verdict and enter judgment for a lesser amount, a successful plaintiff waives his right to appeal, even though he made remission under protest and court may have erroneously found verdict to be excessive.

4. New Trial ⇨162(1), 164

In nonjury action for unauthorized use of plaintiff's name in advertising defendant's product, wherein plaintiff was awarded compensatory and punitive damages, proper procedure in ruling on defendant's motion for new trial would have been to change findings by finding that defendant had not been guilty of oppression, fraud or malice, express or implied and to modify its judgment so as to award plaintiff only compensatory damages, rather than to order that motion for new trial be granted unless plaintiff agreed to remit punitive damages. West's Ann.Civ.Code, § 3294; West's Ann.Code Civ.Proc. § 662.

Ethelyn F. Black, Los Angeles, for plaintiff, respondent and appellant Fairfield.

Alexander H. Schullman, David S. Smith, Abe Mutchnik, Los Angeles, for defendant, appellant and respondent company.

SHINN, Presiding Justice.

This is the second appeal in an action for an injunction and for compensatory and punitive damages, occasioned by defendant's unauthorized use of plaintiff's name in advertising its product. Defendant had judgment of nonsuit upon the first trial. That judgment was reversed by this court. *Fairfield v. American Photocopy, etc., Co.*, 138 Cal.App.2d 82, 291 P.2d 194. Retrial was to the court, which made findings and entered judgment for plaintiff in the sum of \$3,100, consisting of \$1,500 compensatory damages and \$1,600 punitive damages. The court also granted a permanent injunction against the use of plaintiff's name in the conduct of defendant's business. Defendant made a motion for new trial, which was ordered granted unless plaintiff agreed to remit the \$1,600 punitive damages and

ordered denied if plaintiff filed the remission. Plaintiff filed a remission of the judgment in that amount. He appeals from the order requiring him to remit the punitive damages; defendant appeals from the judgment for compensatory damages.

Plaintiff is an attorney at law. Defendant is an Illinois corporation doing business in California; it manufactures and sells a photocopy machine known as the "Apeco Systematic Auto-Stat." Plaintiff was the only witness. Defendant offered no evidence. From the testimony of plaintiff, which was spread out exceedingly thin over 100 pages of direct and cross-examination, we glean the following facts: Plaintiff is licensed to practice law in New York and California. He has lived in the latter state since 1946. He has a wife and two children. His wife is an attorney at law and her professional name is Ethelyn Black. They maintain offices in Beverly Hills. In the summer of 1953, plaintiff bought a photostat machine from defendant which he found unsatisfactory; after considerable correspondence he returned it a month later and received a refund of his money.

In July 1954, an attorney named Lieberman called plaintiff's attention to a circular issued by defendant advertising the machine. It listed "Joe W. Fairfield, Los Angeles" with a list of seventeen others as among "thousands of leading law firms using the Apeco Auto-Stat." No one else was listed from Los Angeles and none from Beverly Hills. Plaintiff had not authorized the use of his name. Lieberman made it clear that he suspected that plaintiff had received money for the use of his name, which plaintiff denied. A man who said he was a lawyer called by phone to inquire about the machine. A female lawyer called him to inquire about the machine and when told of plaintiff's experience with it, expressed doubt that the company would have listed plaintiff's name unless he was a satisfied user. She talked for several minutes and plaintiff was "getting a bad time" explaining to her. Another attorney who read the circular called him. Plaintiff had "a bad time with him." An attorney named

April, whom plaintiff knew quite well, asked him pointblank how much he would ask to endorse a "dog product." Other attorneys, Harvey Silvert, Bentley Ryan and Sidney Traxler, asked him about the machine and plaintiff stated "Well, they wanted to know where I am earning more money by endorsing products than I am from the practice of law * * * and whether I found it profitable or lucrative." Plaintiff claimed that this good-natured bantering wounded his feelings; "I felt humiliated, embarrassed, chagrined. I was worried, sick. Not sick, scared. And I felt pretty cheap." He was worried for fear the State Bar would cite him to explain his conduct in endorsing a product. This anxiety lasted for several hours until he had examined his correspondence, which disclosed that he had not consented to the use of his name. A lawyer named Silbert asked him if he had also endorsed another machine. A couple of his friends twitted him over the use of his name, pretending to believe that in return the company had not only singled him out as a leader in his profession but had also paid him money. Altogether there were six or eight people who questioned plaintiff about the machine. No one accused him of unethical conduct. No one criticized him. His professional standing was not impaired in the minds of his friends.

[1] Defendant contends that the judgment is excessive. We regard the award of \$1,500 as generous, but not excessive as a matter of law. Plaintiff suffered some annoyance. We held on the former appeal, *Fairfield v. American Photocopy etc., Co.*, supra, 138 Cal.App.2d 82, 88, 291 P.2d 194, upon substantially the same evidence, that it could not be said as a matter of law that plaintiff was entitled to no more than nominal damages and that in the appraisal of plaintiff's detriment the trial court would exercise a wide and elastic discretion. Upon the first trial the court, by its judgment of nonsuit, assessed plaintiff's damage at zero. We held that the evidence would have warranted an award of a substantial sum.

\$1,500 was a substantial sum. Plaintiff pictured himself to the court as a person of fragile sensibilities. The court was not greatly impressed and stated that plaintiff had been annoyed and his time wasted and "I think there is a damage here but it is not great."

Defendant argues that the distinction of being publicized as a leading attorney was ample recompense for the slight annoyance which plaintiff suffered. The contention appears to be that since many celebrities exploit their fame by endorsing commercial products, the notoriety thus achieved must be desirable and beneficial. The argument is specious. No one would suspect that the endorsers of publicized products permit the use of their names except for money or for the mere satisfaction of seeing their names in print or on the screen. Plaintiff's situation was different. Defendant did not offer him any money. All of defendant's arguments fail in view of the fact that our former decision held it was within the discretion of the trial court to award substantial damages. That discretion has been properly exercised.

As previously stated, plaintiff gave notice of appeal from "so much of the order dated the 2nd day of August, 1956, which requires the plaintiff herein to remit the exemplary damages awarded to him in the above entitled action." In the remission of judgment plaintiff stated that he did not desire at that time to take an appeal "involving this small sum of \$1,600," but he reserved the right to appeal if the defendant

appealed from the judgment for compensatory damages.

[2] By remitting the amount of the exemplary damages plaintiff avoided a re-trial of the action and preserved his judgment for \$1,500. He now seeks to retain the advantage he derived from denial of defendant's motion for a new trial and at the same time have his judgment for exemplary damages restored. Remission of the exemplary damages was the price he paid for denial of the motion for new trial.

[3] It is settled that by agreeing to reduce the verdict and enter judgment for a lesser amount, a successful plaintiff waives his right to appeal, even though he made the remission under protest and the court may have erroneously found the verdict to be excessive. *Conlin v. Southern Pacific R. R. Co.*, 40 Cal.App. 743, 182 P. 71; 4 C.J.S. Appeal & Error § 213, p. 635.

[4] In this nonjury case the proper procedure would have been for the court, in ruling on the motion for new trial, to change its findings by finding that defendant had not been guilty of oppression, fraud or malice, express or implied (Civ.Code, § 3294), and to modify its judgment so as to award plaintiff only compensatory damages of \$1,500 (Code Civ.Proc. § 662).

The judgment and order are affirmed without costs to either party.

PARKER WOOD and VALLÉE, JJ., concur.

49 Cal.2d 784

Mary Eileen GOETZ, Petitioner,

v.

SUPERIOR COURT of the State of California
IN AND FOR the COUNTY OF
LOS ANGELES, Respondent,
and

Robert E. Goetz, Real Party in Interest.

L. A. 24768.

Supreme Court of California,
In Bank.

March 7, 1958.

See publication Words and Phrases,
for other judicial constructions and defini-
tions of "Written Notice".

Bentson & Blumberg and James T. Bent-
son, Long Beach, for petitioner.

Harold W. Kennedy, County Counsel,
and William E. Lamoreaux, Asst. County
Counsel, Los Angeles, for respondent.

Eric A. Rose, Long Beach, for real party
in interest.

SHENK, Justice.

Proceeding on a petition for a writ of prohibition to restrain the superior court from enforcing its order setting aside a certain order and from proceeding to conduct a rehearing. The Supreme Court, Shenk, J., held that a notification by the deputy clerk of the commissioner's recommendation and the court order was insufficient to commence the running of the five day period for filing exceptions to the report and order.

Alternative writ discharged and peremptory writ denied.

Opinion, 314 P.2d 479, vacated.

1. Attorney and Client §90

Where an attorney is retained in an action to represent a party litigant all statutory notices and legal proceedings therein must be signed or inaugurated by the attorney of record alone.

2. Divorce §309

Where two copies of commissioner's findings and recommendations and court order thereon were served by mail on April 8, 1957 by deputy court clerk upon petitioner's attorneys of record after hearing of petitioner's order to show cause why support provisions previously entered in interlocutory divorce decree should not be modified, such service was insufficient to commence running of the five-day period for filing exceptions to the commissioner's report and subsequent court order since such was not "written notice" of the court's action within the statute. West's Ann.Code Civ.Proc. § 259a, subd. 2.

This is an application for a writ of prohibition to restrain the respondent superior court from proceeding further on an order to show cause by which Robert Goetz, the real party in interest, sought to modify alimony and support provisions of an interlocutory decree of divorce. An alternative writ was issued.

The petitioner, Mary Goetz, obtained an interlocutory decree of divorce from Robert Goetz on May 25, 1956. It contained provisions for alimony and the support of the Goetz' minor children. On February 15, 1957, Robert obtained an order to show cause why these provisions should not be modified. On March 19, 1957, a hearing was had on the order to show cause. The matter was transferred to the court commissioner for his findings and recommendations. On April 8, 1957, the court entered an order on the commissioner's findings and recommendations denying the relief sought. On the same day a deputy court clerk mailed a copy of the commissioner's recommendations and court order to Robert's attorney. On May 14, 1957, Robert's attorney filed and served exceptions to the findings and recommendations of the court commissioner and a notice of motion to set them aside. On May 31, 1957, the court entered a minute order sustaining the defendant's exceptions and granting his motion. The court re-set the order to show cause for hearing on June 18, 1957. Mary then brought this proceeding in prohibition to restrain the superior court from enforcing its order of May 31st and from further proceeding on the order to show cause.

Mary contends that because Robert failed to except to the commissioner's first recommendations and court order within five days after copies thereof were mailed to his attorney on April 8 by the deputy clerk, his exceptions to the court's later action may not be heard or considered. Mary relies upon section 259a, subdivision 2 of the Code of Civil Procedure. Section 259a is contained in the chapter relating to the powers and duties of court commissioners. It is there provided that a commissioner shall have power " * * * 2. To take proof and make and report his findings thereon as to any matter of fact upon which information is required by the court; but any party to any contested proceeding may except to such report and the subsequent order of the court made thereon within five days after written notice of the court's action, a copy of said exceptions to be filed and served upon opposing party or his counsel within said five days; and may argue his exceptions before the court on giving notice of motion for that purpose within ten days from entry thereof. After a hearing before the court on such exceptions, the court may sustain, or set aside, or modify its order theretofore made. * * *."

Mary contends that the mailing of the commissioner's recommendations and the court order by the deputy clerk gave "written notice of the court's action" within the meaning of section 259a, subdivision 2. Robert contends that the mailing of such copies was not the "written notice" contemplated by that section because the copies of the commissioner's recommendations and court order were not served upon his attorney by opposing counsel. He relies upon *Jansson v. National Steamship Co.*, 34 Cal.App. 483, 168 P. 151, and *Harris v. Minnesota Investment Co.*, 89 Cal.App. 396, 265 P. 306 as holding that effective notice of the court's action could only have been given by Mary's counsel, and that the notice given by the deputy clerk was insufficient to commence the running of the five-day period for the filing of exceptions.

[1] In the *Jansson* case, the plaintiff signed and mailed a notice of assignment of judgment to defendant's counsel. More than ten days after its receipt, defendant's counsel filed a notice of intention to move for a new trial. Under Code of Civil Procedure, section 659, such notice was required to be made within ten days after receipt of notice of entry of judgment. The order denying the plaintiff's motion to strike was affirmed on the ground that the purported notice of entry of judgment was intended only as a notice of assignment of the judgment and could not, therefore, begin the running of the ten-day period for the filing of a notice of intention to move for a new trial. The court then considered the effect of the notice having originated with the plaintiff, quoting the trial judge: "Even assuming that such paper was intended to apprise defendant's counsel of the fact and date of the entry of judgment herein, it was wholly inoperative for that purpose. Where an attorney is retained in an action to represent a party litigant, all statutory notices and legal proceedings therein must be signed or inaugurated by the attorney of record alone." 34 Cal.App. at page 486, 168 P. at page 152.

In the *Harris* case a post card notice of the overruling of defendants' demurrer was sent to the defendants by a court clerk. No answer was filed and a default judgment was entered against one of the defendants to whom such notice was sent. That defendant moved to vacate the judgment contending that the postal card was not a sufficient notice to begin the running of the ten-day period in which an answer could be filed. The motion to vacate was granted. In affirming the order granting the motion to vacate the court approved the statement of the trial judge in the *Jansson* case above quoted and further stated: "Where notices during the course of proceedings in court are required to be given, they must be signed by the attorney of record." 89 Cal.App. at page 401, 265 P. at page 308.

Written notice of the court's action originating with counsel of record makes cer-

tain the date from which the five-day period for filing of exceptions is to run. To require, under section 259a, subdivision 2, the filing of exceptions to any written notice of the court's action without regard to its source would unsettle the orderly procedure established by that section. Parties would act at their peril in failing to respond to such notices, and the attendant uncertainty could only obstruct the conduct of litigation. Confusion would be introduced into the practice with great prejudice to counsel and litigants if persons other than counsel were permitted to exercise control over such matters.

[2] We conclude that the notification by the deputy court clerk of the commissioner's recommendations and the court order was insufficient to commence the running of the five-day period for filing exceptions to the commissioner's report and the subsequent court order.

The alternative writ is discharged and the peremptory writ is denied.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



158 Cal.App.2d 286

Katherine L. SELLAR, Plaintiff and Respondent,

v.

George SELLAR, Defendant and Appellant.
Civ. 17547.

District Court of Appeal, First District,
Division 1, California.

March 7, 1958.

Proceedings on defendant husband's motion to modify divorce decree by deleting therefrom a property settlement agreement which had been incorporated therein. The Superior Court, City and County of San Francisco, I. L. Harris, J., denied the

motion, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence would support (1) finding that defendant had been physically and mentally capable of understanding and executing property settlement agreement and of appearing as a witness on behalf of himself at hearing of divorce action, (2) finding that the agreement had not been tainted with compulsion and overreaching on part of plaintiff and (3) finding that there had been no lack of consideration for agreement.

Affirmed.

1. Judgment ⇐435, 443(1)

Public policy that underlies principle of res judicata must be considered together with policy that party shall not be deprived of a fair adversary proceeding in which fully to present his case, and equitable relief may be granted if the party seeking it was precluded by fraud or mistake of other party from participating in proceeding or from fully presenting his case. West's Ann.Civ.Code, § 1605.

2. Divorce ⇐254

In proceedings on husband's motion to modify divorce decree by deleting therefrom property settlement agreement which had been incorporated therein, evidence would support finding that defendant had been physically and mentally capable of understanding and executing property settlement agreement and of appearing as a witness on behalf of himself at hearing of divorce action.

3. Divorce ⇐254

In proceedings on husband's motion to modify divorce decree by deleting therefrom property settlement agreement which had been incorporated therein, evidence would support finding that property settlement agreement had not been tainted with compulsion and overreaching on part of plaintiff.

4. Divorce ⇐254

In proceedings on husband's motion to modify divorce decree by deleting therefrom property settlement agreement which

had been incorporated therein, lack of consideration, standing alone, would not furnish basis for relitigating validity of agreement.

5. Divorce ☞254

In proceedings on husband's motion to modify divorce decree by deleting therefrom property settlement agreement which had been incorporated therein, fact that agreement was in writing furnished presumptive evidence of consideration, and burden was on defendant to show want of consideration. West's Ann.Civ.Code, §§ 1614, 1615.

6. Husband and Wife ☞278(5)

Wife's release of husband from any and all liabilities, debts, and obligations of every kind and character except as in the agreement otherwise provided constituted significant element of consideration for his execution of property settlement agreement. West's Ann.Civ.Code, § 1605.

7. Divorce ☞254

In proceedings on husband's motion to modify divorce decree by deleting therefrom property settlement agreement which had been incorporated therein, evidence would sustain finding that judge who had presided at divorce trial had been fully advised as to terms of agreement; but even if finding had not been sufficiently supported, lack of support would not necessarily furnish adequate basis for reversal of order granting motion.

Ernest O. Meyer, James A. Himmel, San Francisco, for appellant.

Gladstein, Andersen, Leonard & Sibbett, Ewing Sibbett, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant George Sellar moved to modify a final decree of divorce by setting aside a property settlement agreement which was attached to and incorporated in the

interlocutory and approved by the interlocutory and the final decrees.

He sought to delete from the decree and the agreement "all alimony, support payments, devises and bequests and interests of every kind * * * for the benefit of plaintiff [Katherine Sellar] * * * and that the property of defendant be released from any and all liens by reason thereof."

[1] He sought this deletion on the alleged ground of intrinsic fraud¹ in the negotiation and execution of the agreement and in the conduct of the divorce proceedings. The public policy that underlies the principle of *res judicata* "must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case * * * [Equitable] relief may be granted if the party seeking it was precluded by fraud or the mistake of the other party from participating in the proceeding or from fully presenting his case. [Citations.]" *Jorgensen v. Jorgensen*, 32 Cal.2d 13, 18-19, 193 P.2d 728, 732. Some but not necessarily all of defendant's allegations bring his motion within the purview of this policy. Since the trial court found against him upon every point and the evidence supports the findings, it is unnecessary to consider which points might have entitled him to relief if the court had found in his favor.

[2] (1) *The evidence supports the finding that defendant was physically and mentally capable of understanding and executing the property settlement agreement and appearing as a witness on behalf of himself at the hearing of the divorce action.*

Although there was evidence that defendant had been a heavy drinker of alcoholic beverages and that he was under the influence of alcohol a great deal of the time, there was also evidence that he was a periodic drinker, and between "binges" would abstain from drinking for

1. He did not invoke the power of the court to modify under authority of section 139 of the Civil Code.

several weeks. Mr. K. R. McDougall, defendant's attorney at the time of the negotiation of the agreement, testified that he was in frequent consultation with defendant during these negotiations, that everything was explained to him, and that defendant did not appear to be under the influence of liquor during these consultations. The final form of the agreement was explained to him clause by clause, and he took it home with him for further study. At the time he did not appear to be under the influence of liquor. The defendant was actually present at the hearing of the interlocutory decree and sober. The final decree was obtained at defendant's own instigation. Defendant himself testified that he was familiar with the most important features of the agreement and had complied with them since the time the agreement was executed.

During the period of the negotiation of this agreement, defendant executed a partnership agreement with his business partner. The latter testified that upon that occasion defendant knew what he was doing, knew what was in the partnership agreement.

[3] (2) *The evidence supports the finding that the agreement was not tainted with compulsion and overreaching on the part of the plaintiff.*

Defendant seems to predicate his claim of compulsion and overreaching upon the fact that the parties married in March, 1951, separated in August, 1952, and executed the agreement in January, 1953, plus the asserted lack of any community property and the fact that by the terms of the agreement defendant was very generous toward the plaintiff.

Those facts of themselves do not spell "compulsion and overreaching" on the part of the plaintiff, especially in view of the further facts that the parties were first married in 1921, divorced in 1936, and had a dependent epileptic son for whose

welfare both parties wished to provide and did provide.

Moreover, defendant has not brought to our attention any evidence that the provisions of the agreement, however generous toward the plaintiff, did impose an undue burden upon defendant. For aught that appears, the amounts which defendant agreed to pay for plaintiff's support and the support of their son may have been well within the scope of his ability to pay at the time of the execution of the agreement, which significantly provided that these commitments upon his part "shall be subject to downward revision by a proper Court" except that the amount of support for plaintiff could not be reduced below an amount equal to 35% of his net income for any particular month.² There has been no showing and no attempt to show any change in his financial circumstances.

(3) *There was no lack of consideration for the property settlement agreement.*

[4-6] Lack of consideration, standing alone, would hardly furnish a basis for relitigating the validity of the agreement. However, the very fact that it was in writing furnished "presumptive evidence of a consideration" (Civ.Code, § 1614) and cast upon defendant, "the party seeking to invalidate or avoid it," the "burden of showing a want of consideration" (Civ. Code, § 1615). See *In re Estate of Brimhall*, 62 Cal.App.2d 30, 34, 143 P.2d 981; *In re Estate of Baxter*, 96 Cal.App.2d 493, 501, 215 P.2d 805. Each party reciprocally released the other party "from any and all [past and future] liabilities, debts, and obligations of every kind and character" except as in the agreement otherwise provided. This, of course, was a significant element of consideration. *Remondino v. Remondino*, 41 Cal.App.2d 208, 213-214, 105 P.2d 437.

Furthermore, the agreement expressly declared the cancellation of a trust which

2. We, of course, are not deciding whether the parties, when they consent to judicial modification of their agreement, may

place limitations upon the extent of the modifications a court of competent jurisdiction may make.

the parties created in 1947 for the benefit of their son and of a will which in 1947 the parties agreed defendant would execute, also the cancellation of any other agreement between the parties for the benefit of plaintiff or of the son; subject to the condition that if it be held by final judgment of a proper court that the cancellation of the trust or of any such agreement be ineffective without the consent of a guardian for the son and court approval thereof, and such consent and approval be not given within 10 days after such final judgment, "all provisions of this property settlement agreement shall become null and void and of no effect, at the option of Husband or his personal representative, if he be dead."

These cancellations, if effective, would operate to lessen defendant's obligations and thus would be a "benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled." That would be good consideration for a promise. Civ. Code, § 1605.

There well may have been additional elements of consideration. Those here mentioned are sufficient.

(4) *Was the judge who presided at the divorce trial fully advised as to the terms of the agreement?*

[7] The answer is "Yes," as found by the trial judge herein. That would seem to end our inquiry, for he presided upon both occasions. Moreover, the record shows that at the original hearing the judge had the agreement before him, could have learned from its perusal all that defendant now claims he should have known, was orally apprised of the monthly payments agreed to be made to plaintiff, asked plaintiff and was assured by her of the authenticity of the signatures and that the terms were satisfactory to her, whereupon the judge asked defendant's counsel and was assured by him that the agreement was agreeable to the defendant also.

Clearly, the finding on this subject is sufficiently supported. Even if it were not, that would not necessarily furnish an adequate basis for reversal.

The order is affirmed.

PETERS, P. J., and BRAY, J., concur.



158 Cal.App.2d 176

**ESTATE of Morris Marks LANDAU,
Deceased.**

**Leslie Lesser LANDAU, as Trustee of Trust
No. 3 under the Last Will and Testament
of Morris Marks Landau, Deceased,
Appellant,**

v.

**John R. MOORE, as Guardian Ad Litem of
the Minor Beneficiaries of Trust No. 3,
Respondent.
Civ. 22453.**

District Court of Appeal, Second District,
Division 3, California.

March 4, 1958.

Testamentary trustee petitioned the Superior Court for an order authorizing him to make emergency payments and current and future administrative payments in the amount of \$7,500. The Superior Court, Los Angeles County, Newcomb Condee, J., entered an order allowing trustee to make payments only in amount of \$6,000, and the trustee appealed. The District Court of Appeal, Vallée, J., held that District Court of Appeal could not say, as a matter of law, that Superior Court erred in allowing \$6,000 rather than \$7,500.

Affirmed.

1. Trusts ☞ 177

Absolute discretion, exercised in good faith by trustee, cannot be controlled by

court on considerations going to soundness of discretion so exercised. West's Ann. Civ.Code, § 2269.

2. Appeal and Error ⇨882(3)

Where testamentary trustee submitted to probate court the question as to what constitutes an emergency and question as to how much money should be used from corpus of trust for support and maintenance of beneficiaries, trustee on appeal to District Court of Appeal could not contend that determination of those questions was a matter within trustee's absolute discretion. West's Ann.Civ.Code, § 2269.

3. Judgment ⇨746

Benefit of prior adjudication constituting estoppel or bar may be waived by failure to present it in subsequent proceeding.

4. Judgment ⇨746

Where, in 1956 proceeding on first account current and petition for instructions of testamentary trustee, there was an entire absence of pleading and proof of 1953 order of probate court determining what constituted an emergency so that money could be used from corpus of trust for support and maintenance of beneficiaries, trustee thereby waived right to rely on 1953 order in 1956 proceeding.

5. Trusts ⇨276

On petition by testamentary trustee for order authorizing trustee to make emergency payments and current and future administrative payments in amount of \$7,500, probate court did not, as a matter of law, err in allowing only \$6,000.

Max Fink, Cyrus Levinthal, Emmet G. Lavery, Jr., and Ronald K. Lipstone, Los Angeles, for appellant.

Moore & Moore, and Bender Moore, Los Angeles, for respondent.

1. Leslie G. Landau and Samuel S. Zagon were appointed trustees of the trust by the decree for ratable distribution. They

VALLEE, Justice.

Appeal from an order instructing a testamentary trustee with respect to reimbursement of moneys expended by him in behalf of the beneficiaries of the trust.

Morris Marks Landau died testate on November 4, 1949. A decree for ratable distribution of his estate distributed part thereof to trustees in trust. Petitioner, Leslie Lesser Landau, is now the duly appointed trustee of the trust.¹ The decree provided that the trustee should pay and apply all the net income of the trust for the benefit of three minor grandchildren of the deceased during minority. On attaining the age of 21, each grandchild is to receive his or her pro rata share of the trust res and any remaining income. Petitioner trustee is the father of the beneficiaries. The decree provides:

"The Trustees may, without any obligation so to do however, and in their sole and absolute discretion, pay to any of the beneficiaries out of this trust prior to the distribution thereof, such sums as may be required in the event of an emergency."

On April 6, 1953 the then trustees filed a petition for instructions with respect to payment for the support and maintenance of the beneficiaries. They alleged the provision of the decree for ratable distribution as to an emergency; certain moneys had been expended by the father of the beneficiaries for their maintenance; they, the trustees, desired to pay \$7,500 to the guardian of the estates of the beneficiaries to be used toward reimbursing petitioner for moneys theretofore expended by him for the support and maintenance of the beneficiaries and other necessary expenses, and to be used for their support and maintenance pending final distribution of the estate. The prayer in part was that the then trustees be instructed that the expenditure of such moneys constituted an emergency within the meaning of the decree.

resigned and on April 13, 1954 petitioner, Leslie Lesser Landau, was appointed sole trustee.

On May 28, 1953 an order was made that the moneys expended by the trustees for the support and maintenance of the beneficiaries and in the protection of their interests in the estate and "the monies to be expended in the future for the support and maintenance of said minor children constitutes an emergency within the meaning" of the decree. The trustees were ordered to pay \$7,500 to the guardian of the estates of the beneficiaries. This order became final.

Petitioner was appointed successor trustee on April 13, 1954. On August 15, 1955, at the request of petitioner, an order was made that all assets of the trust be deposited in a bank, subject to withdrawal only on further order of the court.

On January 19, 1956 petitioner filed his first account current; petition for instructions, for distribution, and for authority to the depository to distribute deposited funds. The period covered by the account was from April 13, 1954 to November 30, 1955. On February 24, 1956 the court made an order in which it found that petitioner had incurred expenses of administration in excess of \$1,000; that each beneficiary required provision for maintenance and support and that \$200 a month commencing January 10, 1956 was a proper and suitable sum therefor; that an emergency existed as the trust income was insufficient; therefore trust principal could and should be distributed when needed to provide such payments; and that the depository should be ordered to make the payments and distribution. The court ordered that \$1,000 be paid petitioner on account of and not in full discharge of amounts expended by him for administrative expenses of the trust; and ordered that commencing as of January 10, 1956 and continuing for 23 monthly installments on the 10th of each month thereafter, including February 10, 1956, there be paid from the income of the trust, if sufficient, with any deficiency to be supplied from principal, \$200 to each beneficiary for his or her maintenance, education, and support, and that the sum be paid monthly to petitioner as trustee.

On June 21, 1956 petitioner again petitioned the court for an order authorizing him to make emergency payments and "payments of current and future administrative payments." In this petition he alleged that on substantially the same facts the court, on May 28, 1953, interpreted the emergency provision of the decree to be applicable to said facts; and ordered the then trustees to pay \$7,500 to the guardian of the beneficiaries, part of which was to be used to reimburse petitioner on account of the moneys he expended on behalf of the beneficiaries. The petition alleged that the order of May 28, 1953 provided that the moneys to be expended in the future for the support and maintenance of the minor grandchildren constituted an emergency within the meaning of the decree. The petition further alleged there was \$7,500 available in the trust which could and should be distributed on account to petitioner to provide him with funds from which payments to creditors could be made. The prayer was that funds in the amount of \$7,500 be ordered distributed to petitioner so that he could discharge pressing obligations of the beneficiaries.

On October 16, 1956 the court made an order in which it found the allegations appearing in the petition were true, that there was sufficient money and property on hand to make the payments therein authorized, that petitioner had personally incurred expenses on behalf of the beneficiaries of a substantial amount, and that \$6,000 should now be paid to him for all claims thereof to the date of the filing of the petition. The court ordered that \$6,000 be paid to petitioner individually on account of the amount expended by him for the benefit of the trust, and that he report in his accounts as trustee upon the application of said amount to his previous advances, and the depository was directed to make the payment. Petitioner appeals from this order.

[1,2] It is asserted the decree of distribution confers absolute discretion on the trustee to determine when an emergency exists and to determine how much money shall be paid from the corpus of the trust

to a beneficiary in the event of an emergency. It is true that an absolute discretion, exercised in good faith by a trustee, cannot be controlled by a court on considerations going to the soundness of the discretion so exercised. Civ.Code, § 2269; *In re Estate of Charters*, 46 Cal.2d 227, 239, 293 P.2d 778. The rule is not applicable on the facts at bar. The trustee has not exercised any discretion. His predecessors and he submitted the questions to the probate court and requested instructions with respect thereto. In 1953 the then trustees, apparently being in doubt as to what constituted an emergency, petitioned the probate court for instructions and a determination of what constituted an emergency. In response to the petition, the court determined that moneys theretofore and thereafter expended for the support and maintenance of the beneficiaries constituted an emergency. In his first account current, filed in 1956, petitioner as successor trustee asked for an order "that an emergency be found to exist and distribution of funds in discharge of obligations of the above-named minor beneficiaries and for their maintenance and support be ordered," and the court so ordered. No mention of the 1953 order was made in the first account or in the petition for instructions which accompanied it. And in the present proceeding petitioner alleged that an emergency existed and prayed that "funds in the amount of \$7,500 be ordered distributed to Leslie Lesser Landau so that he may discharge pressing obligations of the above-named minor beneficiaries." Having submitted the question as to what constitutes an emergency and the question as to how much money should be used from the corpus of the trust for the support and maintenance of the beneficiaries to the probate court, petitioner cannot here contend that the determination of those questions was a matter within his absolute discretion.

Petitioner asserts that the 1953 order of the probate court determining what constitutes an emergency is *res judicata* on that issue—in other words, that the court in 1953, by final order, determined that moneys to be expended in the future for the support

and maintenance of the beneficiaries constituted an emergency within the meaning of the decree of distribution; that order is *res judicata* on that issue; and the court in the present proceeding erred in not allowing petitioner the full amount prayed for—\$7,500, instead of \$6,000.

It is argued the present petition alleged that \$7,500 was available in the trust which could and should be distributed on account to petitioner to provide him with funds from which payments to creditors could be made; the court found that the allegations of the petition were true; consequently the court, by reason of the claimed effect of the 1953 order, could do nothing but allow petitioner \$7,500 and invade the corpus if the income was insufficient.

[3, 4] The benefit of a prior adjudication constituting an estoppel or bar may be waived by failure to present it in the subsequent proceeding. (29 Cal.Jur.2d 258, § 282.) "It has been uniformly held that in the absence of either pleading or proof of a former judgment upon litigated issues, the defense of *res judicata* is thereby waived in the subsequent action." *Wolfsen v. Hathaway*, 32 Cal.2d 632, 638, 198 P.2d 1, 5. "Where a party joins issue on a question previously litigated or voluntarily opens an investigation of matters which he might claim to be concluded by a prior judgment, he will be held to have waived his right to assert the benefit of the former adjudication and the case will be determined without regard therefor." *Dillard v. McKnight*, 34 Cal.2d 209, 219, 209 P.2d 387, 394, 11 A.L.R.2d 835. There was an entire absence of pleading and proof of the 1953 order and an entire absence of reliance thereon in the 1956 proceeding on petitioner's first account current and petition for instructions. Petitioner thereby waived the right to rely on the 1953 order in that proceeding.

As noted, the February 24, 1956 order provided that for a period of two years commencing January 10, 1956 there be paid from the income of the trust if sufficient, with any deficiency to be supplied from the principal, \$200 a month for the mainte-

nance, education, and support of each beneficiary. The order also provided that \$1,000 be paid to petitioner on account of and not in full discharge of amounts expended by him for administrative expense of the trust. This order became final. It left the amount to be allowed petitioner for administrative expenses open for future determination by the court.

[5] The present petition, filed four months after the order of February 24, 1956, covers the period from November 4, 1949 to December 31, 1955. It alleges that in order to provide support, maintenance, and education for the beneficiaries and in order to protect their interests petitioner was compelled to borrow money from a bank on their behalf; the bank would soon file suit to enforce payment unless it was paid a substantial amount; about \$1,500 was owing a law firm for services performed on behalf of the beneficiaries; a tax was owing the United Kingdom and an amount owing accountants; and certain expenditures had been made by petitioner's local attorneys, petitioner being a resident of the United Kingdom. The court did not find, as asserted by petitioner, that all the allegations of the petition were true. The finding was qualified. The court did not find that \$7,500 was available for distribution to petitioner. It found "that no injury will result to the trust or to any person interested therein by reason of the payments and distributions herein ordered, and that there is sufficient money and property on hand to make the payments herein authorized, and that petitioner has personally incurred expenses on behalf of the three beneficiaries of a substantial amount and that the sum of Six Thousand Dollars (\$6,000) should now be paid to him for all claims thereof to the date of filing said petition." The oral proceedings are not part of the record. The cause is here on the clerk's transcript. Consequently, the record does not show the condition of the trust either at the time the petition was filed or at the time of the hearing. We cannot say as a matter of law that

the court erred in allowing \$6,000 and not \$7,500.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



158 Cal.App.2d 197

Louis H. KAPLAN, Plaintiff and
Appellant,
v.

NALPAK CORPORATION, a California corporation, and Laz Freedman, Defendants and Respondents.

Civ. 22670.

District Court of Appeal, Second District,
Division 2, California.

March 5, 1958.

Action for declaratory judgment. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered the judgment challenged by plaintiff's appeal. The District Court of Appeal, Herndon, J., held that the cities or counties in which a corporation's business "has been carried on", within meaning of business and professions code section authorizing agreements not to compete within cities or counties in which business "has been carried on", are not necessarily only those in which it has maintained plants, warehouses, stores or other physical structures; and held that agreement to refrain from competition was valid and enforceable not only in county wherein corporation had its place of business but in those counties in which it had customers to whom it made sales in substantial amounts.

Affirmed.

1. Monopolies ☞ 12(4)

The cities or counties in which a corporation's business "has been carried on",

within meaning of Business and Professions Code section authorizing agreements not to compete within cities or counties in which business "has been carried on", are not necessarily only those in which it has maintained plants, warehouses, stores or other physical structures; and agreement to refrain from competition was valid and enforceable not only in county wherein corporation had its place of business but in those counties in which it had customers to whom it made sales in substantial amounts. West's Ann.Bus. & Prof.Code, § 16601.

See publication Words and Phrases, for other judicial constructions and definitions of "Carried On".

2. Contracts ☞117(2)

At common law, contractual restriction upon competition, where its imposition was incident to sale of business, was valid and enforceable if restriction was found reasonable in its duration and territorial scope.

3. Contracts ☞175(1)

Parties were presumed to have contracted with reference to law as it existed when contract was signed.

4. Appeal and Error ☞1008(3)

Where trial court's interpretation of contract is entirely reasonable in light of evidentiary facts stated in stipulation, its judgment should not be disturbed.

Harry Brody, Los Angeles, for appellant.

J. Jay Shapiro, North Hollywood, and Paul P. Selvin, Los Angeles, for respondents.

HERNDON, Justice.

Appeal from a declaratory judgment which determines the territorial limits within which appellant is legally bound to refrain from competitive business activity under the terms of a covenant contained in a contract whereby appellant Kaplan sold to respondent Freedman all his shares in respondent Nalpak Corporation.

The cause was submitted to the trial court upon a stipulated statement of facts. Appellant and respondent Freedman, herein-

after referred to as respondent," each owned one-half the issued and outstanding shares of respondent Nalpak Corporation, hereinafter referred to as the "corporation." The corporation was engaged in the manufacture and sale of hand trucks, dollies and other industrial equipment. Pursuant to a written agreement of sale dated March 21, 1956, respondent purchased all of appellant's stock. By the terms of the contract, appellant, the selling shareholder, promised as follows: "5. Kaplan further agrees not to re-establish, reopen, or in any manner become interested, directly or indirectly, either as an employee, owner, partner, agent, stockholder, director or officer of a corporation, or otherwise, in any business, trade, or occupation, the same as, similar or competitive to the business of Nalpak Corporation, within California and/or Arizona, for a term of Five (5) years from the date of this Agreement [continuing with exceptions not in issue] * * *."

It appears from the stipulation that both parties were represented by counsel in the negotiation of this agreement. In August of 1956, five months later, appellant filed his complaint for declaratory relief alleging the existence of several controversial issues. During the trial, however, the dispute was narrowed to the single issue as to the extent of the territory within which the non-competition covenant was valid and enforceable.

With respect to the geographical extent of Nalpak's operations, the parties stipulated as follows: "* * * that the defendant Nalpak Corporation has and prior to March 21, 1956, has had customers and sells and has sold to these customers in substantial amounts in the following counties of the State of California: Alameda, Contra Costa, Fresno, Humboldt, Imperial, Inyo, Kern, Kings, Los Angeles, Marin, Mendocino, Merced, Monterey, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, San Joaquin, San Louis [sic] Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, Solano, Sonoma, Stanislaus, Tulare, and Ventura. The defendants concede that they had no plant,

physical structure, or other place of business from which it either manufactured, or shipped merchandise other than in Los Angeles at the time of the agreement, March 21, 1956; and that since the agreement the defendant NALPAK has a warehouse in San Francisco for which they pay \$75.00 a month and have one employee, which warehouse was opened in April, 1956."

The applicable statutory provisions were enacted in 1941 as sections 16600 and 16601 of the Business and Professions Code:

"§ 16600. Contracts void. Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

"§ 16601. Exceptions: Sale of good will or corporate shares. Any person who sells the good will of a business, or any shareholder of a corporation selling or otherwise disposing of all his shares in said corporation, may agree with the buyer to refrain from carrying on a similar business within a specified county or counties, city or cities, or a part thereof, in which the business so sold, or that of said corporation, has been carried on, so long as the buyer, or any person deriving title to the good will or shares from him, carries on a like business therein."¹

The trial court agreed with respondents' contention that appellant's agreement to refrain from competition is valid in all of the thirty specified counties of California in which, according to the stipulation, the corporation had customers to whom it was making sales "in substantial amounts" at the date of the contract.

Appellant contended below, and now contends here, that his promise is not valid or enforceable beyond the limits of Los Angeles County. The essence of his argument is that the expression contained in section 16601, supra, "county or counties * * * in which the business * * * has

been carried on * * *" must be construed to mean "where the business is located," that is to say, in the county or counties in which the corporation "had a plant, physical structure or other place of business."

Stated in another way, it is appellant's contention that under the stipulated facts it must be held as a matter of law that, although the corporation "had customers" and "sold to these customers in substantial amounts" in the several specified counties other than Los Angeles, its business had not been "carried on" in those other counties because it "had no plant, physical structure, or other place of business from which it either manufactured or shipped merchandise other than in Los Angeles at the time of the agreement."

[1] We have concluded, after a review of the authorities hereinafter discussed, that appellant's contention is untenable. The cities or counties in which a corporation's business "has been carried on" within the meaning of section 16601 of the Business and Professions Code are not necessarily limited to those in which it has maintained plants, warehouses, stores or other physical structures.

[2] At common law a contractual restriction upon competition, where its imposition was incident to the sale of a business, was valid and enforceable if the restriction was found reasonable in its duration and territorial scope. There was recognition of a logical relationship between the permissible territorial scope of the restriction and the limits of the area in which the good will of the business had been established. It was the policy of the law, within reasonable limits, to protect the purchaser in the enjoyment of the good will which he had purchased and paid for. *City Carpet Beating, etc., Works v. Jones*, 102 Cal. 506, 36 P. 841; 33 Cal.Jur.2d 377, § 35; 58 C.J.S. Monopolies § 84, p. 1098.

Prior to the enactment in 1941 of sections 16600 et seq. of the Business and Professions Code, the statutory law of California

1. The provisions of section 16601 relating to the sale of shares of a corporation were added by amendment in 1945.

applicable to this type of contractual restraint was found in now-repealed sections 1673 and 1674 of the Civil Code reading as follows:

"§ 1673. Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void."

"§ 1674. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any one deriving title to the goodwill from him, carries on a like business therein."

It is immediately obvious that former Civil Code section 1674 was substantially more restrictive than is the presently effective statute. Whereas the former limited the permissible scope of the restraint to "a specified county, city, or part thereof," the present statute extends it to "a specified county or counties, city or cities, or a part thereof, *in which the business * * * has been carried on.*" The policy implicit in section 16601 of the Business and Professions Code seems more nearly consistent with the common law rule under which the territorial limits for permissible operation of covenants in restraint of competition were co-extensive with the area in which the good will of the business in question had been established.

In view of the significant change in the statutory law to which we have alluded, the four cases cited and relied upon by appellant are without controlling force. All but one of the four were decided before 1941 and the fourth, although decided in 1947, applied the former statute because it was effective at the date of the contract involved. Therefore we shall discuss these four cases but briefly.

In the City Carpet Beating, etc., Works v. Jones, supra, 102 Cal. 506, 36 P. 841, 842, the seller was engaged in the business of cleaning and renovating carpets at a certain

address in San Francisco. In selling the business he agreed that for a period of ten years he would not engage in a competing business in the city and county of San Francisco or in the counties of Alameda and San Mateo. The seller appealed from a judgment which enjoined him from competing with the buyer in the city and county of San Francisco, contending that the covenant was void because it covered three counties. Applying section 1674, Civil Code, the Supreme Court affirmed, holding that the agreement was valid in the city and county in which the business was conducted. The respondent purchaser conceded that the contract was void in so far as the other two counties were concerned. The decision contains the following language: "At common law the territorial restriction imposed by this contract would doubtless have been considered valid, inasmuch as a portion of the value of the goodwill may have accrued from customers residing in these contiguous counties, though the business was conducted in one alone; and the purchaser, unless restricted by statute or by a controlling public policy, was entitled to the whole of the goodwill which he purchased and paid for."

In Franz v. Bieler, 126 Cal. 176, 56 P. 249, 58 P. 466, the defendant seller agreed that he would not engage in the wine and liquor business "within a radius of ten miles in either direction" from the specified Oakland address of the business sold. On appeal from an adverse judgment, the seller contended that the covenant was wholly void. In rejecting this contention the court held "that the description of the territory is good as to all of it that lies within Alameda county, such boundaries being capable of exact ascertainment, the Code permitting the restriction to extend to 'a specified county, city, or a part thereof.'" Citing Civil Code, § 1674.

In General Paint Corp. v. Seymour, 124 Cal.App. 611, 12 P.2d 990, the appellant sellers of a paint and varnish business contended that because the agreement of sale purported to prohibit them from engaging in a similar business within the entire state

it was void. In rejecting this contention the appellate court again applied section 1674 and held the covenant valid as to Los Angeles County in which the operations of the business were centered.

In *Mahlstedt v. Fugit*, 79 Cal.App.2d 562, 180 P.2d 777, 779, appellant was restrained for a period of ten years from competing with respondent in Los Angeles County in the business of manufacturing and selling orchard heaters. The contract involved did not specify any territorial limits in so far as the non-competition clause was concerned. It was executed in May of 1941. The holding of the appellate court so far as material to our present inquiry is indicated by the following language from the decision: "The law in force at the time the contract was executed became a part of the contract and it is presumed that the parties contracted with knowledge of the law. On the date of the contract sections 1673 and 1674 of the Civil Code were in effect. * * * In the instant case the contract did not specify the territory in which appellant agreed that he would not engage in business. Prior to the sale appellant's business had been carried on in Los Angeles County and after the sale respondent conducted his business in the same county. The court construed the contract to be limited to the territory in which the parties respectively had conducted their business and restrained appellant from infringing on respondent's business in Los Angeles County. We find no error in the restraint thus imposed on appellant."

[3] In the instant case, the parties are presumed to have contracted with reference to the law as it existed in March of 1956 when the contract was signed. Under that law it was competent for the parties to agree to a restraint upon competition in the county or counties in which the business of the corporation had been carried on. Although formal findings of fact were waived in this case, the judgment itself states: "(d) As of March 21, 1956, Nalpak Corporation carried on and did, and Nalpak

Corporation now carries on and does substantial business in * * * [the included counties]."

[4] It is our view that the trial court most reasonably could infer and find that the business of Nalpak Corporation had been "carried on" in all of the specified counties in which it had been selling its products to its customers "in substantial amounts." Although the stipulation is silent as to the precise methods and procedures by which the corporation's sales had been effected, we cannot say as a matter of law that the trial court was not justified in drawing the inference that the selling of its products in substantial amounts involved the carrying on of business in the counties where such sales were made. We conclude that the trial court's interpretation of the contract is entirely reasonable in the light of the evidentiary facts stated in the stipulation. In these circumstances its judgment should not be disturbed. In re Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319; *Universal Sales Corp. v. California Press, etc., Co.*, 20 Cal.2d 751, 772, 128 P.2d 665.

It has been suggested that in determining the question here presented as to whether the corporation was "carrying on" its business in the included counties the trial court might well have applied the same test that is applied in determining whether a foreign corporation has been "doing business" within the state to such an extent as to be amenable to the service of process. Without deciding that this necessarily would be the proper test, we can say without hesitation that its application would support the same conclusion. *West Publishing Co. v. Superior Court*, 20 Cal.2d 720, 128 P.2d 777; *Kneeland v. Ethicon Suture Laboratories*, 118 Cal.App.2d 211, 257 P.2d 727; *Lewis Mfg. Co. v. Superior Court*, 140 Cal.App. 2d 245, 295 P.2d 145.

The portion of the judgment appealed from is affirmed.

FOX, P. J., and ASHBURN, J., concur.

**Dorsey Marlin MILLER, Plaintiff
and Appellant,**

v.

**Mary E. M. HEDRICK, Defendant
and Respondent.**

Civ. 5613.

**District Court of Appeal,
Fourth District, California.**

March 6, 1958.

Rehearing Denied April 1, 1958.

Hearing Denied April 30, 1958.

Action for declaratory relief brought by plaintiff alleging that defendant had divorced him outside of state and asking that court set forth in particular his visitation rights. From an order of the Superior Court of Kern County, Norman F. Main, J., plaintiff appealed. The District Court of Appeal, Griffin, J., held that it had not been an abuse of discretion for trial court to (1) award custody of child to defendant pendente lite, (2) limit plaintiff's visitation rights to four hours per week and (3) restrain plaintiff from requiring child to engage in any religious activities other than those directed by defendant.

Affirmed.

1. Parent and Child ☞2(3.1)

In action between parents in reference to custody of, and right of visitation with, minor child, welfare of child is the all-important question first for decision; and the State, acting in relation of parens patriae, has wide range of power for limiting parental freedom and authority in things affecting child's welfare and which may be detrimental to the mind of child. West's Ann.Civ.Code, § 138(2).

2. Parent and Child ☞2(4)

Trial court has broad discretion in determining whether advantages of good home, congenial surroundings, and intelligent attention and direction in matters affecting health and development of children are offered by respective parents.

3. Infants ☞19

Primary consideration in child custody case is what will promote best interests of child.

4. Divorce ☞303(3)

An application for modification of an award of custody is addressed to a sound legal discretion of trial court.

5. Divorce ☞403(9)

In action for declaratory relief, brought by plaintiff alleging that defendant had divorced him outside of state and asking that court set forth in particular his visitation rights, it was not, on record presented, an abuse of discretion for trial court to (1) award custody of child to defendant pendente lite, (2) limit plaintiff's visitation rights to four hours per week and (3) restrain plaintiff from requiring child to engage in any religious activities other than those directed by defendant. West's Ann.Civ.Code, § 138(2).

J. B. Tietz, Los Angeles, for appellant.

Dorris, Fleharty & Underhill, by C. Fleharty, Jr., Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff alleged in a declaratory relief action filed September 4, 1956, that he married defendant in March, 1951; that she secured a divorce from him in Nevada in October, 1953, and he was to pay \$15 per week for the support of their minor child and have the right to visit and be visited by the child at all reasonable times and places; that she lived in Kern County for more than one year last past with their son Stephen, now aged 5½ years; and that she is presently married to one Joseph Hedrick. Plaintiff also alleged that he had been a resident of California for more than one year and of Kern County for more than "30 days". He does not question the validity of the Nevada divorce decree but avers that in the event the court finds it is valid it should be so declared and enforced; that the court determine a reasonable amount for the child's support, not to exceed \$10 per week, and set forth, in particular, the father's visitation rights; and that a restraining order issue directing defendant to keep the child in California; that if the Nevada decree be declared inval-

id he should be granted a decree of divorce from defendant on the grounds of bigamy and extreme cruelty. He then alleges in some detail his religious belief, being that followed by Jehovah's Witnesses; that defendant follows the Catholic faith, though she violated it in obtaining a divorce from him; that she insists that the child, while visiting his father, be not exposed to plaintiff's religion and not allowed to sell and dispose of its literature; that on account of this training, when absent from her, the mother informed plaintiff he could not continue to have his son overnight or week-ends, as customarily granted, unless plaintiff promised to give up his religion; that through their attorneys they agreed plaintiff could come to her home and visit with the son and that defendant told him about April 15, 1956, if he went to court in California pertaining to the custody of the child she would take him to Texas. No demurrer or answer to the complaint has, as yet, been interposed.

An order was issued ordering defendant to appear and show cause why, during the pendency of the action, the child's custody should not be awarded to defendant "but with specific visitation rights to plaintiff". The husband's questionnaire on the hearing recited that he desired custody in defendant reserving to him a definite right to visit the child at specific hours, and to take him home overnight at least one week-end each month and for one week in the summer. The wife's affidavit shows that she obtained a final decree of divorce in Nevada on October 3, 1953; that by power of attorney, her husband authorized a Nevada attorney to appear for him; that such power of attorney authorized him to consent to a decree awarding the care, custody and control of the minor to the mother, and that he agreed to pay \$15 per week for the child's support; that a decree was so ordered; that plaintiff begrudgingly paid these payments when due; that the needs of the child are now greater and she seeks \$100 per month for his support; that she has always permitted plaintiff to visit his son at all reasonable times, has frequently per-

mitted him to visit with plaintiff over week-ends, and has never requested plaintiff to give up his religion; that since she recently found he was taking the child to religious meetings and requiring him to sell their publication from door to door she remonstrated; that she is raising her boy as a Catholic and believes, under her custodial rights, it would be antagonistic to have the child taught a belief contrary to those he is regularly taught, and that the child complained about spending his week-ends with his father under such conditions; that she curtailed his week-end visitations because plaintiff told her he did not want his child to grow up believing he should be taught to salute the flag of his country, that he owed it any allegiance or that he should defend it by going to war. For the best interests of the child she asked that if such teachings be not discontinued plaintiff's visitation rights should be abolished.

The trial court, after hearing the matter on the order to show cause, signed a written memorandum or order reciting that the parties did not there question the validity of the Nevada decree; that the custody of the child should be awarded to the mother pendente lite; that the father pay \$15 per week for his support; and awarded plaintiff reasonable visitations which would include a two-hour visit each Tuesday evening and a similar visit on any other evening agreed upon, and that both parties be restrained from removing the child from California. He then made a note that as between parents the parent having legal custody was entitled to determine the child's religion, citing *Armstrong's California Family Law* p. 954; *Burge v. City and County of San Francisco*, 41 Cal.2d 608, 617, 262 P.2d 6; and *Lerner v. Superior Court*, 38 Cal.2d 676, 681, 242 P.2d 321. The court remarked that the question of religion between the parents should not be a continual bone of contention and that the welfare of the child suggested the order made. Pendente lite plaintiff was restrained from requiring the minor child to engage in any religious activities other than those directed by the mother. The court concluded that

there was no apparent jurisdiction to grant a divorce to plaintiff. Plaintiff appealed from this order.

Several pages of testimony of plaintiff were taken, bearing mainly upon his activities with his church, his belief, and his desire and determination to bring his son up under such belief. He testified on cross-examination it would not be for the best interests of the child to be exposed to diametrically different religious teachings at the child's age. Defendant testified she did not deny visitation by the father because of his religious belief but claimed it was not for the best interests of the child to be taught two different religious beliefs at the same time.

As we construe plaintiff's contentions on appeal, he claims the court erred in holding that as between parents the parent having legal custody is entitled to determine the child's religious training; that the court abused its discretion in reducing plaintiff's visitation rights because of this plaintiff's religious opinion; that the testimony of the fitness of the respective parties to have the care and control of the minor child was not gone into and the court's finding that it had no jurisdiction to grant a divorce to plaintiff was not supported by the showing made, citing *Cory v. Cory*, 70 Cal.App.2d 563, 161 P.2d 385; *Stone v. Stone*, 16 Wash.2d 315, 133 P.2d 526; *People ex rel. Sisson v. Sisson*, 271 N.Y. 285, 2 N.E.2d 660; and *Denton v. James*, 107 Kan. 729, 736, 193 P. 307, 12 A.L.R. 1146, which in effect held that the court has no authority over that part of a child's training affecting its religious discipline, and in a dispute relating to custody, religious views afford no ground for depriving a parent of custody if he is otherwise qualified.

In the *Lerner* case, supra [38 Cal.2d 676, 242 P.2d 323], it was said: "The essence of custody is the companionship of the child and the right to make decisions regarding his care and control, education, health, and *religion*." (Italics ours.)

Plaintiff claims this statement was only dicta and that the cases in this state do not support such a rule when applied to religion.

[1] It must be borne in mind, in an action between parents in reference to the custody of and right of visitation with a minor child of this age, the welfare of the child is the all-important question first for decision, and the state, acting in the relation of *parens patriae*, has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare and which may be detrimental to the mind of the child. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 804, 64 S.Ct. 438, 784, 88 L.Ed. 645, 652-654, and 1090; *Wilson v. Wilson*, 58 Cal.App.2d 641, 137 P.2d 700; *Fine v. Denny*, 111 Cal.App.2d 402, 244 P.2d 983; Civ.Code, Sec. 138, subd. (2); *Ludlow v. Ludlow*, 89 Cal.App.2d 610, 201 P.2d 579.

[2-5] Here, it appears that the trial court was of the belief that dual custody of the child, under all the circumstances considered by it, was not for the child's best interest and welfare. Limited and controlled visitations were authorized, at least, pendente lite and until a full hearing is had after the pleadings are settled. The trial court has a broad discretion in determining whether the advantages of a good home, congenial surroundings, and intelligent attention and direction in matters affecting the health and development of children are offered by the respective parents. The primary consideration is what will promote the best interests of the child. (16 Cal. Jur.2d p. 551, sec. 261.) An application for modification of an award of custody is addressed to the sound legal discretion of the trial court. The record here before us contains no showing of abuse of discretion. *Fay v. Fay*, 12 Cal.2d 279, 283, 83 P.2d 716.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.

158 Cal.App.2d 169

Curtis MATTHEWS, Plaintiff and Appellant,
v.

**CIVIL SERVICE COMMISSION OF the
CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents.**

No. 17755.

District Court of Appeal, First District,
Division 2, California.

March 4, 1958.

Rehearing Denied April 3, 1958.

Hearing Denied April 30, 1958.

Action by civil service employee for declaratory relief to establish that he was entitled to advance to position available to one of his qualifications. From adverse judgment of the Superior Court, City and County of San Francisco, Clarence W. Morris, J., the employee appealed. The District Court of Appeal, Brazil, J. pro tem., held that record failed to show that trial judge prejudged case or failed to give plaintiff every reasonable opportunity to present his case.

Judgment affirmed.

1. Declaratory Judgment ⇨344

In action by civil service employee for declaratory relief to establish that he was entitled to advance to position available to one of his qualifications, it was not error on court's part to ask or permit asking of questions about residence, which were relevant on issue of receipt of notice of witness of his probable appointment to another position and for purpose of testing credibility of witness.

2. Evidence ⇨594

Uncontradicted and unimpeached testimony cannot arbitrarily be disregarded.

3. Evidence ⇨588

Disbelief of testimony of a witness does not prove that opposite of such testimony is established solely because of that disbelief.

4. Notice ⇨10

Where a statute requires notice and does not specify how it shall be given, presumption is that personal service is required.

5. Municipal Corporations ⇨217(1)

Rule of civil service commission setting forth consequences of failure of person eligible to appointment to respond to a notice of probable appointment within three days after mailing of notice permitted giving of such notice by mail.

6. Statutes ⇨219

Contemporaneous administrative construction of enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such interpretation unless it is clearly erroneous or unauthorized.

7. Municipal Corporations ⇨217(1)

Civil service rule providing that failure of person eligible to appointed position to respond within three days to notice of inquiry or notice of probable appointment shall automatically place such person under waiver of appointment was reasonable.

8. Declaratory Judgment ⇨364

In action by civil service employee for declaratory relief to establish that he was entitled to advance to position available to one of his qualifications, record did not disclose that trial judge prejudged case and failed to give plaintiff every reasonable opportunity to present his case.

Joseph T. Curley, Marvin C. Hix, San Francisco, for appellant.

Dion R. Holm, City Attorney of City and County of San Francisco, R. J. Reynolds, Deputy City Atty., San Francisco, for respondents.

BRAZIL, Justice pro tem.

From a judgment in favor of the San Francisco Civil Service Commission and some individual defendants, the plaintiff employee, a member of the system, appeals. He sought in an action for declaratory relief to establish that he was entitled to an advance to a position available to one of his qualifications.

The situation requires, first, an explanation of the circumstances involved. The

plaintiff was a civil service employee who at all times with which we are concerned stood at the head of the list of eligibles for the promotive position of J 10 Labor Subforeman. On February 29, 1956, the appointing officer for the position sent a requisition to the commission for the certification of the name highest on the list to fill a vacant J 10 sub-foreman job. On March 2, 1956, the commission mailed a notice to plaintiff of his probable appointment, but, because of a typographical error in the name of the street, the notice came back to the commission office in its original envelope. A clerk in the office definitely recalled the return of this notice and the re-mailing of the selfsame notice in a window envelope, this time properly addressed to the plaintiff at Apartment 2, 1801 Turk Street, San Francisco, California. This notice came back to the office again on March 13, 1956, but just how it got there no one was able to testify from personal knowledge. The original envelope was missing. A commission office clerk testified that, in the regular course of business of the commission, every time a notice was returned in an original envelope, the returned envelope was retained in the office along with the notice. The respondent relies for proof of the fact here involved, upon the disputable presumption that the ordinary course of business has been followed (Code Civ.Proc. § 1963, subd. 20); the inference being that the notice must have been returned in another envelope which, not being required by business practice to be kept, was thrown away.

Apartment 2, 1801 Turk Street, is the home of Mr. and Mrs. La Vallee, an address listed by plaintiff with the commission as his place of residence. There is only one mail box at the La Vallee apartment, and Mrs. La Vallee says she is the only one who had a key. She testified that Mr. Matthews slept on a couch in the living room, that he was there every night of the week beginning March 5, 1956, that no mail of any kind came to Mr. Matthews during that week. Plaintiff said he did not receive the notice, that he did not remain it

to the commission, that he was at the listed address every day of the week involved. It developed at the trial that plaintiff was married, that his wife lived in San Mateo County in a house the two of them owned in joint tenancy, that they were not divorced or legally separated, although plaintiff mentioned such a separation was at least contemplated.

On Friday, the 9th of March, the commission, not having heard from Mr. Matthews, within the allotted three days, mailed a notice of probable appointment to defendant Aiuto, the employee next on the eligible list. Mr. Aiuto promptly replied, got the job and has it to this day. Plaintiff said he found out about the situation late on Friday the 9th, and that he called on the commission at the earliest opportunity, which was Monday the 12th. He then orally protested the appointment of Mr. Aiuto to the position he claimed was rightfully his, following that up with a written protest, dated March 14th.

[1] There is no issue about plaintiff's residence, for all agree, and the pleadings so indicate, that he was a resident of San Francisco—that his failure to get the promotion is not based on any lack of residential qualification. In this regard, the appellant complains that it was error on the court's part to ask, or permit the asking of, any questions about residence, as that was an admitted fact; and in particular because the trial judge obviously appeared skeptical that plaintiff was, in fact, a bona fide resident of San Francisco. The questions about residence, while not material to determine a fact already established, were relevant on the issue of actual receipt of the notice and for the purpose of testing the credibility of the witness. The appellant sought on a motion for new trial to prove conclusively he was a resident of San Francisco, as is required by the charter, but that would have formed no basis for a new trial because the findings of the trial court by necessary implication found that to be so.

Section 141 of the Charter provides for the adoption of rules by the commission

to carry out the civil service provisions of the charter. Section 148 thereof requires, among other things, that upon receipt of a requisition to fill a position, such as we have here, "Thereupon, the commission shall certify the name and address of the person highest on the list. * * * In case the position is promotive, the commission shall certify the name of the person highest on the list." etc. The commission determines whether the position is temporary, seasonal or permanent and "shall notify the candidate in accordance therewith to the end that the candidate may have knowledge of the probable duration of the employment."

Commission Rule 23 sets forth that " * * * failure of an eligible to respond within 3 days to a notice of inquiry or notice of probable appointment relating to appointment to a permanent position, shall automatically place such eligible under waiver of appointment * * * until withdrawal of such waiver. * * * For purpose of this rule the term 'respond within three days' means that the response, either by letter, telephone or in person must be received in the offices of the Civil Service Commission during regular business hours within three days (Saturdays, Sundays and legal holidays excepted) after the date of *mailing* of the notice of inquiry or notice of probable appointment. In case of a notice *sent* to an eligible who is not a resident of San Francisco, the Personnel Director and Secretary may extend the time in which to respond * * *." (Emphasis added.)

The appellant claims error in that (1) the trial judge did not believe, what he says is the uncontradicted testimony, that the notice was not received, (2) the charter requires personal service of the notice of appointment, notice by mail being insufficient, (3) the plaintiff occupying a promotive job should have been automatically elevated without any preliminary notice, (4) the defendant upon receiving the requisition did not "thereupon", i. e., immediately or without delay, notify plaintiff, (5) the court impliedly found he did

not live at 1801 Turk Street where residence was not an issue and (6) he was deprived of a fair trial because the judge, from prejudice, prejudged the case, for which reason a new trial should have been granted.

[2,3] It is, of course, true that "uncontradicted and unimpeached testimony cannot arbitrarily be disregarded" (*Kneeland v. Ethicon Suture Lab.*, 118 Cal.App.2d 211 at page 229, 257 P.2d 727 at page 738), or that "evidence which is uncontradicted and not inherently improbable may not be disregarded by the trier of facts" (*Dickenson v. Samples*, 104 Cal.App.2d 311 at page 314, 231 P.2d 530, 532). The testimony of plaintiff and Mrs. La Vallee was, of course, not inherently improbable, but neither was it uncontradicted because there was circumstantial evidence that the notice was received. Presumptions are a form of evidence, and, in addition to the one heretofore cited, there is the presumption "that a letter duly directed and mailed was received in the regular course of the mail" (Code Civ.Proc. § 1963, subd. 24). Disbelief of the testimony of a witness does not obviously prove that the opposite of such testimony is established solely because of that disbelief. The findings are supported by indirect evidence, and not by absence of evidence because of such disbelief. Nor is there any merit in appellant's contention that the presumption of innocence of wrongdoing, being the strongest presumption (that plaintiff and witness La Vallee did not commit perjury), as a matter of law wiped out the other disputable presumptions. If such were so, no one could ever expect to try a case based on circumstantial evidence if opposed by direct evidence.

"Actual knowledge (waiver of sale) need not be directly proved. It, like any other fact, may be inferred from circumstantial evidence" (*Gantner & Mattern Co. v. Hawkins*, 89 Cal.App.2d 783 at page 786, 201 P.2d 847, at page 849).

[4,5] Ordinarily, "As to the matter of notice, it may be said that where a statute

requires notice and does not specify how it shall be given, the presumption is that personal service is required" (Colyear v. Tobriner, 7 Cal.2d 735 at page 743, 62 P.2d 741, at page 745, 109 A.L.R. 191). "It may be broadly stated that, where a statute or contract requires giving of notice, and there is nothing in the context or circumstances of the case, to show that any other form of notice was intended, personal notice will be required" (Stockton Automobile Co. v. Confer, 154 Cal. 402 at page 408, 97 P. 881, at page 884). While Section 148 of the charter is silent as to the manner of giving notice, Rule 23 in which reference is made to "mail" and notice being "sent" quite obviously contemplates that the notice may be mailed. The context and circumstances of the case as governed by the rules adopted pursuant to the charter and to supplement its provisions in the operation of the civil service system show that a form of notice other than personal was intended. This interpretation is supported by the rule of administrative interpretation over a period of 24 years or so, during all of which time such notices were all sent by ordinary mail.

[6] "The contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such interpretation unless it is clearly erroneous or unauthorized" (Richfield Oil Corp. v. Crawford, 39 Cal.2d 729 at page 736, 249 P.2d 600, at page 604).

[7] The rule which provides for notice of probable appointment is not unreasonable. Substantially such notice is for the benefit of the employee in that, if he is the first on the list of eligibles, he automatically gets the job, but he is given the opportunity to decline the appointment if for some reason, maybe on the information contained in the notice, he does not want it.

Appellant contends that "thereupon" when used to denote a sequence in time means "immediately" or "without delay", and in this he is supported by Webster. In

the first place, failure to "thereupon" notify appellant could only be important insofar as a few days increase in pay would have been lost by the delay, in the event he otherwise was entitled to the job. In Dennis v. Superior Court, 87 Cal.App.2d 279 at page 280, 196 P.2d 893, at page 894, in construing an Election Code provision, section 8550, requiring that "the court shall thereupon order" etc., the court approved the holding in Dudley v. Superior Court, 13 Cal.App. 271 at page 276, 110 P. 146, and Busick v. Superior Court, 16 Cal.App. 499 at page 504, 118 P. 481, that "'thereupon' does not of necessity mean immediately, but at most 'within a reasonable time.'"

The court, quite contrary to appellant's claim of error, impliedly found that appellant lived at 1801 Turk Street, for it made a direct finding that he had actually received the notice, and being at that address is a primary basis for such a holding.

Appellant cites 20 Cal.Jur. 51 for a rule that "It is an irregularity upon the part of the judge to express an opinion as to the weight and effect to be given the testimony of a witness during the progress of the trial." The authority for this statement is Pratt v. Pratt, 141 Cal. 247, 74 P. 742, 743, the reading of which will not disclose a basis for such a sweeping generalization if, by it, it is meant an irregularity sufficient, in and of itself, to require a reversal. In Pratt v. Pratt, the trial judge excluded relevant and competent testimony against which he confessed a prejudice, when, in a divorce case upon the calling of an 18 year old daughter of the parties, he said to appellant's attorney, "Can't you prove it by somebody else than the daughter? I don't know anything more revolting than to have a child put on the witness stand to dispute a parent, father or mother * * * I don't know anything that would condemn your client in my eyes so completely as to put that girl on the stand. * * * you would have to bolster everything he (defendant) said to make me believe," etc.

[8] The situation in the Pratt case is a far cry from this one where the trial judge, apparently prompted by a flippant

answer to one of his questions, promptly threatened plaintiff with contempt of court if such conduct happened again. The remarks of the trial judge indicated irritation rather than prejudice. A careful examination of the transcript discloses no instance of pre-judgment and no failure to give appellant every reasonable opportunity to present his case. In fact, there were instances, albeit less apparent, of irritation of the judge directed at the other side. As was said in *Barr v. Barr*, 119 Cal.App.2d 588 at page 591, 259 P.2d 957, at page 959, "Each of the cited cases in which trial judges have been found guilty of misconduct * * * has differed substantially from the others; none of them can be a controlling precedent in a new situation in which new fact questions are presented."

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

Hearing denied; CARTER, J., dissenting.



158 Cal.App.2d 94

Alma H. ESTES, Plaintiff,

v.

Robert S. ESTES, Precision Motor Cars, Bob Estes, a California corporation, and Rogers-Estes Engineering Corporation, Defendants.

Alma H. ESTES, Plaintiff, Cross-Defendant and Respondent,

v.

Robert S. ESTES, Defendant, Cross-Complainant and Appellant.

Civ. 22659.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1958.

Proceedings for divorce wherein the defendant husband filed a cross complaint. From an order of the Superior Court, Los

Angeles County, Orlando H. Rhodes, J., with respect to payments required of the defendant, the defendant appealed. The District Court of Appeal, White, P. J., held that defendant was properly required to pay auditing expenses incurred by plaintiff in examining books and accounts of corporations from which defendant's income was derived and that there was no abuse of discretion in fixing amount of payments required of the defendant where there was substantial evidence that he had capacity to discharge such obligations.

Order affirmed.

1. Divorce ⇨192

Where defendant husband in divorce case claimed he had been ordered to make payments beyond his ability to pay, adequate basis existed for examination, at husband's expense, of books and accounts of corporations in which defendant had an interest and from which his income was derived.

2. Divorce ⇨235

Where there was substantial evidence that defendant husband in divorce case was financially able to make payments directed, there was no abuse of discretion in court's order on ground that payments ordered exceeded his total income.

3. Divorce ⇨206

Payments required of defendant husband in divorce case were for "necessities of life" within meaning of that term as used in order restraining parties from transferring property except in due course of business or for necessities of life.

See publication Words and Phrases, for other judicial constructions and definitions of "Necessities of Life".

4. Divorce ⇨240(2)

In ascertaining ability of defendant husband to make payments in divorce case court is not restricted to consideration of his salary alone, but may consider all evidence concerning his income, assets and abilities.

Leon J. Garrie, Los Angeles, for appellant.

Combs & Hoose, Stanley Gleis, Beverly Hills, for respondent.

WHITE, Presiding Justice.

Defendant Robert S. Estes appeals "from that certain order made by the court in this action on January 4, 1957 and entered on January 8, 1957 * * * and from the whole thereof".

The action is one for divorce and the order from which defendant appeals was made on hearing of order to show cause. It requires that defendant pay \$750 auditing expenses incurred by plaintiff for examination of the books and accounts of corporations in which defendant has an interest and from which his income is derived.

[1] It is appellant's contention that the portion of the order requiring defendant to pay the expenses of said accountant must be reversed because "there is no evidence of any necessity for the examination of those records". In this respect he cites and relies upon the decision in *Low v. Low*, 143 Cal.App.2d 650, 654, 299 P.2d 1022, 1024, holding that the lower court therein erred in ordering the husband to pay plaintiff \$500 on account of expenses of accountants. In the *Low* case, however, plaintiff wished to examine the books of a corporation wholly owned by defendant as his separate property. The only materiality of the evidence to be thus acquired would be to prove "husband's ability to pay, about which he raised no question".

In the instant action appellant husband urges that the court has ordered him to make payments beyond his income or other ability to pay. It is conceded that he claims partial ownership of three corporations. It is alleged by plaintiff that all of the stock of Bob Estes, a California corporation, is owned by defendant, who is the alter ego of said corporation; that said corporation owes defendant husband \$40,000; and that said stock and debt are community property; that 6 $\frac{2}{3}$ shares of stock (of a total of 20) of Rogers-Estes

Engineering Corporation are owned by defendant as community property; that defendant owns 1,800 shares of Precision Motor Cars, a corporation, which is community property. Those allegations are denied by defendants husband, Precision Motor Cars, Rogers-Estes Engineering Corporation, and Bob Estes, a California Corporation.

Under the circumstances of the instant action, as shown by the pleadings, affidavits and testimony before the court, we cannot say that the implied finding of the trial court that there was a necessity for examination of the books of the various defendants is without support.

[2] The other ground urged for the reversal of the order is that "It was an abuse of discretion for the court to order defendant to make payments which exceeded his total income, where he was enjoined from disposing of any community or separate property and there was no proof that the plaintiff is unable to work". In this connection he cites and relies upon the decision in *Sweeley v. Sweeley*, 28 Cal.2d 389, 390, 170 P.2d 469, wherein an order for \$225 monthly temporary alimony was reversed. There the husband's monthly income was \$460.45 and his total cash was \$100, while the wife (a resident of Illinois) had under her control and in her possession the sum of \$5,800 in cash remaining from the proceeds of the sale of the Illinois home of the parties. The Supreme Court said, 28 Cal.2d at pages 393 and 394, 170 P.2d at page 472 thereof: "It is true that the trial court has a substantial range of discretion in determining whether support and suit money pendente lite are necessary and that the amount found necessary will not be disturbed on appeal unless an abuse of discretion clearly appears * * * but where, as here, it does clearly appear that the trial court, either from a misapprehension of the effect of its order (as seems probable), or otherwise, requires payments which are not shown to be necessary and which, in view of all the circumstances, including the substantial amount of cash in the possession and control of defendant,

are manifestly disproportionate to the needs and assets of the respective parties, the order cannot be sustained as an exercise of sound judicial discretion * * *

In *Fallon v. Fallon*, 86 Cal.App.2d 872, 195 P.2d 878, an award in favor of plaintiff wife was affirmed for attorneys fees and costs on appeal. At page 873 of 86 Cal.App.2d, at page 879 of 195 P.2d the court said: "The wife seeking these awards must establish her necessity for them. Such necessity may be proved only by showing that her need for proper support and the expenses of the litigation exceed her available resources. This means that the trial judge must be informed in detail not only as to her needs * * *, but also as to her resources."

There is testimony in the instant action that respondent was a dance instructor at Arthur Murray's from 1943 to 1946. She married the appellant in February 1949, their child was born in December 1949, she has earned no money since her marriage, and has none in her possession or under her control.

In *McBride v. McBride*, 95 Cal.App.2d 329, 330, 213 P.2d 9, 10, the court said: "We are mindful of the cases holding that an order should be made when a wife's testimony that she is wholly without income stands uncontradicted * * * but such cases presuppose a showing that the husband can pay."

Appellant, in his opening brief, states that "the probable explanation of the action of the trial court in compelling defendant to make payments in an amount over and above his total income is that the actual total amount of the miscellaneous items to be paid by the defendant was not apparent to the court * * *. It is also possible that the court inadvertently overlooked the fact since he had refused to grant defendant's motion to modify that portion of the July 16, 1956 order restraining the parties from transferring or encumbering any property pending the trial of the action that defendant could not even raise the means

of making the required payments by liquidating his business assets."

The restraining order last above referred to contains the following phrase "excepting in the due course of business or for the necessities of life". From appellant's own testimony, it can be inferred that one of his corporate businesses has a net worth in the neighborhood of \$350,000; that their home (in which respondent and the child are still living) is valued at \$60,000; that he is able to borrow at will; that respondent, with their minor son, has continued to incur the same expenses for the two of them as during some years before the separation; that since their separation appellant has spent a \$10,000 cashier's check which he then had in his possession and has placed another cashier's check for \$7,500 in escrow in an "oil deal". It also appears in the record that Bob Estes, a California corporation, entirely owned and managed by appellant, during eleven months of 1956 paid appellant \$11,000 salary, but, on its statement, showed a profit for those eleven months in excess of \$18,000. There is considerable conflict in the evidence as to appellant's income. Near the end of the hearing where the order was made, the trial court said, "From Mr. Estes' attitude concerning his business, everything is going to be difficult. If his testimony were accepted at its face value, he is unable to make any payments whatever, so he is going to have to finance the discharge of these accumulated balances and this further support money by borrowing, or perhaps selling stock or some other assets so that these payments can be made."

[3,4] We are persuaded that the payments required by the order are "necessities of life", for the payment of which appellant is not restrained from transferring or encumbering property. In finding that the husband has the ability to pay the amounts ordered the court is not restricted to a consideration of his salary alone, but may consider all the evidence concerning his income, assets and abilities. Where, as on the instant appeal, there is substantial

evidence that the husband has the "capacity to discharge the obligation of the support award", such award is not such an abuse of discretion as would warrant a reversal on appeal.

The order is affirmed.

DORAN and FOURT, JJ., concur.



158 Cal.App.2d 78

Anthony J. OAKES, Plaintiff and Appellant,

v.

William CHAPMAN, Jr., Defendant and Respondent.

Civ. 17478.

District Court of Appeal, First District,
Division 1, California.

Feb. 28, 1958.

Action for injuries sustained by plaintiff when defendant, with whom he was golfing, took a swing at a ball which went off on nearly a 90-degree angle from its intended line of flight and hit plaintiff in the eye. From adverse judgment of the Superior Court, San Mateo County, Louis B. Dematteis, J., the plaintiff appealed. The District Court of Appeal, Peters, P. J., held that trial court did not err in sustaining objection to question propounded to golfing expert as to effect, if any, that slight disability from which defendant suffered as result of poliomyelitis might have had when there was no showing that witness knew what effects, if any, such disability would have on golfer's swing and witness had testified that in 29 years of golfing he had never seen such a shot.

Judgment affirmed.

I. Evidence ⚡555

In action for injuries sustained by plaintiff when defendant, with whom he

was golfing, took swing at ball which went off on nearly a 90-degree angle from its intended line of flight and hit plaintiff in eye, trial court did not err in sustaining objection to question propounded to golfing expert as to effect, if any, that slight disability, from which defendant suffered as result of poliomyelitis might have had when there was no showing that witness knew what effects, if any, such disability would have on golfer's swing and witness had testified that in 29 years of golfing he had never seen such a shot.

2. Appeal and Error ⚡971(2)

Evidence ⚡546

It is for trial court to determine, in exercise of sound discretion, competency and qualification of expert witness to give his opinion in evidence, and its ruling will not be disturbed upon appeal unless manifest abuse of that discretion is shown.

3. Evidence ⚡508

Testimony of expert is admissible when such expert, because of his profession, or his peculiar skill and knowledge in some department of science not common to men in general, enables him to draw an inference where men in general would be left in doubt.

4. Negligence ⚡139(7)

In action by plaintiff for injuries sustained when he was hit in eye when golf ball hit by defendant went off on nearly a 90-degree angle from its intended line of flight, instruction that if plaintiff knew that defendant was about to strike golf ball, there was no duty upon defendant to make oral or audible warning of his intention to strike ball because such warning would have been superfluous, was proper.

5. Negligence ⚡25, 136(24)

Generally, whether there is duty to warn of intended golf shot is question of fact, but warning is not required to be given to persons who are aware that a potentially dangerous movement is about to be made, nor is one about to hit a ball required to warn persons in a position that is not, reasonably, in a state of danger.

Sullivan, Roche, Johnson & Farraher, San Francisco, for appellant.

Ropers & Majeski, Redwood City, for respondent.

PETERS, Presiding Justice.

[1] Plaintiff was hit in the eye by a golf ball driven by defendant. He sued defendant on the ground of negligence. The jury brought in a verdict for defendant. From the judgment entered on that verdict plaintiff appeals. His contentions are that the trial court committed prejudicial error in sustaining an objection to a question asked of the witness McMurry, and in instructing the jury that if plaintiff knew that defendant was about to hit the ball defendant was under no duty to warn the plaintiff of that fact.

On July 21, 1955, plaintiff and defendant were members of a foursome engaged in a golf game on a municipal course. The plaintiff and his son were placed in that foursome with defendant and another man by the club starter. The group played 15 holes without incident. The 16th hole is a long one—530 yards—with a par 5. Defendant's first shot from the 16th tee landed on the fairway, about 50 yards behind plaintiff's. Plaintiff and his son waited for defendant to take his second shot. They stood about 40 to 45 feet from defendant, standing in back of him as he faced the ball. Respondent is a left-handed golfer. Plaintiff watched defendant at all times, and even made a comment about defendant's choice of a No. 2 wood for his next shot. Defendant took a might swing and the ball went off on nearly a 90-degree angle from its intended line of flight and hit the plaintiff in the eye, seriously injuring him and causing the eye to be later removed.

Plaintiff's son was standing beside plaintiff when he was hit. They both testified that they had watched defendant on the preceding 15 holes and had noted nothing unusual about his swing or his play. As far as they knew, the defendant had not hooked the ball on any of his prior shots. They estimated that the ball went off 80 to 95 degrees from the intended line of flight.

No one actually saw the ball in flight because it was traveling too fast.

Defendant admitted that he had had infantile paralysis when he was young, but the disease had not impaired his arms or legs. His right arm is not quite as strong as his left. He can walk on his right leg, but does not have full use of it. He has full use of his left leg. He has the full use of his right hand except for picking up small objects such as pins. He can grasp a golf club with this hand and can follow a stroke right through with his right arm all the way behind him. He had been playing golf for about two years and averages around 90 strokes for 18 holes. He never before had hooked a ball on a 90-degree angle, his worst prior hook shot being off line about 35 degrees. He had never hit anyone before. He did not tell anyone in the foursome that there was anything wrong with his right arm or leg. He swung at the ball very hard and has no idea why it went so badly off course.

Everett McMurry, a golf professional called by plaintiff, testified that the safest place for a person to stand while another person is playing a shot is directly back of the shooter and about 25 to 40 feet away. A shot as here described would be very "unusual," or a "freak" shot. The witness had never seen such a shot in 29 years of playing golf.

Ralph Fry, another professional called by defendant, testified that, while a golf ball seldom goes exactly where the average player desires it to go, in 40 years of playing golf he had never seen such a shot, and, in fact, believed that such a shot would be "impossible" under any conditions. If such a shot happened it would not necessarily be the result of a physical deficiency.

On this evidence the jury brought in a verdict for the defendant, and plaintiff appeals.

Appellant's first contention is that the trial court committed prejudicial error when it sustained an objection to the following question addressed to appellant's expert McMurry: "Add onto the hypothe-

tical question that I previously gave to you of the circumstances of this particular case, add to that the fact that the man who was swinging the golf club at age 18 months had an attack of infantile paralysis and that the residual effect from that attack left one arm weaker than the other, and the right leg weaker than the other, and that in his right hand, he has no feeling of touch, and cannot, for example, pick up pins, and that he does not have full touch in the right hand, has some strength in it, but not the same strength that he has in the left arm, and assume further that that individual strikes the ball which goes a 90 degrees different direction from that which he intended, would you form any opinion as to the cause for the ball going in that direction?"

The trial court sustained respondent's objection to this question, stating: "I believe that the answer to the question propounded would entail the knowledge of matters that are beyond the qualifications of this witness. I think there are medical aspects involved in answering that question, and he hasn't been qualified as a medical man."

Later appellant, in his cross-examination of Mr. Fry, asked a similar question which was, however, allowed by the court. This question was as follows: "Now, assume, for instance, however, the situation where a man has less strength in one arm than he has in the other; assume that he has no sense of touch in his right arm; assume that when he was a child at age eighteen months, he suffered an affliction of an attack of poliomyelitis, which left some residual effect upon him, and that that residual effect affected both his leg and both his arm; assuming further that he is left-handed and that the residual effect is in his right arm and in his right leg; assuming further that he strikes a golf ball in the position in which you were right here, and that the golf ball goes directly behind him a distance of 40 feet and hits a man in the eye, would you not conclude that the direct cause of that abnormal, freak occurrence was the physical deficiencies under which the golfer was playing?"

Mr. Fry replied that he could not answer that question "directly," but that if such a shot occurred it would "not necessarily" be the result of a physical handicap; that "Anyone can hit a ball tremendously off line * * * and he would not have to necessarily be handicapped in any way in order to do so"; that such a shot normally just does not happen, and, in his opinion, it was "impossible for anyone to hit a golf ball at right angles for a distance of 40 feet with any kind of a golf club under any conditions."

[2] In close situations the admissibility of expert testimony is frequently a matter within the discretion of a trial court. In *Huffman v. Lindquist*, 37 Cal.2d 465, 476, 234 P.2d 34, 41, 29 A.L.R.2d 485, the Supreme Court stated the rule as follows: "It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence [citing a case], and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown. [Citing authorities.] The competency of an expert 'is in every case a relative one, i. e., relative to the topic about which the person is asked to make his statement.' 2 Wigmore on Evidence, 3d Ed., § 555, p. 634."

In *Fall v. Coastwise Line*, 116 Cal.App. 2d 345, 254 P.2d 58, the trial court sustained an objection to a question asked of a seaman and master of a lumber schooner as to whether a man in plaintiff's condition was physically qualified to perform the duties of an able-bodied seaman. In holding that this was not error the appellate court stated (116 Cal.App.2d at page 353, 254 P.2d at page 62): "The qualifications of a witness to testify as an expert is a matter within the sound discretion of the trial court; and where there is no showing of a clear abuse of that discretion, the ruling will not be disturbed on appeal. Cases collected—21 West's California Dig. ¶546, page 605. No such showing is made. The question merely assumed the present condition of plaintiff's foot and ankle as testified to by some of the medical

experts. The witness was not shown to have ever known any seaman, who, after an injury similar to that sustained by plaintiff, was able to go to sea and do actual work. There was no error."

Of course, the discretion conferred upon the trial court in such matters can be abused. Such an abuse was found in *Jones v. Johnston Testers, Inc.*, 132 Cal. App.2d 162, 281 P.2d 602. In that case the basic issue involved the question of how and under what circumstances a pipe cap fell from a hook. An expert—a mechanical and industrial engineer and a safety engineer—who had examined the hook was asked if the mechanism was so worn as to permit opening of the hook without exertion of pressure on the trigger. The effect of the wear and tear on the mechanism was obviously a question for expert testimony. The court held (132 Cal.App.2d at page 170, 281 P.2d at page 607):

"It has long been recognized that expert testimony is not only proper but also virtually indispensable in cases where the relation between the facts and results may be understood only by those with special skill or training.' [Citing a case.] That is the situation here. [Citing authorities.]

"The witness had disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury. The purpose of the question was apparent. It is evident from the question itself and from the previous testimony of the witness that his answer would have been favorable to plaintiffs. No offer of proof was necessary. Where a question to which an objection is sustained indicates that the answer to it will be favorable to the party seeking to introduce the testimony and the question is a material one, it is not necessary to make an offer of proof. [Citing 2 cases.]"

[3] It is well settled that the testimony of an expert is admissible when such experts, because of his profession, or his peculiar skill and knowledge in some department of science not common to men in general, enables him to draw an infer-

ence where men in general would be left in doubt. 10 Cal.Jur. p. 958, § 217; *Wells Truckways, Ltd. v. Cebrian*, 122 Cal.App.2d 666, 265 P.2d 557; *Eger v. May Department Stores*, 120 Cal.App.2d 554, 261 P.2d 281; *Burch v. Valley Motor Lines, Inc.*, 78 Cal.App.2d 834, 179 P.2d 47. The game of golf fits into this classification. It certainly is a game of skill. But this does not mean that the trial court committed error in sustaining the objection. There was no showing that the witness knew what effects, if any, the slight disability here shown to exist would have on the golfer's swing. The witness had testified that in 29 years of golfing he had not seen such a shot. The trial court was justified in concluding that he was not qualified to testify on this type of shot. There was no offer of proof and there is no showing that the witness could have answered the question, or what his answer would have been. Thus the court acted well within its discretion in sustaining the objection.

Even if the ruling were erroneous, the exclusion of this evidence could not have prejudiced appellant. The key issue was whether respondent knew or should have known, because of his physical condition, that there was danger that he might make such a shot so as to impose upon him a duty to warn bystanders. There was a failure of proof on that issue. Everyone concedes that on the first 15 holes defendant played a normal game. The evidence is to the effect that respondent had never before hooked or pulled a ball so badly. Never before had he made such a shot. If the jury had found that such an injury was foreseeable, where would there be one word of evidence to support such a finding? There is not one word of evidence that the residual effect of infantile paralysis in any way had ever affected respondent's game.

[4] The only other contention made by appellant is that the trial court erred in giving the following instruction: "If you find that the plaintiff knew that the defendant was about to strike the golf ball, there was no duty upon the defendant to make

oral or audible warning of his intention to strike the ball because such a warning would have been superfluous."

[5] Appellant urges that telling the jury that, as a matter of law, defendant would not be liable if plaintiff knew defendant was about to hit the ball was error. The instruction was correct. While it is the general rule that whether there is a duty to warn of an intended golf shot is a question of fact (*Everett v. Goodwin*, 201 N.C. 734, 161 S.E. 316; *Alexander v. Wrenn*, 158 Va. 486, 164 S.E. 715), it is equally clear that, as a matter of law, a warning is not required to be given to persons who are aware that a potentially dangerous movement is about to be made. In connection with a golf shot this principle was expressed as follows in *Stober v. Embry*, 243 Ky. 117, 47 S.W.2d 921, 922: "No duty to give notice of the intended drive existed for the benefit of the boy who was already aware of the player's purpose to send the ball in his general direction, and who was stationed where he could watch the play. Negligence is the breach of a duty owed to another by reason of the relationship existing or the circumstances presented, and the record contains no evidence tending to show that Embry failed to perform any duty imposed upon him either in omitting any precaution or in committing any act."

In reference to a factual situation similar to the one here involved the court in *Walsh v. Machlin*, 128 Conn. 412, 23 A.2d 156, 138 A.L.R. 538, stated: "At the time the defendant made his shot he knew that the plaintiff had walked away as above stated, and that his general position was about thirty-five or forty feet distant on a line at right angles to the intended and anticipated line of flight of the defendant's ball. When the defendant hit his ball there was nobody between it and the green, that is, within the intended line of flight or within the area within which danger from

the ball was reasonably to be anticipated, and the plaintiff knew that the shot was then being played or was about to be played. The plaintiff was then in a position where, under all ordinary circumstances, he should have been reasonably safe and not where the defendant should reasonably have anticipated that any injury from the shot would result to him. Under the circumstances the defendant was not under a duty to warn the plaintiff that he was going to strike the ball, for the plaintiff knew it and oral or audible warning would have been superfluous."

These and other cases establish the rule that, in golf, the person about to hit the ball is not required to give a warning to persons who know his intention, nor is he required to warn persons in a position that is not, reasonably, in a state of danger. *Houston v. Escott*, D.C., 85 F.Supp. 59; *Miller v. Rollings*, Fla., 56 So.2d 137; *Trauman v. City of New York*, 208 Misc. 252, 143 N.Y.S.2d 467. Thus the instruction correctly stated the law. The evidence is without conflict that appellant knew that the defendant was about to hit the ball, and was watching him at all relevant times. The evidence also is without conflict that appellant and respondent both felt that appellant was standing in a place where danger was not to be anticipated. The experts agreed on this issue. Respondent had no reason to believe that appellant was in a place of danger. The shot was purely a "freak" shot. A warning that respondent was about to hit the ball would have been superfluous. Neither party knew, or had reason to believe, that the ball would go 90 degrees off course. Under these circumstances there just was not any evidence of negligence on the part of respondent.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ.,
concur.

158 Cal.App.2d 27

In the Matter of JAMISON STEEL CORPORATION, a corporation.**Robert H. JAMISON, Elaine T. Barthorpe,**
Respondents,

v.

Harry F. BROWN, George W. Dellett, Jamison Steel Corporation, Appellants.**No. 17721.****District Court of Appeal, First District,**
Division 1, California.**Feb. 26, 1958.****As Corrected on Denial of Rehearing**
March 28, 1958.**Hearing Denied April 23, 1958.**

Suit for the appointment of a provisional director for a corporation on the ground that the directors of the corporation were evenly divided and could not agree as to the management of its affairs, so that business could no longer be conducted to advantage and that its property was in danger of being impaired and lost. The Superior Court, City and County of San Francisco, John B. Molinari, J., granted the petition, and the defendants appealed. The District Court of Appeal, McMurray, J. pro tem., held that the evidence did not establish an abuse of discretion by the trial court in granting the petition.

Judgment affirmed and stay vacated.

1. Corporations ⇨553(1)

The appointment of a receiver for a corporation is a drastic remedy and should not be invoked unless there is an actual or threatened cessation or diminution of the business.

2. Corporations ⇨281

The appointment of a provisional director for corporation, where corporation has an even number of directors who cannot agree as to management of its affairs, is merely a method of resolving the disagreements between the directors when there are an even number of directors on a board and the remedy is not analogous to that appointment of a receiver for the corporation. West's Ann.Corp.Code, § 819.

3. Corporations ⇨281

The remedy afforded by the statute for appointment of a provisional director where there are an even number of directors who cannot agree as to the management of the corporate affairs is available where the situation has not yet reached the point that a receiver should or could be appointed for the corporation, and does not reflect upon the financial standing of the corporation, nor does it take the property out of the hands of the owners or the persons actually administering its business. West's Ann.Corp.Code, § 819.

4. Corporations ⇨281

In suit by stockholders alleging that directors of the corporation were evenly divided and could not agree as to the management of its affairs, and that the business was in danger of being impaired and lost, evidence justified the appointment of a provisional director under the statute. West's Ann.Corp.Code, § 819.

5. Evidence ⇨553(2)

In suit to appoint a provisional director for a corporation on the ground that the directors were evenly divided and could not agree as to the management of the corporate affairs, hypothetical question was not improper because it did not, perhaps, exactly outline the type of business conducted by the corporation.

6. Corporations ⇨281

In suit for appointment of a provisional director for a corporation, defendant stockholders, by refusing to attend board meetings and refusing to call meetings when requested, could not complain of the acts of the plaintiff stockholders. West's Ann.Corp.Code, § 819.

7. Corporations ⇨281

In suit for appointment of a provisional director for a corporation on the ground that the existing directors are evenly divided and cannot agree as to the management of the corporate affairs, question before the court is whether there is a deadlock and not why such deadlock may exist. West's Ann.Corp.Code, § 819.

8. Corporations Ⓒ281

In suit for appointment of a provisional director for corporation on ground that existing directors were evenly divided and could not agree as to management of corporate affairs, fact that court gave provisional director uncontrolled authority to vote for an amendment to articles of incorporation was not improper as giving such director powers tantamount to appointment of plaintiff's nominee rather than an impartial person, since it could not be assumed that such director would not fairly perform his duties as a court-appointed officer. West's Ann.Corp.Code, § 819(b).

Cushing, Cullinan, Duniway & Gorrill, Ben C. Duniway, San Francisco, O'Melveny & Myers, Everett B. Clary, Los Angeles, for appellants.

Ruffcorn, Kimball & Smith, La Jolla, for respondents.

McMURRAY, Justice pro tem.

Robert H. Jamison and Elaine T. Barthorpe filed a verified petition in the Superior Court of the City and County of San Francisco under the provisions of section 819 of the Corporations Code, alleging that the directors of appellant Jamison Steel Corporation were evenly divided and could not agree as to the management of its affairs, so that the business could no longer be conducted to advantage and its property and business was in danger of being impaired and lost. The trial court granted the petition and appointed a provisional director. Harry F. Brown and George W. Dellett and Jamison Steel Corporation appeal from this judgment, and have filed a petition for a writ of supersedeas.

Edgar E. Jamison founded Jamison Steel Company in 1912. Robert H. Jamison, one of the respondents here, is his son. At first Jamison Steel was a partnership, but in 1935 it was incorporated. The original stockholders were appellant Harry F. Brown, Edgar E. Jamison, and J. S. Barthorpe, the husband of the respondent, Elaine T. Barthorpe, who inherited her

husband's stock upon his death in 1943. In 1956 Edgar E. Jamison transferred legal title to his stock to his son, Robert, in trust for Edgar. The appellant George W. Dellett does not presently own any stock in the business, but has been employed by the corporation since it was founded, and is now manager of the San Francisco office. Appellant Harry F. Brown was Los Angeles manager of the corporation until Mr. Barthorpe's death, at which time Brown succeeded him as general manager. Both Barthorpe and Brown were receiving a salary of \$600 plus a bonus of 15 per cent of the net profits of the corporation before taxes. When Brown became general manager, there was no change in compensation.

At the present time the stock of the corporation is held as follows: Respondent Barthorpe owns 90½ shares of common stock and 50 shares of preferred stock. Respondent Barthorpe's daughter owns 4½ shares of common stock. Respondent Jamison, as trustee for his father, holds 95 shares of common stock. Mrs. Barthorpe holds her daughter's proxy. Therefore, the respondents have under their control some 240 shares of corporate stock. Appellant Brown owns 50 shares of common stock and 50 shares of preferred stock. Edward Brown, his son, owns 30 shares of common stock, for which his father holds the proxy. Harry Brown, Jr., another son of appellant Brown, also owns 30 shares of common stock, for which his father holds the proxy. The appellants, therefore, have under their control some 160 shares of stock.

Until 1946 the Articles of Incorporation provided for a three-member board of directors, but in that year by resolution of the board the articles were amended to increase the number of directors to four. The directors, at the time of the change, were Mrs. Barthorpe, Harry Brown, and Edgar Jamison. George Dellett was appointed the fourth director. In 1955 Robert H. Jamison succeeded to his father's position as director.

The first meeting at which respondent Jamison was a director was held on December 6, 1955. At that meeting Mr. Brown

was unanimously elected president. It was unanimously decided to postpone the election of a vice-president until the next meeting. The nomination of Mrs. Barthorpe for secretary-treasurer resulted in a tie vote, as did the nomination of Mr. Dellett for secretary-treasurer, but as Dellett was the incumbent secretary-treasurer he retained the office for the year 1956. No decision was reached as to Brown's and Dellett's compensation at that meeting. Mr. Brown moved that a common stock dividend of 6 per cent of $\frac{1}{2}$ of the book value of the corporation as of the financial statement at the close of business on November 30, 1955, be declared. The vote on this motion was a tie. Mrs. Barthorpe moved that a 6 per cent dividend on the full book value as of November 30, 1955, be declared, and that Brown's bonus should be reduced from 15 per cent to 10 per cent. This motion also resulted in a tie vote, appellant Brown stating that the corporation could not pay a dividend of such amount without endangering its credit, and suggested a meeting in June, 1956, to discuss the possibility of an extra dividend. No action was taken. Appellant Brown moved that a 3 per cent dividend be paid on December 30, 1955, and a like dividend on June 30, 1956, on the preferred stock. This motion carried with Jamison not voting.

A special meeting was held on January 28, 1956. By unanimous vote the amount of dividend to be paid on the common stock was carried. Robert Jamison was unanimously elected vice-president. A pension of \$300 per month was voted for Edgar Jamison. A pension of \$250 per month was voted for Mrs. Barthorpe. And an incentive payment of 15 per cent of the net profits before taxes was voted to Mr. Brown. This incentive payment was to be based on the yearly profits but was to be paid monthly on an amount equal to 90 per cent of the net profits each month with a year-end adjustment.

In November, 1956, respondent Jamison and his attorneys called upon Dellett at his home. Jamison attempted to persuade Dellett to vote for an amendment to the

Articles of Incorporation to increase the authorized number of directors from four to five. During this meeting it was stated, according to the testimony, that Jamison intended to use a fifth director appointed by the court to amend the by-laws and that after such amendment they would dispose of such director and put in their own director.

The next regular meeting of the board of directors was held on December 4, 1956. The matters on which tie votes were cast were: (1) Election of president, Barthorpe and Brown being nominated, Brown, being the incumbent, retaining the office. (2) Election of secretary-treasurer, Ruffcorn, the attorney for respondents, and Dellett nominated, Dellett, the incumbent, retaining the office. The above positions are admittedly honorary in nature. (3) Barthorpe moved that the corporation declare a cash dividend of \$100,000 to the holders of both common and preferred stock on the basis of \$250 per share regardless of class. The Articles of Incorporation provide for a dividend of 6 per cent per annum on the preferred stock, which amount has never been exceeded. At the meeting Mrs. Barthorpe read a statement declaring that the corporation had available for distribution out of surplus a sum of not less than \$100,000 and that she had been informed that the corporation was reaching or had reached a point where it might be subject to the penalties provided in the Internal Revenue Code, 26 U.S.C.A. § 1551, relating to accumulated taxable income. Appellant Brown stated that such a payment would strip the corporation of needed funds for anticipated expenses and would require the dividend to be paid out of an amount considerably in excess of the corporation's net earnings after taxes for the 1956 fiscal year. The \$100,000 dividend proposed was almost three times as large as the next largest dividend ever paid by the corporation. (4) Appellant Brown moved for the adoption of a cash dividend of \$75,000 with staggered payments. He stated that such amount was twice as large as any previous dividend paid by the corporation and represented all

the net profits for the year 1956. By staggering the payment of such dividend the corporation could meet its obligations when they fell due. (5) Motions were made by respondents to reduce the salary of the general manager and increase the pensions given to Edgar E. Jamison and Elaine T. Barthorpe. In the discussion that followed it was stated that the method of paying the general manager had been effectively used since 1939 and had been unanimously affirmed at the last meeting. It was pointed out that the pensions might not be deductible in determining the income of the corporation for tax purposes. (6) Respondents each moved that they be employed by the corporation in executive capacities, although there was no opening at that time. (7) Respondent Barthorpe moved that the corporation's books of account for the years commencing January 1, 1941, and ending November 20, 1956, be audited by a certified public accountant who had not previously been employed by the corporation. Appellants claimed that such audit would be prohibitive in cost and that no reason or necessity for such an audit had been indicated. (8) A motion to amend the Articles of Incorporation to increase the number of directors from four to five also resulted in a tie vote.

Agreement was reached on the following matters: (1) Respondent Jamison was elected unanimously as vice-president. (2) A discussion on the expansion of the company's activities in the die set manufacturing field resulted in no action because it was felt that further consideration should be given to this proposal. (3) By unanimous vote a dividend of 6 per cent on the preferred shares was voted, payable 3 per cent on December 31, 1956, and 3 per cent on June 29, 1957.

Respondent Jamison called a special meeting of the board for December 8, 1956, notice of which was personally served on each director. Appellants Brown and Dellett did not appear at the meeting, and it was adjourned until December 22, 1956, at which time appellants Brown and Dellett were again absent. Thereafter, Jamison requested Brown to call a board meeting

for the day before the trial in the lower court, but no such meeting was called.

A special meeting of the board of directors was held after the trial on April 13, 1957. The provisional director appointed by the court was not present because of a stay granted by this court. At that meeting a general discussion was held concerning the Los Angeles office and a dividend of \$75,000 was unanimously voted. A motion to increase the board of directors from four to five members resulted in a tie vote.

The appellants argue that section 819 of the Corporations Code is analogous to the appointment of a receiver, claiming that there is no significant difference between the two capacities, and that section 819 merely provides a new type of remedy in cases where a court would have previously appointed a receiver. Section 819 of the Corporations Code, insofar as it is here under consideration, provides, "If a corporation has an even number of directors who are equally divided and cannot agree as to the management of its affairs, so that its business cannot longer be conducted to advantage or so that there is danger that its property and business will be impaired and lost, the superior court of the county where the principal office of the corporation is located may, notwithstanding any provisions of the articles or by-laws of the corporation and whether or not an action is pending for an involuntary winding up or dissolution of the corporation, appoint a provisional director pursuant to this section.

* * * * *

"(b) * * * The provisional director shall be an impartial person, who is neither a shareholder nor a creditor of the corporation, nor related by consanguinity or affinity within the third degree to any of the other directors of the corporation, or to any judge of the court by which he is appointed. The provisional director shall have all the rights and powers of a director, and shall be entitled to notice of the meetings of the board of directors and to vote at such meetings, until the deadlock in the board of directors is broken or until he is removed

by order of the court or by vote or written consent of the holders of a majority of the voting shares. He shall be entitled to receive such compensation as may be agreed upon between him and the corporation, and in the absence of such agreement he shall be entitled to such compensation as shall be fixed by the court."

The appellants contend that before this section may be applied it must be shown that two conditions exist within the corporation: (1) That the directors cannot agree as to the management of the corporation's affairs, and (2) that as a result of the disagreement (i) the business cannot be conducted to advantage, or (ii) there is danger that its property and business will be impaired and lost. They contend that the trial court's finding that these conditions exist as to Jamison Steel Corporation is erroneous as not being supported by the evidence, and, further, that the court could not exercise discretion under the code section, since it had no such power until both of the above conditions were satisfied. Since these conditions did not exist the court acted beyond its jurisdiction in exercising its discretion in appointing a provisional director. The appellants attempt to use the appointment of a receiver as an analogy to the remedy provided under Corporations Code, section 819, is not, we think, a fair analogy.

The appointment of a receiver is a more heroic remedy than that provided under the Corporations Code section here under consideration, since a receiver takes possession of all corporate property and assets and exercises complete control over all the affairs of the corporation including the management of its everyday business. The provisional director provided for under section 819(b) is merely a director who is entitled to notice of board meetings and may vote at such meetings until an existing deadlock of the board is broken or until he is removed by court order or by vote or written consent of the holders of a majority of the voting shares. He is merely a director and has none of the plenary powers which are granted to a receiver.

[1,2] The appointment of a receiver is a drastic remedy and is one which should not be invoked unless there is an actual or threatened cessation or diminution of the business. Furthermore, as is stated in *Sternberg v. Wolff*, 56 N.J.Eq. 555, 42 A. 1078, 1081-1082, "The idea of insolvency, actual or threatened, is so thoroughly associated in the minds of the public with the appointment of a receiver, that it is readily seen that many of the debtors of the concern would feel themselves absolved from any further obligation to pay. Then, also, we must consider the effect upon the general credit of the corporation of the appointment of a receiver, and I cannot but think it will seriously injure, if not destroy, its credit." No such feeling among the debtors of a corporation would result from the appointment of a provisional director, which is merely a method of resolving disagreements between directors when there are an even number of directors on a board. In *Golden State Glass Corp. v. Superior Ct.*, 13 Cal.2d 384, at pages 393 and 394, 90 P.2d 75, at page 80 it is said:

"It is established, however, that a court of equity has power to appoint a receiver of a going corporation upon a showing that there are such dissensions in its governing body as to create a virtual suspension of its business * * * The rule which should govern such an appointment has been succinctly stated by Mr. Pomeroy as follows: 'The power of a court of equity to appoint a receiver of a corporation either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, appears to be settled; but it is equally well settled that this power is subject to certain limitations, namely, it must always be exercised with great caution, and only for such time and to such extent as may be necessary to preserve the property of the corporation and protect the rights and interests of its stockholders. * * *'"

A reading of section 819 of the Corporations Code reveals that it does not require such conditions to exist. In that case the court points out that the appointment of a receiver may well result in serious injury to the name and good will of a solvent, going concern, and that if there is any other adequate remedy, which is less severe and which will protect the rights of the parties, a court should not take the drastic step of appointing a receiver.

[3] It is apparent that the remedy afforded by Corporations Code, section 819, is one which is available in situations which have not yet reached the point that a receiver should or could be appointed. It is a less severe remedy which is available to protect the rights of the parties and does not reflect upon the financial standing or good name of the corporation nor does it take the property out of the hands of the owners or the persons actually administering its business. There is a readily discernible difference between a corporation not able to conduct its business to advantage or being in danger of impairing and losing its property and a corporation which is in danger of cessation or diminution of operations. The facts recited in this opinion may well be taken as a model for the facts which will justify the invoking of the remedy provided by Corporations Code, section 819.

The appellants argue that the only evidence relevant to the trial court's finding that the directors were unable to agree as to the management of the corporation's affairs were in the minutes of December 4, 1956, and that none of the motions on which tie votes were cast were directly concerned with the operation of the corporate business. They urge that the only matter which might deal with the management of the corporation was the question of the dividend and that the action taken at the April 13, 1957, meeting wherein a dividend was declared has rendered that point moot. We do not believe, however, that where an incumbent carries over in an office on the board of directors because of repeated tie votes as to the election of a person to that

office, it can be said that this is not a matter which directly or indirectly affects the administration of a corporation.

[4] The directors did select officers but by tie vote. Appellants overlook the fact that this is merely a perpetuation of incumbents in office and is certainly not a condition which is one that is healthy in a business enterprise. The non-attendance of appellants at the two special meetings, their refusal to discuss disagreements, and appellant Brown's refusal to call a third meeting when requested also lack much of reaching the level of administration that should be afforded in the management of a corporation. We do not feel that perpetuation of existing policies or incumbent officers in office can be construed as effectively managing corporate affairs. In our opinion the trial court acted within its jurisdiction and properly in appointing the provisional director.

Appellants also contend that the trial court erred in its finding that the corporation's business cannot be conducted to advantage and that its property and business is in danger of being impaired and lost, arguing that there is no evidence to support such finding.

This argument fails when it is considered that the testimony indicates that unless a \$100,000 dividend was declared the corporation might suffer penalties under the Federal Tax Statutes. Appellants seek to meet this argument by stating that the \$75,000 dividend voted after the trial removed this danger to the corporation, and that, therefore, the deadlock existing is broken and the reason for a provisional director no longer exists and he should be removed. The position of appellants in this regard would appear to be somewhat didactic, since it is also apparent from a reading of the record that a disagreement exists over the payment of the general manager's salary that is of sufficient consequence that it might impair the corporation's property.

[5] Appellants object to a hypothetical question, which was asked, and the answer

given to such question. They contend that such question assumed a type of business different from that of Jamison Steel Corporation, since it assumed a flat salary rather than a bonus arrangement. They argue that the compensation is not a matter of deadlock, but resulted from the unanimous action of the board at a previous meeting, and that the salary cannot cause a loss to the corporation, since only nominal payments are made unless the corporation makes a profit. That the board of directors might well change its mind after having previously fixed a salary would seem so evident as to require no comment. The fact that the hypothetical question complained of did not perhaps exactly outline the type of business conducted by Jamison Steel Corporation does not, for that very reason, disqualify the question or the answers given thereto from some consideration by the trial court. We must assume that the court properly applied the expert's opinion, which was given in response to the question.

Where the two principal stockholders of a corporation are dissatisfied with the method of payment of its principal employee that appears to be a matter of interest and importance to the corporation. Furthermore, the fact that respondent Barthorpe did not trust the audit made of the corporation's books nor approve of the fact that appellant Brown's wife owned the building occupied by the corporation in Los Angeles and has increased the rent thereon several times without informing the board and, further, that appellant Brown had hired his son as an assistant, paying him \$11,000 a year without consulting the board, would appear to show that there is not such unanimity of action by the board of directors as to render a provisional director under the provisions of the Corporations Code section here under consideration unnecessary.

It seems evident that possible excessive rent charges and employment of a member of the family as an assistant might well result in a monetary loss to the corporation

and thus threaten a loss of its property. It is our opinion that the effect of all of the evidence before the trial court is sufficient to support its finding that the corporation's business cannot be conducted to advantage and that its business and property is in danger of being impaired and lost.

[6, 7] Appellants urge that the doctrine of estoppel or the doctrine of unclean hands should apply as to the respondents in this case, since, they contend, the tie votes were a device used by respondents for the sole purpose of procuring the appointment of the provisional director and of ultimately obtaining control of the corporation. In support of this position they cite the testimony of Mrs. Dellett that Jamison, through his attorneys, stated he would get control of the company. They also state that the very nature of the motions made by respondents shows that they were not made in good faith. The factual situation presented by the record before us shows clearly that both sides have refused to compromise until such time as urgent necessity has required some action by them. The appellants, by refusing to attend board meetings and refusing to call meetings when requested, are in no position to complain of the acts of respondents. Furthermore, we feel that the doctrine here sought to be invoked has no application under section 819 of the Corporations Code. The question before the court is whether there is a deadlock and not why such deadlock may exist. To place upon a court the burden of determining one's reason for voting on certain matters would be to impose a burden that would be almost impossible of fulfillment.

When it is considered that the respondents are the majority shareholders, it is not surprising that they might well be discontented with a situation whereby they are denied a controlling voice in the operation of the corporation. Whether or not respondents exercised good faith in proposing motions and in casting their votes was a matter before the trial court. This

court cannot invade that court's province in that respect. In the record adequate reasons for proposals made by the respondents were given. So long as their personal interest did not harm the corporation it would seem that such interest might well be an adequate reason for justifying their conduct here. Appellants also mention that the respondents should be estopped to complain since they voted for a four-man board and should have known that deadlocks could and would arise in such a case. The argument is somewhat weakened when the composition of the board at the time it was voted to change the number of directors from three to four is viewed, since appellant Brown is the only person now a director who voted to change the number of directors from three to four.

[8] Appellants argue that the trial court erred in giving the provisional director uncontrolled authority to vote for an amendment to the Articles of Incorporation, and argue that the appointment of a provisional director with such broad powers is tantamount to the appointment of respondent's nominee rather than an impartial person. This position, however, assumes that the provisional director will not conscientiously and fairly perform his duties as a court-appointed officer, and the language of section 819(b), which reads: " * * * The provisional director shall have all the rights and powers of a director, and shall be entitled * * * to vote at such meetings, until the deadlock in the board of directors is broken or until he is removed by order of the court or by vote or written consent of the holders of a majority of the voting shares * * *," makes it patent that the legislature intended to grant the provisional director all of the powers ordinarily exercised by other directors. Furthermore, it is within reasonable possibility that the provisional director may well feel that the business of the corporation does not require an uneven number of directors, but that the differences between the parties may be adjusted.

The judgment appealed from is affirmed, and the stay under writ of supersedeas, which has been heretofore granted, is vacated.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.



158 Cal.App.2d 86

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Frank GOLDSTEIN, Defendant and
Appellant.

Cr. 3440.

District Court of Appeal, First District,
Division 2, California.

Feb. 28, 1958.

Prosecution under information charging offenses of occupying premises with paraphernalia for purpose of recording or registering bets, of recording bets and of accepting bets. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered judgment finding defendant guilty of occupying premises with paraphernalia for purpose of recording or registering bets and acquitting defendant of the other charges, and the defendant appealed. The District Court of Appeal, Draper, J., held that fact that defendant had been acquitted of the charge of recording bets and that of accepting bets did not preclude his conviction on charge of occupying premises for the purpose of recording bet.

Affirmed.

1. Gaming ☞98(5)

Occupancy of premises for purposes of recording bets can be shown without production in court of the betting markers

themselves. West's Ann.Pen.Code, § 337a, subd. 2.

2. Gaming ☞98(5)

Fact that apartment and telephone were under an assumed name supported finding that apartment was occupied for illegal purpose of recording bets. West's Ann.Pen.Code, § 337a, subd. 2.

3. Gaming ☞98(5)

Fact that apartment and telephone were under an assumed name, together with defendant's admission that he had disposed of betting records, was sufficient to establish corpus delicti of offense of occupying premises with paraphernalia for purpose of recording or registering bets. West's Ann.Pen.Code, § 337a, subd. 2.

4. Criminal Law ☞878(3)

Fact that defendant had been acquitted of the charges of recording bets and that of accepting bets, did not preclude his conviction on charge of occupying premises for purpose of recording bets. West's Ann. Pen.Code, §§ 337a, 954.

5. Criminal Law ☞878(4)

The disposition of one count of an information has no bearing upon the other counts, even though there may be a degree of logical inconsistency in the finding. West's Ann.Pen.Code, § 954.

Benjamin M. Davis, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

By stipulation, three counts of violation of Penal Code, Section 337a were tried to the superior court upon the transcript of the preliminary hearing. Defendant was found guilty of violation of subdivision 2 (occupying premises with paraphernalia for the purpose of recording or registering bets) and was acquitted of the charged violation of subdivision 4 (recording bets) and subdivision 6 (accepting bets). He was

sentenced to one year in county jail, but execution of sentence was suspended and he was admitted to probation for two years on condition he pay a fine of \$250. Defendant appeals.

Police maintained surveillance of an apartment occupied by defendant under the name of Marx. An officer standing in the hallway outside the apartment heard the telephone in the apartment ring, and heard a man's voice answer. The conversation of the apartment's occupant indicated that he was receiving bets upon horse races. Shortly thereafter the same voice again answered the telephone, and this time gave a list of initials, names and amounts. The officer heard the toilet in the apartment being flushed six or seven times. A short time later, appellant left the apartment. An officer asked to talk to him, and at appellant's invitation entered the apartment with him. Until that time, no one but appellant had entered or left the apartment, and the apartment was unoccupied when appellant and the officer entered it. The apartment contained no clothing except one pair of women's slippers. A list of names or initials and telephone numbers, which was identified by an expert as a list of bettors, together with an "owe sheet," were found on the kitchen table. Another "owe sheet" was found in a closet. A racing form was in appellant's possession as he left the apartment. It appears that an "owe sheet" is a list of amounts due to and from bettors. Appellant told officers that he had flushed the records of bets down the toilet. He admitted that the "owe sheets" were his, that he had used the apartment for less than a week, that he lived elsewhere, and that the telephone in the apartment was his but was listed under the name of Marx.

Appellant argues that the evidence is insufficient to sustain the judgment. He relies upon *People v. Foreman*, 112 Cal.App. 2d 616, 246 P.2d 979. In that case, a room contained betting markers. However, in the absence of evidence that they were in defendant's handwriting or that he had ever occupied the room, it was held that the evidence was insufficient to sustain a

conviction of occupying the room for the purpose of recording or registering bets. Appellant concedes the inapplicability of this holding to the case at bar. He relies upon language in the decision stating that "owe sheets" "are commonly used to pay bets or make collections but not to 'record or register bets'" (112 Cal.App.2d at page 619, 246 P.2d at page 981). He argues that, since only "owe sheets," rather than betting markers, were found here, there is no evidence that the room was occupied to record or register bets.

[1] But occupancy of premises for the purpose of recording bets can be shown without the production in court of the betting markers themselves. In *People v. Jackson*, 152 Cal.App.2d 397, 313 P.2d 931, a piece of linoleum, a pencil and a wet sponge were found. There was expert testimony that a smooth surface, such as linoleum, was frequently used to record bets, and that the record could be erased by use of the sponge after the bets had been relayed by telephone to another location. In *People v. Watkins*, 126 Cal.App.2d 199, 203, 271 P.2d 641, it was pointed out that a telephone may be "paraphernalia" within the meaning of Subdivision 2 of Penal Code, Section 337a.

[2,3] In the case at bar, the telephone conversations overheard by the officer warrant the inference that appellant was taking bets in the apartment, making a record of them, and relaying these recorded bets to another. The fact that the apartment and telephone were under an assumed name support the finding that the apartment was occupied for this illegal purpose. Thus the evidence was sufficient to establish the corpus delicti (*People v. Race*, 151 Cal.App. 2d 678, 685, 312 P.2d 322) and appellant's admission that he had disposed of the betting records clearly establishes his guilt of the offense charged.

[4,5] Appellant suggests that, because he was acquitted of the charge of recording bets and that of accepting bets, he cannot be convicted of occupying premises for the purpose of recording bets. The disposition

of one count of an information has no bearing upon the other counts, even though there may be a degree of logical inconsistency in the findings (Pen.Code, § 954; *People v. Villa*, 156 Cal.App.2d 128, 318 P.2d 828; see also *People v. Smith*, 35 Cal. App.2d 73, 76, 94 P.2d 633).

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



158 Cal.App.2d 98

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Abel GONZALVES, Defendant and
Appellant.**

Cr. 6061.

District Court of Appeal, Second District,
Division 1, California.

Feb. 28, 1958.

Rehearing Denied March 10, 1958.

Defendant was convicted of unlawful sale of heroin. The Superior Court, Los Angeles County, Herbert V. Walker, J., rendered judgment, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained conviction and that where defendant allegedly rode with codefendant, investigator for District Attorney's office and unidentified informer to location where heroin was given by defendant to codefendant who gave it to investigator, defendant was not entitled to ascertain name and identity of informer, in view of fact that informer did not participate in the crime.

Affirmed.

I. Witnesses — 216

In prosecution for sale of heroin by defendant who allegedly rode with codefend-

ant, investigator for District Attorney's office and unidentified informer to location where heroin was given by defendant to codefendant who gave it to investigator, defendant was not entitled to ascertain name and identity of informer, in view of fact that informer did not participate in the crime.

2. Poisons ☞9

Evidence sustained conviction of unlawful sale of heroin.

3. Criminal Law ☞741(1), 742(1)

Weight of evidence and credibility of witnesses are matters for trier of fact to determine.

4. Criminal Law ☞1159(2)

To warrant reversal on ground of insufficient evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below.



Robert M. Maslow, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

The appellant and Mary Gonzalves, husband and wife, were charged with the unlawful sale of heroin, and convicted after a trial before a judge, a jury trial having been waived. A petition for writ of error coram nobis was denied. Appellant's notice of appeal was ruled invalid but the Supreme Court granted leave to petition for relief from default in the preparation of a record (In re Gonsalves, 48 Cal.2d 638, 311 P.2d 483), and the present appeal followed.

It appears from the record that at approximately 10:00 a. m. on September 17, 1955, officer Anthony Coia, an investigator for the District Attorney's office, drove with appellant, appellant's wife, and an unidentified informer, to a location in Los Angeles. Appellant left the car, returning about ten minutes later to a point some 50 feet away, from where appellant called and motioned to his wife to join him. Appellant spoke

to the wife and handed her a small white package. Appellant's wife then walked back to the automobile, entered the rear seat and handed three "caps" of heroin to officer Coia, left the vehicle, and the officer drove away.

There was testimony that on September 27, 1955, Lieutenant Nick Cimino talked to appellant in the Hall of Justice; that appellant admitted accompanying officer Coia and the others with knowledge that they were driving to pick up some heroin; that appellant did not wish to sell narcotics directly to Coia, and so gave the "caps" to Mrs. Gonzalves who went to the car with the caps. Appellant, at the trial, denied knowing anything about the narcotics, and claimed to be going to see a friend whose name could not be remembered. Appellant also denied telling Cimino that appellant had participated in any sale of narcotics.

It is appellant's contention that the trial court committed reversible error in refusing to permit appellant to ascertain the name and identity of the informant who accompanied officer Coia in the automobile. In support of this contention appellant argues that "Where an informer is an active participant in a narcotics sale case, it is reversible error to sustain objections to questions asking the arresting officer to name him". In this connection appellant relies on such cases as *People v. Castiel*, 153 Cal.App.2d 653, 315 P.2d 79, and *People v. Lawrence*, 149 Cal.App.2d 435, 308 P.2d 821.

As pointed out in the respondent's brief, the facts in the cited cases are distinguishable from those existing in the present case, since the evidence in the cited cases shows that the informer actively participated in the commission of the crime. This element of active participation was not present in the instant case where the informer was merely present in the automobile and in no manner participated in the sale. In the *Castiel* case cited above, the undisclosed informer was a principal actor; in the *Lawrence* case, only the informer was present at the time of the sale and was obviously a participant.

[1] The distinction between the two situations is thus expressed in *People v. Lawrence*, 149 Cal.App.2d 435, 308 P.2d 821, 830: "The name of an informant who co-operates with law enforcement officers has been held to be confidential upon the theory that the informant performs a public service. * * * This is particularly true in narcotics cases. * * * When such a person is truly an informant he simply points the finger of suspicion towards a person who has violated the law. * * * On the other hand, when an informant participates in the criminal act he is no longer simply an informer". So the rule is stated that "When an informant becomes a participant in the crime charged against the defendant, he and the people lose the right to keep his identity anonymous". In the present case the informant was entirely passive.

[2] Appellant's further contention that the evidence was insufficient to sustain the conviction, is untenable. Conceding that Mary Gonzalves was involved in an unlawful sale of narcotics, appellant husband claims that there is no evidence of a corpus delicti, linking appellant with the crime.

The record discloses evidence that officer Coia had paid money to Mary Gonzalves who handed the money to appellant; that the officer had seen appellant hand to Mary "a small white package", and that appellant gave the "caps" to his wife, feeling that he should not sell directly to the officer. Appellant's denial of any knowledge of the matter and the story that appellant was merely riding with officer Coia to the home of a friend whose name he could not remember, was not believed by the trial judge.

[3, 4] The law is well settled that the weight of the evidence and credibility of witnesses are matters for the trier of fact to determine. As said in *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 780, to warrant a reversal on the ground of insufficient evidence, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to

support the conclusion reached in the court below".

The judgment is affirmed.

WHITE, P. J., concurs.

FOURT, J., concurs in the judgment.



158 Cal.App.2d 279

Helen C. MILLS, Plaintiff and Appellant,

v.

George J. RUPPERT, Jr., and Barbara A. Ruppert, Defendants and Respondents.

Civ. 9196.

District Court of Appeal, Third District,
California.

March 6, 1958.

Hearing Denied April 30, 1958.

Action for specific performance of an option to purchase real property. From a judgment denying relief in the Superior Court, Mendocino County, Lilburn Gibson, J., the plaintiff appealed. The District Court of Appeal, Peek, J., held that the evidence justified the denial of specific performance.

Judgment affirmed.

Specific Performance 61, 119

Plaintiff was not entitled to specific performance of an option to purchase real property contained in lease of a motel on the ground that the defendants agreed to sell their interest in the property to another for \$21,000 and to prevent plaintiff from exercising her option represented that the price was \$26,000, where the evidence failed to sustain the contention of plaintiff, and she accepted a sum of \$1,000 and executed a waiver of her rights under the option to purchase the interest.

L. G. Hitchcock, Santa Rosa, for appellant.

Purchio, Crews & Fairwell, Hayward, for respondents.

PEEK, Justice.

This is an appeal by plaintiff from a judgment denying relief in an action for specific performance of an option to purchase real property.

By her complaint, plaintiff alleged that defendants, as joint tenants with certain other persons not parties hereto, leased to her a motel in the city of Ukiah; that under the terms of the lease in the event the lessors chose to sell she was given the option to buy the property upon the same terms and conditions as contained in any bona fide offer received by the lessors; that the defendants agreed to sell their undivided one-half interest to one Smith for \$21,000; that to prevent plaintiff from exercising her option, defendants represented in their written notice to her that they proposed to sell their interest for the sum of \$26,000; that defendants well knew that such sum was not a fair or reasonable price; that plaintiff had demanded performance by defendants; that they refused to accept her tender of \$21,000 and refused to fulfill any of the terms of the option agreement. The complaint concluded with a prayer that defendants be compelled to specifically so perform the contract.

At the conclusion of the trial the court found in part that none of the allegations of plaintiff's complaint were "* * * true except it is true that there *may* have been an original offer of \$21,000.00, but if there was such an offer it was soon thereafter annulled by the offeror and offerees and a new offer was made of \$23,000.00 plus the \$3,500.00 loan [to the lessors]. It is true that Mrs. Mills was given notice of these transactions in accordance with the

contract, and she not only failed to meet this latter offer, but she sold her rights to do so for the sum of \$1,000.00."

The primary question presented on appeal by counsel for plaintiff—that the court erred in denying specific performance of the option as alleged—is essentially one of fact and hence is governed by rules too well established to warrant citation of authority.

An examination of the record shows specific testimony by Smith that there had been talk of \$21,000 plus a loan of \$5,000, but that the ultimate agreement was \$23,000 plus a \$3,500 loan. Ruppert testified to the same effect. Plaintiff's testimony was that she had "* * * suspicions only. I couldn't get a confirmation from them there had ever been a price of 21." She further testified that Ruppert told her the deal was \$21,000 plus a \$5,000 loan, but they had changed their minds; that she saw escrow instructions at the title company for \$21,000 plus a \$5,000 loan; that over these figures were superimposed the figures of \$23,000 and \$3,500, respectively; (her counsel gave similar testimony concerning the escrow); and that she was not interested in buying the property at the price quoted in the escrow. Finally, it is not denied that she accepted the sum of \$1,000 and executed a waiver of her rights under the option to purchase defendants' interest. The evidence so summarized was amply sufficient to sustain the conclusions of the trial court.

We find no merit in plaintiff's remaining contentions relative to the reasonableness of the selling price of the property and the phraseology of the option.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

158 Cal.App.2d 248

**Salvador Lara TELLEZ, Plaintiff and
Appellant,**

v.

**Michael SCHREYER, Defendant and
Respondent.**

Civ. 22524.

**District Court of Appeal, Second District,
Division 2, California.**

March 6, 1958.

Action for eye injury sustained by plaintiff when he was struck by end of branch while trimming tree limb in course of his casual employment by defendant. From a judgment of nonsuit rendered by the Superior Court, Los Angeles County, Lothrop E. Smith, J., plaintiff appealed. The District Court of Appeal, Ashburn, J., held that there had been insufficient evidence in support of claims of negligence, in failing to warn of hidden dangers and in failing to furnish safe tools, to take case against defendant to jury.

Affirmed.

Master and Servant (286(4, 40))

In action for eye injury sustained by plaintiff when he was struck by end of branch while trimming tree limb in course of his casual employment by defendant, there was insufficient evidence in support of claims of negligence, in failing to warn of hidden dangers and in failing to furnish safe tools, to take case against defendant to jury. West's Ann.Labor Code, §§ 3201 et seq., 3352, 3354.

Edward L. Lacy, Conoga Park, for appellant.

Parker, Stanbury, Reese & McGee, Los Angeles, by J. H. Peckham, Los Angeles, for respondent.

ASHBURN, Justice.

Appeal from judgment of nonsuit in a personal injury action. Defendant employed plaintiff to do certain work in clean-

ing the premises of his home. It consisted of spreading dirt in low spots in the yard and cutting some branches of trees that were lying on the ground. There is no suggestion that the Workmen's Compensation law is applicable and the pleadings show plaintiff to have been a casual employee (Lab.Code, §§ 3352, 3354) to whom workmen's compensation is not applicable.

Plaintiff lived about 15 miles from defendant's home and the latter agreed to furnish plaintiff transportation, pay him \$12 a day and furnish the tools for doing the job. Those tools were pointed out by defendant in plaintiff's presence and consisted of a wheelbarrow, a big saw, rake, shovel, claw hammer and a hand hatchet or ax. While trimming off some of the smaller branches of a limb lying on the ground plaintiff used the hand ax, hitting the wood three times; the third blow was a hard one and the end of the branch hit him in the eye and injured it seriously.

The charge of negligence is that defendant failed to warn plaintiff of hidden dangers in the work and was negligent in furnishing tools that were unsafe. The evidence fails to show any violation of either of these asserted duties. The hidden danger claimed by counsel lay in the tendency of wood to fly into the air when hit with an ax and to strike anything in its path. We perceive nothing of substance in this claim. What happened was the usual thing, one deemed to be within the ken of the ordinary person; hence, foresight of such an occurrence was no more attributable to defendant than to plaintiff.

Failure to furnish a safe tool for doing the work is asserted to consist of providing a short-handled ax instead of a long one. The evidence affords no basis for this distinction and warrants no inference that the hand ax furnished to plaintiff was not a reasonably safe tool for doing the work in question. "The employer is not required, * * * to furnish appliances that are absolutely safe, to furnish the best obtainable, or to adopt every latest improvement in machinery. If he has used ordinary and reasonable care, and the machinery or ap-

pliance furnished is of an ordinary character and reasonably fitted for the purposes for which it is designed, the employer has fulfilled his duty." (32 Cal.Jur.2d § 90, p. 511.) "It has been said by this court that, 'if the machinery or apparatus be of an ordinary character, and reasonably fitted for the purposes for which it is designed, the employer in this regard has fulfilled his duty. The burden is upon the injured servant to show that the machinery or appliances were so defective or inadequate as to make the use of them by the employer negligent and culpable.' *McAlpine v. Laydon*, 115 Cal. 68, 46 P. 865." *Luman v. Golden Ancient Channel M. Co.*, 140 Cal. 700, 704-705, 74 P. 307, 309. There is nothing in this record to raise an inference that the hand ax in question was not in proper condition or that such an ax is *per se* a tool not reasonably safe for chopping wood, or the particular kind of wood involved in this case. On the merits there appears to be no error in the granting of the nonsuit at bar.

Appellant argues, however, that the court disregarded the familiar rule that the motion cannot be granted upon a ground not specified by counsel in presenting it. 16 Cal.Jur.2d § 43, p. 205. The rule is not applicable here. The grounds of the motion were stated by counsel as follows: "I should like to move for a nonsuit in this action on the ground that there has been no *prima facie* showing of any negligence whatsoever, no *prima facie* showing of any proximate cause whatever resulting in any acts of the defendant Michael Schreyer in connection with the alleged injuries sustained by the plaintiff." The trial judge said: "Well, if I evaluate the evidence properly, the defendant had a limb off of a tree that he wanted cut up, probably for firewood, and other than telling him where the tools were, why, he didn't undertake to instruct him in the matter at all, and I have an idea that probably—I mean, as between the two, the plaintiff probably knows more about cutting wood than the pharmacist does. * * * Well, it just seems so conjectural. I can't see anything to this law-

suit at all. I don't often grant nonsuits, because I know that everything has to be construed most favorably to the plaintiff, but I just can't find anything in this lawsuit that the jury can find for the plaintiff on. The motion will be granted." The formal judgment of nonsuit recites: "Thereupon the defendant Michael Schreyer moved said court to dismiss said cause and enter a judgment of nonsuit on the grounds that there was no evidence proving or tending to prove any negligence on the part of the defendant Michael Schreyer and on the further ground that there was no evidence proving or tending to prove that any act on the part of defendant or any failure to act on his part were the cause of any injuries sustained by the plaintiff. Said motion was considered by the court and granted." It is apparent that the order was not based on a ground not included in the motion. Counsel's segmental argument to the contrary is not convincing.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.



158 Cal.App.2d 291

Lucille BORDENAVE, Plaintiff and Appellant,

v.

The FRANCHISE TAX BOARD OF STATE OF CALIFORNIA, Defendant and Respondent.

Civ. 9230.

District Court of Appeal, Third District,
California.

March 7, 1953.

Action to recover income taxes paid under protest. Judgment for the defendant in the Superior Court, Sacramento County, Jay L. Henry, J., and the plaintiff appeals.

The District Court of Appeal, Van Dyke, P. J., held that record did not establish that the property remained community property so as to entitle the surviving wife to recover income taxes paid notwithstanding the joint tenancy deed.

Judgment affirmed.

1. Taxation ☞1098

Where ranch property when purchased was community property of taxpayer and her husband, and subsequently they executed a deed for themselves in joint tenancy, unless the property remained community property surviving wife was not entitled to recover income taxes paid notwithstanding joint tenancy deed. West's Ann.Rev. & Tax.Code, § 17746.

2. Evidence ☞589

In suit by wife to recover income taxes paid, court was not bound by uncontroverted testimony of wife that property of spouses was community property notwithstanding joint tenancy deed, in view of wife's interest, fact that joint tenancy deed was not questioned during lifetime of husband, and document executed by wife declaring that she and her husband were by execution of the deed creating between themselves a title in joint tenancy.

Jones, Lane, Weaver & Daley, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., by James E. Sabine and Irving H. Perluss, Asst. Attys. Gen., and Edward P. Hollingshead, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Plaintiff, appellant herein, brought this action against respondent, The Franchise Tax Board, to recover income taxes paid under protest.

[1] Appellant and her husband purchased a ranch near Stockton, California, in 1944. The title was taken in the name of the husband, but it is without dispute that the purchase was made with community funds and that the property was com-

munity property of the two spouses. In 1946 husband and wife executed a deed to themselves in joint tenancy purporting to change the title to that form of ownership. The husband died April 2, 1948. Appellant brought a proceeding to establish his death of record and an appropriate decree was obtained. The income taxes here involved are those for the years 1949 and 1950, then governed by Section 17746 of the Revenue and Taxation Code, since repealed. Without stating the details, it is sufficient to say that unless appellant could prove in the trial court that the property remained community property of the parties notwithstanding the joint tenancy deed she could not prevail. An examination of the record discloses that under the trial court's factual findings she did not so prove. We have concluded that the judgment appealed from must be affirmed.

Appellant takes the position that, notwithstanding the presumption the execution of the joint tenancy deed created the estate of joint tenancy, the testimony of appellant necessitates a reversal of the trial court's judgment upon the ground of insufficiency of evidence.

Testifying nine years after the joint tenancy deed was executed, appellant said that her husband conducted all business affairs as he wished; that she never questioned the nature of papers he asked her to execute because of her trust in his business judgment; that she assumed she signed the joint tenancy deed among a number of other papers which he requested her to sign from time to time; that he did not tell her she was signing a deed that would change the property from community to joint tenancy; that she did not read nor did he acquaint her with the contents of the instruments; that she did not discover or become aware that she had signed a joint tenancy deed until after his death and during the probate of his estate. There is no testimonial dispute of the foregoing, but, as she must, appellant concedes that her testimony is in conflict with the presumption that the parties intended to and did create a joint tenancy.

The rules by which we must determine the issue presented are well settled and are well and sufficiently stated in the case of *Hicks v. Reis*, 21 Cal.2d 654, 659, 134 P.2d 788. In that case an owner of an automobile had testified that he had given no consent that his codefendant drive his car which was involved in an accident that injured the plaintiff. There was no testimony to the contrary. The plaintiff respondent, however, relied upon the right of the jury to infer that an employee of a car owner was operating the car with the permission of that owner. *Blank v. Coffin*, 20 Cal.2d 457, 460, 126 P.2d 868. The Supreme Court in *Hicks v. Reis*, supra, held that the inference was not rebutted as a matter of law; that the trier of facts is the exclusive judge of the credibility of witnesses and that while a witness is presumed to speak the truth the code also declares that this presumption may be repelled by the manner in which he testifies, by the character of his testimony or by his motives; that the trier of facts may, in weighing the inference (here a presumption) against the opposing testimony, consider the interest of the witness in the result of the case; and that, provided the trier of facts did not act arbitrarily, he might reject in toto the testimony of the witness, though testimonially uncontradicted. Therefore, said the court, 21 Cal.2d at page 660, 134 P.2d at page 791: "As a general rule * * * the trier of the facts is free to disbelieve the evidence as to the non-existence of the fact of permission, and to find that it does exist solely on the basis of the inference." The court noted that there is a common-sense limited exception aimed at preventing the trier of facts from running away with the case in that he might not indulge in the inference if it be rebutted by clear, positive, uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. The court said that in most cases, however, the jury is free to disbelieve the evidence as to the non-existence of the fact and to say it does exist on the basis of the inference. Both inferences and presumptions are by our code declared

to be evidence of the existence of the facts inferred or presumed.

[2] In this case we are bound by the decision of the trial judge, for he could, as he no doubt did, consider that appellant's interested testimony was given nine years after the event concerning which she testified; that the effect of the joint tenancy deed was not only unquestioned by her during the lifetime of her husband, but affirmed after his death in that in her petition to establish the fact of death she swore that the property was held in joint tenancy; that as the personal representative she declared in the inventory that it was joint tenancy property. And, finally, of course the court had before it the solemn document which declared that she and her husband were by the execution of that instrument creating between themselves a title in joint tenancy.

It is not necessary to discuss other contentions made.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



158 Cal.App.2d 226

In the Matter of the ESTATE of H. L.
WHISTON, Deceased.

Kenneth LeRoy WHISTON, Contestant
and Appellant,

v.

Stanley NEWMAN, Public Administrator,
et al., Proponents and Respondents.

Civ. 5644.

District Court of Appeal, Fourth District,
California.

March 5, 1958.

Proceedings on petition to revoke probate of holographic will on grounds of unsound mind, lack of due execution and

forgery of decedent's signature. The Superior Court of Kern County, Norman F. Main, J., denied the relief sought, and an appeal was taken. The District Court of Appeal, Griffin, J., held that evidence sustained findings upholding will.

Affirmed.

Wills $\S$ 55(1), 302(6)

In proceedings on petition to revoke probate of holographic will on grounds of unsound mind, lack of due execution and forgery of decedent's signature, evidence sustained findings upholding will. West's Ann.Rules on Appeal, rules 15, 18, 26.

Kenneth LeRoy Whiston, in pro. per.

Conron, Heard & James, Bakersfield, for respondents.

GRIFFIN, Justice.

This proceeding involves a petition of contestant Kenneth LeRoy Whiston to revoke the probate of a holographic will of his father, Herbert L. Whiston, Sr., dated April 25, 1949. In 1941, deceased was married to Mabel Whiston. Other members of the testator's family were his adult children by a former marriage, Kenneth L. Whiston (contestant), Herbert L. Whiston, Jr., and La Fonda R. Orland.

A few days before the decedent and his wife left for a trip, they made wills respecting the disposition of their property upon death. The testator wrote his in longhand and later signed it in the presence of his accountant, Marian Evans, who was asked to sign as a witness to his signature. She did so and placed the will in the safe in a sealed envelope, as directed by the testator. He then handed her another sealed envelope and said it was his wife's will, and it was also placed in the safe.

H. L. Whiston died on February 23, 1955. The wills were turned over to Mrs. Whiston and her attorney. The testator's will was opened and read. A petition for its

probate was filed. At the hearing, Marian Evans testified that the testator wrote and signed the will in his own handwriting and that she witnessed his signature. It was admitted to probate and Mrs. Whiston was appointed executrix. The executrix died July 21, 1955, and the respondent, Public Administrator Stanley Newman, succeeded Mabel Whiston as personal representative under the will here in question. Respondent Marian Evans was appointed executrix of Mabel Whiston's estate. On September 20, 1955, contestant, then represented by his attorney, filed this petition to revoke the subject will on three grounds: (1) Unsound mind of the testator; (2) Lack of due execution of the will; and (3) That it and the signature thereon were not in the handwriting of the decedent.

Answers were filed by the respondents Public Administrator and Marian Evans, as executrix. The named children of deceased filed no answer. After trial of the issues thus presented the court made its findings, denied the petition, entered judgment dismissing it, and affirmed the previous order admitting the will to probate. Contestant appeals from this judgment. Contestant's attorney was then substituted out of the case, and contestant endeavored to secure several other counsel to represent him on this appeal without success. He then, in propria persona, filed what purports to be a typewritten opening and closing brief setting forth certain claims and objections to the decision of the trial court. He argues that the evidence shows, in truth and in fact, the will was not entirely in the handwriting of the decedent, was not signed by him, and he feels that the property in the estate should have gone to decedent's direct heirs rather than to strangers. The will provided that all of his possessions go to his wife, or if she predecease him, to be divided, \$500 each to contestant and Herbert, Jr., \$3,000 to La Fonda, and the balance to testator's brother and decedent's four grandchildren.

Proponents first argue that contestant's so-called brief was typewritten and no per-

mission of this court was given allowing it to be so filed; that under Rules 15 and 18 of the Rules on Appeal, this court should order the brief stricken, and it should be disregarded. It is then claimed that the appeal is frivolous and should be dismissed or a penalty imposed under Rule 26, *supra*, citing *McFadden v. Dietz*, 115 Cal. 697, 47 P. 777.

Had the briefs and points attempted to be raised been filed by a practitioner of law, the record might well indicate the propriety of such action. Under the circumstances, we are more charitably inclined. We have fully examined the transcript and record on appeal. Respondents' motion for a nonsuit on the ground that there was no sufficient evidence of unsound mind of the testator was properly granted. Contestant did not resist the motion. The testimony of the subscribing witness to the signature on the will was similar to that given at the former hearing. She was employed by the testator from 1948 until his death and she fully established her familiarity with his handwriting and signature and particularly identified them as such. She said the will was, in its entirety, written, dated and signed by him. Apparently she was a main beneficiary under Mrs. Whiston's will, although she was not mentioned in the testator's will. Contestant offered evidence that might well indicate that previous to the execution of this will the testator had stated that he had executed a former will and that the contestant and other children would receive some part of the estate. The attorney for the testator, who had been such for the last five years of the testator's life, testified that Mr. Whiston did say to him something about the fact that he had prepared his own home-made will and wanted to discuss its provisions with said attorney, but he never came in for that purpose; that he was somewhat familiar with the testator's handwriting, in connection with other business transactions, and he thought the will and signature here involved were in the handwriting of the decedent.

Contestant presented a navy pay clerk who claimed to be familiar, to a certain

extent, with analyzing handwriting. She pointed out to the court certain letters and marks which she claimed were dissimilar or discrepancies between the signature and the writing in the will and other known signatures and writings of decedent, and asked the court to take note of them. She then expressed her opinion that the will was not written or signed by the testator. She claimed two of the exemplars examined by her and identified by other witnesses to be the testator's signature were the same as the signature and handwriting in the will but these did not compare with the other exemplars examined. Another handwriting expert witness for contestant testified that all of the exemplars shown to him and identified as the signature of the deceased were written by one individual; that the will was not signed by that same individual; and that the person who signed the will also wrote the body of it. On cross-examination he was presented with other exhibits shown by a witness for proponents to be in the handwriting of deceased. He testified those exhibits were written by the same person who wrote the will.

Apparently the trial judge made his own examination of the exemplars and questioned documents and from all the evidence concluded that the will was entirely written, dated and signed in the handwriting of the deceased and executed in the manner and form required by law. He found accordingly.

The time-honored rule is here applicable, i. e., that the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court, and when two or more inferences can reasonably be deduced from the facts the reviewing court is without power to substitute its deductions for those of the trial court, and all conflicts must be resolved in favor of the prevailing party. *Crawford v. Southern Pacific Company*, 3 Cal.2d 427, 429, 45 P.2d 183.

There being sufficient competent evidence to support the findings, the judgment must be affirmed.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



158 Cal.App.2d 150

Marcus D. ASPEITIA, Rose Aspettia and
Manuel D. Aspettia, Plaintiffs and
Respondents,

v.

CALIFORNIA TRUST COMPANY, a corpora-
tion, as Executor of the Estate of Caye-
tano Minjarez, Deceased, California Trust
Company, a corporation, Concepcion Min-
jarez, Doe One, Doe Two and Doe Three,
Defendants,

California Bank, a corporation, as Executor
of the Estate of Cayetano Minjarez,
Deceased, Appellant.

Civ. 22355.

District Court of Appeal, Second District,
Division 3, California.

March 3, 1958.

Action to recover money alleged to have been paid in violation of usury laws. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., rendered judgment for plaintiffs, and a defendant appealed. The District Court of Appeal, Vallée, J., held that mere fact that plaintiffs had not paid decedent any usurious interest during his lifetime would not prevent their recovery from decedent's executor of money paid in violation of usury law.

Affirmed.

1. Judgment ⚡570(1)

A mere statement that judgment of dismissal with prejudice is not conclu-

sive as to whether it is bar to subsequent action on same claim.

2. Judgment ⚡570(5)

Where record did not show that there had been actual determination on merits of prior action, for decree declaring agreement usurious, wherein plaintiffs had filed supplemental complaint for treble damages, order of dismissal of supplemental complaint in such prior action was not bar to subsequent action to recover money alleged to have been paid in violation of usury laws.

3. Usury ⚡88

An obligation once usurious is always usurious as long as its original existence continues.

4. Usury ⚡88

That plaintiffs had not paid decedent any usurious interest during his lifetime would not prevent their recovery from decedent's executor of money paid in violation of usury law.

5. Usury ⚡117

In action to recover money alleged to have been paid in violation of usury laws, evidence would sustain finding that third party had made payments on behalf of plaintiffs.

6. Usury ⚡86

Payment of excessive interest is nonetheless usurious even though made by third party at debtor's request.

7. Compromise and Settlement ⚡5(1)

Offset statement, reciting that borrowers had received full consideration for agreement under which they became obligated to lender, that agreement was valid and that they had no offsets against it, constituted, in effect, merely a renewal of original promise to pay, and not a compromise or settlement of borrower's claim for money allegedly paid in violation of usury law. West's Ann.Civ.Code, § 1916-2.

8. Usury ⚡66

Taint of usury in original transaction attaches to all renewals thereof.

9. Usury ☞88

Where original transaction is usurious, it can never become validated by subsequent dealings unless usury is purged.

10. Appeal and Error ☞989

Question as to where preponderance of evidence lay was for trial court, in action to recover money alleged to have been paid in violation of usury laws; and question on review was whether there was any substantial evidence to support findings.

11. Usury ☞119

Whether transaction is usurious is question of fact.

12. Usury ☞117

In action to recover money alleged to have been paid in violation of usury laws, evidence would sustain findings favorable to plaintiffs.

Samuel S. Adler, Los Angeles, for appellant.

Lillie & Bryant and Cy H. Lemaire, Los Angeles, for respondents.

VALLÉE, Justice.

Plaintiffs brought this action against California Trust Company, now California Bank, as executor of the will of Cayetano Minjarez, deceased, to recover moneys alleged to have been paid in violation of the usury law. Plaintiffs had judgment. Defendant appeals.

On December 20, 1950, Minjarez loaned plaintiffs Marcus and Manuel Aspeitia \$560; on January 24, 1951—\$1,700; on February 16, 1951—\$300; on April 3, 1951—\$1,440; a total of \$4,000. On April 3, 1951, Marcus and Manuel, as first parties, and Minjarez, as second party, entered into a written agreement by which the Aspeitias fictitiously acknowledged receipt of \$5,600 and agreed to deliver to Minjarez (1) a third deed of trust for \$4,000 on a parcel of realty; (2) a second deed of trust for \$4,000 on another parcel of realty; and (3) a chattel mortgage for \$1,600 on the fixtures

and equipment of a meat market. Marcus and Rose Aspeitia executed two deeds of trust in accord with the agreement naming California Trust Company as trustee and Cayetano Minjarez and his sister as beneficiaries, and executed the chattel mortgage. The agreement provided:

"The above loan has to be paid off at the rate of \$100.00 per month beginning on May 1st, 1951 and continuing until the sum of \$4,000.00 has been paid.

"Payments of \$50.00 per month on the Chattel Mortgage to start on April 1st, 1952, and continuing until the sum of \$1,600.00 has been paid in full.
* * *

"When the sum of \$5,600.00 has been paid within 41 months from this date, the above documents held as guarantee will be reconveyed. It is understood that payments will be \$100.00 for the first year and thereafter \$150.00 per month. *Time* is of the Essence."

There was much evidence that only \$4,000 was loaned and that the \$1,600 was interest. At the trial, counsel for defendant stated "there is no question in my mind that perhaps in this situation they might have paid usury." By January 3, 1953, plaintiffs had paid \$2,000 on the obligations. Minjarez died on April 25, 1953 and defendant is the executor of his will. On July 21, 1954, proceedings were commenced to foreclose the two deeds of trust referred to in the agreement. The foreclosure sale was noticed for December 7, 1954. On December 6, 1954, defendant demanded that plaintiffs pay an additional \$4,073.73, consisting of \$3,890.95 claimed principal and interest and \$182.78 foreclosure costs. Plaintiffs borrowed \$4,073.73 from a Mr. Nordin and gave him a promissory note in that amount, and a chattel mortgage and an assignment of rents as security therefor. On December 6 Nordin paid the \$4,073.73 to defendant in behalf of plaintiffs.

On July 7, 1954, plaintiffs filed an action in the superior court of the County of Los

Angeles (not this action) for declaratory relief, seeking a decree declaring that the agreement of April 3, 1951 was usurious. On July 19, 1955 (after the payment of the \$4,073.73 to defendant on December 6, 1954), plaintiffs filed a supplemental complaint in that action praying for treble damages. Defendant demurred to the supplemental complaint on the ground payment of the usurious interest was not a proper matter for a supplemental complaint. The demurrer was sustained with leave to amend. At that time the court advised plaintiffs' counsel that a new and separate action should be commenced. Plaintiffs did not amend the supplemental complaint. On October 10, 1955, on stipulation, an order was made dismissing the supplemental complaint. The present action was filed October 26, 1955. The complaint in this action contains substantially the same allegations as did one of the counts in the supplemental complaint. In its answer in this action defendant alleged the foregoing facts with respect to the prior action and that the order dismissing the supplemental complaint is a bar to the prosecution of this action. The trial court found that the order dismissing the supplemental complaint was not a bar to the prosecution of this action and "it is true that plaintiff did not amend said Supplemental Complaint and did join with defendant and stipulate in effect that the Supplemental Complaint might be dismissed with prejudice to the further filing of said cause of action in that particular action. The Court specifically finds that there has been no previous hearing upon the merits of the within action and that the dismissal of the previous action was based merely on rules of procedure relating to supplemental complaints and the stipulation of the attorneys."

[1,2] Defendant asserts the order dismissing the supplemental complaint in the prior action is a bar to the prosecution of this action as a matter of law. It appears that the order dismissing the supplemental complaint originally stated it was "with prejudice," but at a later time those words

were stricken on the ground their insertion in the order was a clerical error.

A mere statement that a judgment of dismissal is "with prejudice" is not conclusive. "It is the nature of the action and the character of the judgment that determines whether it is *res judicata*. The intention of the court to make a determination on the merits may be important, but if the judgment is clearly not on the merits, the court's intention is immaterial. A dismissal without prejudice, on the other hand, is not a bar to another action by the plaintiff on the same cause. In other respects, however, it has the effect of a final judgment in favor of the defendant, for it terminates the action and concludes the rights of the parties in that particular action.

* * * An order of dismissal containing no statement whatever that it is made without prejudice is not a bar to a subsequent action, unless the record shows that there was an actual determination on the merits.' 16 Cal.Jur.2d, Dismissal, etc., § 5." *Gagnon Co., Inc. v. Nevada Desert Inn*, 45 Cal.2d 448, 455, 289 P.2d 466, 472. The record does not show that there was an actual determination of the prior action on the merits. The order of dismissal of the supplemental complaint in the prior action is not a bar to this action.

[3,4] Defendant asserts the findings are unsupported because plaintiffs did not pay Minjarez any usurious interest during his lifetime. No authority is cited in support of the point. It is not tenable. An obligation once usurious is always usurious as long as its original existence continues. 91 C.J.S. Usury § 76, p. 653. The obligation here was usurious in its inception and its original existence continued after the death of Minjarez to and including the payment of \$4,073.73 to defendant.

[5,6] It is urged that payment to defendant by Nordin did not constitute payment by plaintiffs. The court found it did and the finding is supported. Nordin testified he loaned the money to plaintiffs and he paid it to defendant in their behalf. The effect of the transaction was payment by

plaintiffs to defendant. In fact defendant in effect so concedes for he says "It is the general rule of law in the State of California that if someone pays the usurious interest for and on behalf of a borrower at the borrower's request it does not change the fact that usury has been paid by the borrower direct."

[7-9] On April 27, 1954, at the request of defendant, Marcus and Rose Aspeitia signed an offset statement in which they stated that the original principal was \$5,600; they had received full consideration for the agreement of April 3, 1951; that the agreement was valid; and they had no offsets, claims, or defenses against it. The statement was postdated to April 25, 1953, the date of death of Minjarez. The offset statement was not signed by Manuel Aspeitia. On the same day—April 27, 1954—Marcus and Rose, at defendant's request, delivered a letter to it in which they promised to pay \$150 or more a month on the indebtedness. Marcus Aspeitia testified that he told defendant's representative at the time the offset statement and letter were given that \$1,600 of the obligation was interest and that defendant's representative said it was not. The court found plaintiffs were not estopped by reason of the offset statement and letter from contending that the payment of \$4,073.73 to defendant included usurious interest. Defendant contends the offset statement constituted a compromise or settlement—a waiver—of plaintiffs' claim and estops them from claiming that the payment of \$4,073.73 constituted usurious interest. The point is not tenable. The offset statement was not a compromise or settlement of plaintiffs' claim. The offset statement and the accompanying letter were in effect merely a renewal of the original promise to pay. The original agreement was "null and void" as to the stipulation to pay interest. 2 Deering's Gen.

Laws, Act 3757, § 2, West's Ann.Civ.Code, § 1916-2. The signing and delivery of the offset statement and the letter did not give it validity. *Westman v. Dye*, 214 Cal. 28, at page 38, 4 P.2d 134, 138, says the taint of usury in the original transaction attaches to all renewals thereof and quotes from *Gladwin State Bank v. Dow*, 212 Mich. 521, 180 N.W. 601, 13 A.L.R. 1233, thus:

"If a transaction is usurious in its inception, it remains usurious until purged by a new contract; and all future transactions connected with or growing out of the original are usurious and without valid consideration. An original taint of usury attaches to the whole family of consecutive obligations and securities growing out of the original vicious transaction; and none of the descendant obligations, however remote, can be free of the taint if the descent can be fairly traced."

"Where the original transaction is usurious, it can never become validated by subsequent dealings unless the usury is purged." 91 C.J.S. Usury § 65, p. 646.

[10-12] Defendant claims "the evidence pertaining to usury preponderated in favor of the defendant and not in favor of the plaintiffs as the court found." The question as to where the preponderance of the evidence lay was for the trial court. The question on review is whether there is any substantial evidence to support the findings. Manifestly there is. Whether a transaction is usurious is a question of fact. *Middlekauf v. Vinson*, 106 Cal.App.2d 204, 207, 234 P.2d 742; *Murphy v. Ablow*, 123 Cal. App.2d 853, 858, 268 P.2d 80.

The evidence supports the findings and the findings support the judgment.

Affirmed.

SHINN, P. J., and PATROSSO, J. pro tem., concur.

158 Cal.App.2d 114

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Nell Estes SCOTT, Defendant and
Appellant.

Cr. 5997.

District Court of Appeal, Second District,
 Division 3, California.

Feb. 28, 1958.

Hearing Denied April 23, 1958.

Defendant was convicted of robbery. The Superior Court, Los Angeles County, Edward R. Brand, J., rendered judgment and denied motion for new trial and defendant appealed. The District Court of Appeal, Parker Wood, J., held that testimony of accomplice, who had held up bartender and proprietor of liquor store, that defendant had participated in planning robberies and had received half of money taken was sufficiently corroborated.

Affirmed.

Vallée, J., dissented in part.

Criminal Law §511(1)

In prosecution for robbery of bar and liquor store, testimony of an accomplice, who had held up bartender and store proprietor that defendant had participated in planning robberies and had received half of money taken was sufficiently corroborated.

James Crehan and F. Walter French,
 Santa Monica, for appellant.

Edmund G. Brown, Atty. Gen., Lynn
 Henry Johnson, Deputy Atty. Gen., for
 respondent.

PARKER WOOD, Justice.

Defendant was accused, in six counts, of robbery. A jury could not agree upon a verdict and a mistrial was declared. Another jury trial was had as to Counts II and III only. Defendant was found guilty on both counts. He appeals from the judgment and the order denying his motion for a new trial.

Cal.Rep. 321-322 P.2d—37

Appellant contends that the testimony of the accomplice Olsen was not corroborated.

In Count II defendant was accused of robbery of Mr. Langan on November 22, 1956. In Count III he was accused of robbery of Mr. Ranger on December 14, 1956.

Mr. Langan testified as follows: On said November 22, about 1:30 a. m., he was the bartender at Ted's Grill in Santa Monica Canyon. At that time defendant entered the place, sat on a stool at the bar, and ordered beer. Four patrons were at a table. Mildred Butler, a waitress, was also in the room. About five minutes after defendant entered the room, Roy Olsen entered, sat next to defendant, and ordered beer. No greeting was exchanged between defendant and Olsen. After beer had been served to Olsen, the defendant asked Langan how far it was to Pasadena. As Langan was about to reply, Olsen interrupted and told defendant that it was about 20 miles. Defendant said he was going there, to a friend's or relative's place, for dinner that day (which was Thanksgiving Day). Olsen said that he was going that way and if defendant would follow him, he would show defendant the way to Pasadena. Defendant ordered another beer and Langan told him that he had a short time in which to drink it. Then Langan told the patrons that he was making the last call (before closing the bar) and that it was time to leave. The four persons at the table started to leave. Defendant and Olsen also started to leave. All the persons went out practically at the same time—more or less in a bunch—the four persons were in front and defendant went ahead of Olsen. About 30 seconds after all of them had gone out the door, Olsen was standing in front of Langan, holding a gun (automatic pistol, Exhibit 1), and Olsen said, "This is it. Put your money on the bar." Langan opened the register and put the money on the bar. Olsen put the money in his pocket and as he went to the door he said that his wife was in a hospital and she could use the money.

Mildred Butler, the waitress, testified that defendant entered the grill about 1:15 a. m. and sat at the bar. About five minutes later Olsen entered and sat next to defendant. No greeting was exchanged between them. They were sitting near the place where she was standing. Defendant asked the bartender how far it was to Pasadena. As the bartender started to answer, Olsen said it was about 20 miles. Defendant said he was going there to his aunt's for Thanksgiving dinner. Olsen said he was going to Pasadena and that defendant could follow him if he could keep up with Olsen's 1952 Lincoln Capri car. Defendant said that he had his 1946 (or 1948) Ford overhauled and had new tires on it and it rolls right along. About 1:45 a. m. the bartender gave the last call (before closing the bar). Then defendant said he wanted another beer, and the bartender told him that he only had 15 minutes in which to drink it. At closing time, 2 a. m., the bartender said that he would have to have defendant's glass. The bartender announced that the patrons would have to leave. Then the four persons who were at the table went to the door, and defendant and Olsen followed them. She (waitress) followed all of them to the door, intending to close the door. After the persons had gone out, she noticed that the door had not closed but was still open about six inches. Olsen was the last person who went out the door. When she reached to close the door she noticed that a person's foot was in the door. Then Olsen pushed the door open, put a gun against her, and told her not to move. Olsen went to the bartender and demanded the money. The bartender handed the money to him, and then Olsen ran out the door, and went around the corner into the parking lot.

Mr. Ranger testified as follows: He is the proprietor of the Ranger Liquor Store in Santa Monica. On December 14, 1956, about 8:45 p. m., he and his wife were in the liquor store. At that time Olsen came to the counter in the store and asked for a bottle of "V. O." When Ranger put the bottle on the counter, Olsen pulled a gun on

Ranger and said, "This is a holdup." Olsen said he wanted everything that was in the register. After Mrs. Ranger handed the bills to him, he told her to give him the silver. She handed him the silver, including many dimes. Then Olsen said he wanted one of the pretty bottles. When a bottle of "Old Forester" was placed beside the "V. O." bottle, Olsen said he wanted the bottles put in separate sacks. Ranger put them in separate sacks, then Olsen took the bottles and money (about \$124) and left. Defendant was not in the store that evening. He (witness) was acquainted with defendant in that about two years previously defendant, who was then operating a Christmas tree lot in front of the store, came into the store at times to get change.

Mrs. Ranger testified in substance the same as Mr. Ranger testified.

Olsen, a witness called by the People, testified that he met defendant in October, 1956, and thereafter he saw defendant frequently. He stayed at defendant's living quarters one or two nights a week for about two weeks, around the time he met defendant. In the evening of November 21, 1956, he and defendant talked about committing a robbery and they went in defendant's 1955 or 1956 Chevrolet automobile, which defendant was driving, to a motel near Ted's Grill. Defendant lived at the motel. Defendant said he would go in and case Ted's Grill. Defendant went in there, and after he came out he said it looked all right, and he would go back in there and that Olsen should come in about five minutes later and sit down, and when defendant mentioned "Pasadena," Olsen should pull the gun and hold up the place. After a few minutes Olsen entered and sat at the bar. Olsen did not want to hold up the place at that time, because people were sitting behind him. When the bartender closed the bar and told the persons in there to go home, Olsen followed the other persons and defendant out the door. Then he, Olsen, went back in, pointed the gun at the waitress, went to the bar, and robbed the bartender. Then Olsen left the place and ran to defendant's room in the motel, where

Olsen and defendant counted the money and each took half of it.

Olsen testified further that on December 14, 1956, he and his wife were celebrating their wedding at a bar in Santa Monica and he saw defendant there. Then Olsen, his wife, defendant, and three other persons went to another bar. After they were there a while, defendant said he would have to leave. Defendant left about 8:30 p. m. but returned soon. Then, while Olsen's wife and Pat Britain were out of the room, defendant said, "Let's get the liquor store up there on Wilshire." Defendant asked if Olsen had the gun with him. Olsen replied that he did not have it. Then they went in defendant's car to Olsen's home, where Olsen changed his clothes, put some brown make-up on his face, and got the loaded gun. Then they went in defendant's car to the Ranger Liquor Store. Defendant parked the car in the alley behind the store and said, "Good luck. This is it." Defendant said he knew the persons in there. Olsen went alone into the store and asked Ranger for "V. O." and then held the gun on him and demanded the money. Olsen also asked for a bottle of "Old Forester." He took the money and the two bottles, left the store, got into the car, and they drove away. While they were driving away, Olsen changed his clothes—ripped his shirt off and threw it away. He also changed his pants. Then they went to the apartment of one Barber. (Barber had been present at the wedding celebration.) Olsen gave the bottles to Barber as a Christmas present. Then Olsen put the money on the bed, and he and defendant sat on the bed and divided the money equally between themselves. Barber was present while the money was being divided. Then Olsen went to get his wife. When they returned, defendant was gone. Olsen was arrested later that evening. He had been convicted previously of violating the Dyer Act, 18 U.S.C.A. §§ 2311-2313, a felony. He had committed eight robberies in Santa Monica, and at the time of the trial he was serving a term in the county jail for one of the robberies. He owned

a 1939 Chevrolet automobile in December, 1956.

Miss Britain, called as a witness by the People, testified as follows: On December 14, 1956, she, Olsen, and Mrs. Olsen went to a bar (Brownie's) in Santa Monica, where they met defendant, Barber, and one Guggemos about 6:30 or 7:30 p. m. Thereafter all of them went to another bar (Circus Room). About 8:30 p. m. defendant left that place, stating that he had a date. About a minute later, Olsen left. Later that evening she saw Olsen at her apartment, when the officers brought him there.

Mrs. Olsen, called as a witness by the People, testified: On December 14, 1956, she and her husband Olsen (witness herein) met the group consisting of Barber, Britain and defendant at Brownie's bar, and later all of them went to the Circus Room. Defendant left that place between 8:00 and 8:30 p. m., stating that he had a date. About a minute later Olsen left, stating that he was going with defendant. She saw Olsen later that evening when the officers brought him to Miss Britain's apartment.

Barber, called by the People, testified: He had known Olsen several months, and Olsen had worked for him at his cafe. He (witness) was with said group of persons at the Circus Room on December 14. He remembered that defendant and Olsen left the group that evening. Later that evening he saw defendant and Olsen at his (witness') apartment, and at that time Olsen gave him a bottle of "V. O." and a fancy bottle of "Old Forester." Defendant and Olsen were in his apartment a few minutes and they were sitting on the bed or couch. While they were there he saw money between them and they were counting money. Later that evening he took the fancy bottle to Brownie's, where he and others drank the whiskey, and he put the bottle in a trash box in the alley back of Brownie's bar.

Officer Kocher testified that on December 15, 1956, about 1 a. m., he found a shirt (Exhibit 3) by the curbing; he was directed to it by Olsen; he also found a fancy

"Old Forester" bottle in a trash box in the alley near Brownie's; he was directed to it by Barber; he found two buttons (Exhibit 5) and two dimes (Exhibit 6) in a 1956 Chevrolet automobile (defendant's automobile); those buttons were in the back seat of the automobile, and the dimes were on the floor on the passenger side of the automobile; he had a conversation with defendant as to the description of his automobile and defendant described the Chevrolet where the buttons and dimes were found; defendant gave him a key to the automobile and told him he could look in the automobile; the officer found that the automobile was locked and the windows were closed; defendant said that he had nothing to do with the robberies.

The deputy district attorney stated for the record that four buttons were missing from the shirt, and that the buttonholes opposite the places where the buttons had been were in a torn condition.

Four men, who were prisoners and were with Olsen and defendant in the sheriff's bus on the way from jail to court, testified to the effect that they (witnesses) heard Olsen tell defendant that as soon as all the charges against Olsen, except one, were dropped he was going to say that defendant was innocent.

Defendant testified that it was possible that Olsen could have used defendant's car; he (defendant) had lent the car to Olsen once, and that defendant left the car unlocked most of the time, and he kept an extra key to his car under the floor mat of the car; Olsen lived with defendant for a while; he (defendant) was at Ted's Grill about one or two o'clock drinking beer, and while he was there Olsen came in and they had mentioned the word "Pasadena" in connection with a job in Pasadena which defendant had applied for; after defendant left Ted's Grill he walked home, about two blocks away, and went to bed; he did not have anything to do with the holdup at Ted's Grill or at Ranger's store.

Defendant testified further that on Friday, December 14, 1956, about 4:30 p. m., he returned from Tiajuana and he went to

Brownie's bar; at that time he was drunk; he had been drinking whiskey and beer all day Thursday, all of Thursday night, and all day Friday (during his trip to Tiajuana); he drank champagne and everything with the party group at the Circus Room; he left that room and the party group and at that time he probably said he had a date, but he could not remember clearly; he did not remember when he left that place; he walked to his hotel, lay upon the bed, and went to sleep; he got up about eleven o'clock and went back to Brownie's where he was arrested; he did not go any place with Olsen; he did not recall having seen Olsen after he (defendant) left the Circus Room; he did not sit on a bed in Barber's room, and he and Olsen did not count and divide money which had been taken from the Ranger holdup; he had been to Pasadena before November 22, 1956; he might have told the officers, on December 16, that on the evening of December 14 he went to his hotel room at six o'clock in the evening and he stayed there until ten-thirty o'clock.

Officer Kocher testified, on rebuttal, that on December 15, 1956, defendant said that he had returned from Tiajuana about 4 p. m. on December 14; he left the Circus Room on December 14 about 6 p. m., moved his car and returned to the Circus Room; he left that place again and went to his hotel room about 6:30 p. m. and he remained there until 10:30 p. m., when he returned to Brownie's where he was arrested.

Olsen testified, on rebuttal, that he did not make the statement which the four bus passengers said he made.

Appellant contends, as above stated, that the testimony of the accomplice Olsen was not corroborated.

"Corroborating evidence is sufficient if it tends to connect the accused with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth; it must be considered without the aid of the testimony which is to be corroborated, and is insufficient if it requires the interpretation and direction of such

testimony in order to give it value. [Citation.] Corroborating evidence need not be direct but may be circumstantial. [Citation.] It need not extend to all the elements of the offense, nor to every detail included in the testimony of the witness to be corroborated; it is sufficient if it tends, in some slight degree, to implicate the accused." *People v. MacEwing*, Cal.App., 314 P.2d 977, 980 [rehearing granted].

"In considering the question of corroboration, the relationship of the parties and their acts and conduct are competent evidence to be considered, and since corroboration need not be by direct evidence, the entire conduct of defendant may be looked to for corroborating circumstances and if, from those circumstances, his connection with the crime may be fairly inferred, the corroboration is sufficient * * *." *People v. Willmurth*, 77 Cal.App.2d 605, 611-612, 176 P.2d 102, 105.

In *People v. Wayne*, 41 Cal.2d 814, at page 822, 264 P.2d 547, at page 550, it was said: "The corroborative evidence may be slight and entitled to little consideration when standing alone." It was also said therein at page 823, of 41 Cal.2d, at page 551 of 264 P.2d, in quoting from another case: "[W]here a material fact is established by evidence and it is shown that a defendant's testimony as to that fact was wilfully untrue, this circumstance not only furnishes a ground for disbelieving other testimony of this defendant [citations], but also tends to show consciousness of guilt or liability on his part and has probative force in connection with other evidence on the issue of such guilt or liability. Such false testimony is in the nature of an admission from which with other evidence guilt or liability may be inferred [citations]."

In the present case there was evidence, other than the testimony of Olsen, which tended to implicate defendant in the robberies. Such evidence was as follows: Defendant arrived at Ted's Grill a few minutes before Olsen arrived there. Defendant was sitting at the bar talking with Olsen about half an hour preceding that robbery and, although they were acquaint-

ances and Olsen had lived with defendant, they acted and talked as if they were strangers. Statements which defendant made there, in the presence of the bartender and waitress, regarding Pasadena and the kind of automobile defendant owned, were false. Defendant delayed the drinking of his second glass of beer until closing time and until the bartender took the glass from him, although the bartender had told him, at the time of serving the beer, that it was about time to close the bar and defendant would have only a short time in which to drink the beer. At the time defendant was delaying the drinking of his beer after closing time had been announced, four other patrons were at a table back of defendant and Olsen. Defendant and Olsen were the last ones to go to the door. The waitress testified that defendant and Olsen went to the door together. Defendant testified that he did not know when Olsen left. Immediately after defendant stepped outside the door, Olsen stepped back into the room and placed a gun against the waitress who was near the door. Defendant knew the Rangers and had been in their store several times. Defendant and Olsen were present with the party group at the Circus Room about 8:30 p. m. on December 14 shortly before Olsen entered the nearby Ranger store and robbed the Rangers. That robbery was committed about 8:45 p. m. A few minutes before that robbery, defendant left the party, but he returned soon. A few minutes later he left again, stating that he had a date. Olsen left the party about a minute after defendant had left the second time. When Olsen left he told the remaining persons at the party that he was going with defendant. Thereafter, during that evening, Barber was present at his apartment when defendant and Olsen were there for a few minutes, and he saw defendant and Olsen sitting on a bed or couch in his apartment and at that time he saw money between them and he saw them counting and dividing the money. Also while defendant and Olsen were at Barber's apartment, Olsen gave Barber a fancy bottle of "Old Forester." Defendant denied that he was in Barber's apart-

ment during that evening and that defendant and Olsen counted money therein. Defendant testified that he did not remember when he left the party group at the Circus Room that evening. Officer Kocher testified that, on December 15, defendant said that he (defendant) was in his own hotel room from 6:30 p. m. until 10:30 p. m. on December 14. Miss Britain testified that defendant left the Circus Room at 8:30 p. m. Mrs. Olsen testified that defendant left that room between 8:00 and 8:30 p. m. About four hours after the Ranger robbery, Officer Kocher found a shirt near a street curb, and four buttons were missing from the shirt. He also found two buttons in the back seat of defendant's automobile, and he found two dimes on the passenger side of defendant's automobile.

The testimony of Olsen was corroborated.

The judgment and the order denying motion for a new trial are affirmed.

SHINN, P. J., concurs.

VALLÉE, J., concurs as to Count II and dissents as to Count III.



N. E. YOUNGBLOOD, Plaintiff and Appellant,

v.

CITY OF LOS ANGELES, a municipal corporation; Los Angeles County Flood Control District, a body corporate and politic; County of Los Angeles, a political subdivision of the State of California; Max A. Rosenberg & Sons, a co-partnership, Defendants and Respondents.*

Civ. 22560.

District Court of Appeal, Second District,
Division 2, California.

March 3, 1958.

Rehearing Granted April 2, 1958.

For Opinion on Rehearing see 325 P.2d 587.

Action to recover for flood damage.
The Superior Court of Los Angeles County,

* Opinion vacated 325 P.2d 587.

Edward R. Brand, J., rendered judgments of nonsuit as to each defendant, and plaintiff appealed. The District Court of Appeal, Kincaid, J. pro tem., held that evidence on issue as to plaintiff's right to recover, on theory of inverse condemnation, from flood control district which had allegedly removed tree providing adjacent and subjacent support for plaintiff's property, had been sufficient to take to jury questions as to whether tree had been removed in connection with maintenance of flood control channel and revetment constructed by district and as to whether employees of district, in removing tree, had been acting under an emergency which justified use of police power without compensation to plaintiff.

Affirmed in part and reversed in part.

1. Waters and Water Courses ⇨119(3)

Where increased flow of surface water into stream resulted solely from urbanization, city incurred no liability to lower riparian owner by virtue of subdivision of upstream tract.

2. Waters and Water Courses ⇨119(6)

City, which had not yet accepted improvements in upstream subdivision when lower riparian owner suffered damage from flooding, incurred no liability to lower riparian owner by reason of manner in which subdivider did work.

3. Bridges ⇨23

Bridge did not come within meaning of complaint allegations as to "storm drains" located "above plaintiff's property" which had allegedly directed waters "onto plaintiff's property" with "increased volume, increased velocity and increased scouring capacity," and complaint for flood damage was consequently insufficient to serve as predicate for introduction of evidence that municipality had been negligent in its maintenance of bridge. West's Ann.Gov.Code, § 53051.

4. Limitation of Actions ⇨127(17)

Where complaint for flood damage contained no allegation that city had maintained any of its property in dangerous and

defective condition, proposed amendment to conform to proof by alleging maintenance of a dangerous and defective condition in public property, within meaning of Government Code section, alleged new, and untimely, cause of action, and was properly disallowed. West's Ann.Gov.Code, § 53051.

5. Trial ☞142

Judgment of nonsuit should be granted only when, accepting full force of evidence adduced, together with every reasonable inference favorable to plaintiff which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that law precludes plaintiff from recovering judgment.

6. Eminent Domain ☞13

Taking or damaging of private property for maintenance of existing public improvement, involving a deliberate act for direct or indirect accomplishment of purpose of improvement as whole, constitutes taking or damaging of property for "public use," entitling owner thereof to compensation under Constitution. West's Ann.Const. art. 1, § 14.

7. Eminent Domain ☞307(2)

In action to recover, on theory of inverse condemnation, from flood control district which had allegedly removed tree providing adjacent and subjacent support for plaintiff's property, evidence was sufficient to take to jury questions as to whether tree had been removed in connection with maintenance of flood control channel and revetment constructed by district and as to whether employees of district, in removing tree, had been acting under an emergency which justified use of police power without compensation to plaintiff. West's Ann. Const. art. 1, § 14.

8. Waters and Water Courses ☞119(3)

Subdivider whose improvements merely increased flow of surface waters in their natural channels incurred no liability to lower riparian owner, even though natural channels were insufficient to contain added water in floodtime.

N. E. Youngblood and Marvin Gross, Beverly Hills, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Joseph N. Owen, William E. Still, and Weldon L. Weber, Deputy City Attys., Los Angeles, for respondent City of Los Angeles.

Harold W. Kennedy, County Counsel, and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondent Los Angeles County Flood Control Dist.

Crider, Tilson & Ruppé and Garvin F. Shallenberger, Los Angeles, for respondent Max Rosenberg & Sons.

KINCAID, Justice pro tem.

Plaintiff brought this action to recover for damage to real property owned by him in the Pacific Palisades area caused by flood conditions arising from heavy rainstorms in January, 1952. The defendants are the city of Los Angeles, hereafter referred to as the "City"; the Los Angeles County Flood Control District, hereafter denominated the "District"; and Max A. Rosenberg & Sons, a co-partnership, hereafter called "Rosenberg." The appeal is from judgments of nonsuit granted as to each defendant.

At the conclusion of plaintiff's evidence Rosenberg's motion for nonsuit was granted on the ground that there was an insufficiency of the evidence to make out a prima facie case against that defendant for several reasons among which was that there was no evidence showing any wrongful act by Rosenberg which caused the claimed damage to plaintiff, as well as no showing with respect to what portion of such damage was claimed to have been caused by Rosenberg.

Also at the close of plaintiff's evidence the District moved to strike from the record all testimony pertaining to the revetment south of plaintiff's property, and the engineering practice and construction of it, as outside the scope of the pleadings. This motion was granted and a subsequent mo-

tion for nonsuit was also granted as to the District.

The defendant City's motion to strike from the record all testimony pertaining to the proposed flood control channel changes and to changing of the bridge, and all events and occurrences in the stream bed as being outside the scope of the pleadings as to it was granted. Plaintiff's motion to amend the pleadings to conform to proof was denied. The City's motion for nonsuit was granted.

A written claim for damages (§§ 53051, 53052, Gov't Code) had been filed with the City Council of the City of Los Angeles and with the Los Angeles County Flood Control District by filing it with the Board of Supervisors of the County of Los Angeles on April 14, 1952. The amended complaint under which the case went to trial contained the general charges as specified in this claim, alleging that prior to January 12, 1952, Rosenberg subdivided a tract "upstream" from plaintiff's property and secured from the City the necessary permits "for the grading of roads and the installation of storm drains, for the draining of storm waters and surface waters from said tract and subdivision. That in the construction and maintenance of said storm drains, and in the grading of streets for said tract, said streets were so graded that surface waters and storm waters falling upon said streets and surrounding areas, and particularly from areas uphill from said streets, are accumulated, and the streams upon said streets are directed and diverted by drainage across said streets maintained by the defendant, City of Los Angeles, in such a manner that storm waters and surface waters which would in a state of nature be absorbed by the natural soil or flow in various directions in accordance with the natural watershed, are accumulated within the confines of said storm drains, and accumulated and diverted into one stream in said storm drain which is diverted across Sunset Boulevard in the area above plaintiff's property and 'dumped' into the natural waterway or small stream hereinbefore referred to above plaintiff's prop-

erty; that the waters so accumulated into one stream possess an increased velocity, by reason of said accumulation and the construction of said storm drains, so that water as it flows onto plaintiff's property has a considerably increased volume, increased velocity, and increased scouring capacity."

Paragraph X alleges: "That during the storm of January 12, 13, 14, and 15, 1952, and for several days and weeks subsequent thereto, there fell upon the area drained by the aforementioned storm drain a considerable volume of water; and as a direct and proximate result of the acts of the defendants hereinbefore referred to and as a direct and proximate result of said additional waters cast into said waterway or stream, as aforesaid, in an increased volume, increased velocity, and increased scouring capacity, considerable volume of earth was caused to erode and wash away from the property of plaintiff, thereby removing adjacent and subjacent support to the remainder of said real property."

In paragraph XI it is alleged: "That during the erosion and loss of soil, as aforesaid, a large tree fell across the base of the hill between plaintiff's property and the waterway or stream hereinbefore referred to, which constituted adjacent and subjacent support for the property of plaintiff; that during said storm the defendants, City of Los Angeles and Los Angeles County Flood Control District, removed and took away said tree, thereby removing said adjacent and subjacent support from the property of the plaintiff, which removal caused further erosion and loss of soil therefrom; all of which acts and conduct were without the knowledge, consent or approval of the plaintiff." A prayer for damages follows.

Viewing the evidence most favorably to plaintiff it appears that in January 1952 plaintiff owned a home which he valued at \$50,000 located at 708 Greentree Road, Pacific Palisades, California. The rear of the lot sloped easterly down to Rustic Canyon stream at about a 35 to 40-degree angle and the house was located at a considerable

height above the floor of the canyon. To the northeast of and above plaintiff's property the stream or channel was crossed by Brooktree Road bridge, owned and maintained by the City. Approximately 50 feet south and east of the southeast "toe" of plaintiff's property and downstream therefrom the District had constructed a flood control "revetment" on each side of Rustic Canyon, the opening of which was 18 feet wide. At its northwest end a wing extended out at a 45-degree angle toward plaintiff's property. The District by means of the revetment and other work in Rustic Canyon was in the process of changing the direction of the previous natural flow of the water. From the date of its construction and at the time of the flood in January 1952, Brooktree Road bridge including its abutments, was in alignment with the original "thread" of the stream. These abutments were at a 45-degree angle westerly from the opening of the previously mentioned revetment. The opening of the revetment "plugged up" from the debris carried by the flood, the waters were directed toward plaintiff's property by reason of the bridge abutments and tended to create a "whirlpool" situation which contributed to the undermining of the bank at the rear of plaintiff's property. During the flood period a large sycamore tree on plaintiff's property fell and was acting as a barrier to the inroads of the onrushing waters. During the course of the flood, employees of the District removed this tree, cut it up and used it to reinforce the revetment. There is evidence that about 90 per cent of plaintiff's damage occurred after the removal of the tree.

Prior to January 1952 Rosenberg commenced subdividing a plateau on a hill to the north of Sunset Boulevard and about a half mile north of plaintiff's property. Rivas Canyon stream flowed along the west side of the hill and Rustic Canyon stream along the east side. South of Sunset Boulevard and a little north of Brooktree Road bridge Rivas Canyon stream joins Rustic Canyon stream, thereby increasing the flow of the latter before it reaches the

bridge and plaintiff's property. Drainage from the hill both before subdividing and at the time of the floods in January 1952 was toward both Rivas and Rustic Canyons. The plateau was graded in March 1951. By January 10, 1952, a few days before the flood, the streets for the tract had been paved and, on the lots where fill had been placed, the fill had been compacted. A drain was in the process of being installed pursuant to requirements of city officials, the purpose of which was to direct the water flow from the southerly portion of the tract under Sunset Boulevard and into Rustic Canyon stream. At the time of the flood, the drain was not completed and had been blocked off at its opening on one of the streets in the tract. Surface waters in the area then eroded a portion of the hillside upon which the plateau was located and some of the eroded material was deposited on Sunset Boulevard. Water accumulated at the southerly cul-de-sac of the tract, overflowed the curbs and ran over Lot 10 of the tract and down the hillside. Virtually all of the eroded material came from the uncompacted fill in the area where the drain pipe was in the process of being installed.

Plaintiff's expert witness, a licensed practicing civil engineer, testified that plaintiff's home was situated on a leveled site; that sycamore trees covered the canyon floor prior to the 1952 floods and most of them were very large in size, from 30 to 50 years in age. Prior to the 1952 flood the thread of the stream meandered to within approximately 16 feet of the easterly line of plaintiff's property, and the bridge and its abutments at that time were aligned on the thread of the stream. The stream flowed, in going under the bridge, at about a 45-degree angle to the opening of the downstream revetment, an "S" curve existing between them. It was not until after the flood that the revetment existing downstream was extended beyond the location of the new bridge and that the new bridge was constructed in alignment with the new channel. At the time of the flood, the revetment had been completed to within

50 feet of plaintiff's property to the south and downstream, and the westerly edge of the revetment had a wing or tip extending out toward plaintiff's property to act as a funnel. The distance between the parallel wire fences of the revetment was 18 feet.

It was the opinion of this expert that during the flood the abutments of the bridge directed a flow of water towards the southeast lower end of plaintiff's property "and that the reason that the water increased in height there and became a menace to and eroded" plaintiff's property "was because it was impounded and built up here by the damming or the stopping up of the channel below [plaintiff's property] by debris and materials that were hung up on this inlet * * *." The inlet referred to by the expert was the 18-foot opening of the revetment constructed by the District; that it was not "good engineering practice to leave the end of this restricted channel—this whole area being an open area, and expect the water to get by this eighteen foot hole and go down the channel * * * [or] to leave a bridge on a 45 skew approximately with the proposed flow of the realignment."

The expert further testified that the Brooktree Road bridge should have been brought about in alignment with the new flood channel revetment to prevent the diversion of waters from the natural channel and onto plaintiff's property; or, in the alternative, a fender should have been appended to the southwest corner of the bridge to deflect the waters toward the new flood channel revetment and away from plaintiff's property; that in view of the condition, size and growth of the canyon floor, it was readily foreseeable that this revetment would clog up, causing the waters to be diverted onto plaintiff's property; that the closer the revetment was brought to the bridge, without realigning the bridge, the more apparent and the more certain was the danger of constriction and diversion of the water, and the greater the hazard to plaintiff's property; that under these circumstances neither the revetment

or bridge was constructed or maintained under sound engineering principles.

With respect to the Rosenberg development the expert testified that the run-off water from the 12 acres in the tract would be much greater due to the destruction of the natural absorption of the soil by reason of the grading, paving and compacting. In addition, he testified that because there was no drain or metal culvert the run-off waters would pick up a greater quantity of gravel, shale and fill. It was his opinion that the Rosenberg development not only increased the volume of the water, but it also increased its erosive and scouring capacity beyond that which would exist under natural conditions.

The Case against the City

It is clear that the only allegations of liability on the part of the City involve the issue of whether the City is responsible for an unlawful diversion or concentration of water discharged into the natural watercourse upstream from plaintiff's property or for the removal of the tree. There are no allegations respecting the alignment of Brooktree Road bridge, or that the City was guilty of maintaining a dangerous and defective condition, of which it had notice and failed to remedy, within the liability provisions of Government Code, section 53051.

As to the removal of the tree, the evidence is uncontradicted that this was done by employees of the District and we need not further consider it with respect to any liability on the part of the City.

[1,2] On this appeal plaintiff appears to have abandoned any claim against the City based on the subdivision of the tract of land by Rosenberg. No liability on the part of the City is indicated from this source as the evidence discloses only an increased flow of water resulting solely from the urbanization of the territory without any added water from any other drainage area. There is no liability on the part of the City under this aspect of the case. *Archer v. City of Los Angeles*, 19 Cal.2d

19, 119 P.2d 1, and cases cited therein. Moreover, since plaintiff's damage was suffered in January 1952 and the improvements in the Rosenberg subdivision were not accepted by the City until October of that year, no liability on the part of the City arose by reason of the manner in which the subdivider was doing the work, under the rule announced in *Hoover v. County of Kern*, 118 Cal.App.2d 139, 257 P.2d 492, and *Wallner v. Barry*, 207 Cal. 465, 279 P. 148.

[3] There remains the question whether any liability attached to the City by reason of its maintenance of Brooktree Road bridge. The evidence with respect to the bridge and its alignment, including the opinion of the expert that it was being maintained in an unsound engineering condition, was stricken as not being within the pleadings. With this ruling we must agree. The amended complaint upon which the case was tried makes no mention of Brooktree Road bridge. Plaintiff contends it comes within the meaning of "storm drains" located "above plaintiff's property" which were directing the waters "onto plaintiff's property" with "increased volume, increased velocity, and increased scouring capacity." There is no merit in this contention. A reading of all the allegations of the amended complaint makes it clear that when plaintiff mentioned "storm drains" he was referring to the drain or drains being constructed on and near the Rosenberg subdivision which had been ordered by the City to carry water from the subdivision under Sunset Boulevard. It is clear that any liability of the City in that

respect would rest on an entirely different theory than the maintenance of a dangerous and defective condition in public property within the meaning of Government Code, section 53051.

[4] But plaintiff urges that even if his allegations were insufficient to state a cause of action against the City under section 53051, the evidence was sufficient to take the case to the jury on that issue, and his motion to amend to conform to proof should have been granted. For the purposes of this discussion only we may assume that the proposed amendment to conform to proof¹ states a cause of action under section 53051.

The theory of plaintiff's amended complaint with respect to the City is that it permitted subdivider Rosenberg to construct certain storm drains and streets in a private subdivision and that such drains and paved areas increased the volume, velocity and scouring capacity of waters flowing in a natural water course past plaintiff's property downstream. The complaint contains no allegation that the City maintained any of its property in a dangerous and defective condition. This is alleged for the first time in the proffered amendment.

It is true that the statutory provision (Code Civ.Proc. § 473) giving the courts the power to permit amendments in furtherance of justice has received a very liberal interpretation by the courts of this state, *Rabe v. Western Union Tel. Co.*, 198 Cal. 290, 300, 244 P. 1077; *Frost v. Witter*, 132 Cal. 421, 424, 64 P. 705. As the court said in *Klopstock v. Superior Court*, 1⁵

1. "[P]laintiff hereby amends First Amended Complaint for Damages to Real Property to conform to proof in the following particulars only:

"I.

"Paragraph IX, Page 4, Lines 13 through 16, inclusive, is hereby amended as follows:

"* * * said accumulation, the construction of the storm drains, and the construction and maintenance of the Brooktree Road bridge, owned and maintained by the City of Los Angeles across Rustic Canyon channel so that water was

wrongfully diverted and caused to flow onto plaintiff's property with a considerably increased volume, increased velocity, and increased scouring capacity.

"II.

"That the said defendants had due and sufficient knowledge and notice of the defective and dangerous condition, and for a reasonable time after acquiring said knowledge and notice failed to remedy the condition or to take action reasonably necessary to protect the public from said condition."

Cal.2d 13, at page 19, 108 P.2d 906, 910, 135 A.L.R. 318: "This position is clearly in accord with the modern theories of code pleading, which would permit amendment in the discretion of the court unless an attempt is made to present an entirely different set of facts by way of the amendment."

In *Weinberg v. Dayton Storage Co.*, 50 Cal.App.2d 750, 759, 124 P.2d 155, 160, the court said: "While it is true that great liberality should be permitted in the filing of amendments where they do not prejudice the opposing party, it is equally true that amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend." See also *Knox v. Atchison, T. & S. F. Ry. Co.*, 95 Cal.App.2d 896, 901, 214 P.2d 589; *Lavelly v. Nonemaker*, 212 Cal. 380, 385, 298 P. 976; *Bank of United States v. Foreman*, 102 Cal.App. 756, 764, 283 P. 874.

In the instant case it is contended by the defendant City that, in his proposed amendment to conform to proof, plaintiff was attempting to state a completely new cause of action, namely, a statutory action based upon Government Code, section 53051, which cause of action would be barred if not commenced within three years from the date of the damage to plaintiff's property. Code Civ.Proc. § 338. Plaintiff did not seek to set forth the alleged new cause of action until October 10, 1956, which is almost four years and nine months after it arose on January 15, 1952. It therefore follows that if plaintiff's proposed amendment constitutes a new cause of action as defined in the cases which we shall hereafter discuss, it was clearly barred by the statute of limitations and the trial court properly refused to permit the amendment.

The test of what constitutes a new cause of action is well expressed by the court in *Klopstock v. Superior Court*, supra, 17 Cal. 2d 13, at page 20, 108 P.2d 906, at page 910, 135 A.L.R. 318: "Of course, the court's power to permit amendments of pleadings is not unlimited. It has generally been said

that an amendment may not be permitted where the effect of such amendment is to state 'another and distinct cause of action.' (Citations.) But this court has said: 'It is obvious that the unqualified way in which the rule is sometimes stated—i. e. that a new or different cause of action cannot be introduced by amendment—cannot be accepted; for the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action, and in these, and often in the case of new parties, a new cause of action is in fact for the first time introduced. All that can be required, therefore (to use the language of Mr. Pomeroy), is that "a wholly different cause of action" shall not be introduced * * *' (Citations.) In determining whether a wholly different cause of action is introduced by the amendment technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated * * * [F]or the purpose of determining whether amendment is possible, the 'cause of action' referred to as furnishing the test means *only the legal obligation which it is sought to enforce against the defendant*. Other courts have used almost identical language; the test is not whether under technical rules of pleading a new cause of action is introduced, *but rather, the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant*. The power to permit amendment is denied only if a change is made in the liability sought to be enforced against the defendant." (Emphasis added.)

It is clear that in the instant case the amendment to the complaint which attempts to set forth a cause of action against the City based on a statutory liability under section 53051, Government Code, states "facts which give rise to a wholly distinct and different legal obligation against the defendant" City. This is not a case in which the plaintiff has merely changed

his theory of recovery based upon the same set of facts. It likewise raises new issues not included in the original pleadings with no opportunity given to the City to defend.

This case is somewhat similar to that of *Burnett v. Boucher*, 108 Cal.App.2d 37, 238 P.2d 1. In that case plaintiffs brought the action for damages for injuries arising out of a collision. Defendant Earl Boucher owned the car but his son Edward was driving at the time of the accident. The complaint charged both with negligence. The action came to trial against the father Earl Boucher alone; the son was not served. At the outset of the trial plaintiffs disclaimed any intention of proving that the son was acting as the agent of the father and stated that they expected to prove that the son was driving the car with the father's permission. The defendant thereupon moved for a nonsuit based on the contention that the only cause of action alleged in the complaint had been abandoned, and that evidence on a different theory, statutory liability for imputed negligence, was inadmissible. Plaintiffs (as in the instant case) argued that their complaint was broad enough to cover statutory liability but requested permission to amend to include the new cause of action. The trial court denied permission to amend and granted the motion for nonsuit, holding that the cause of action stated in the complaint could not be changed to one of statutory liability under section 402 of the Vehicle Code, since more than a year had elapsed since the accident occurred. This judgment was affirmed on appeal. To the same effect see *McKnight v. Gilzean*, 29 Cal.App.2d 218, 84 P.2d 213.

Plaintiff relies upon *Day v. Western Loan & Bldg. Co.*, 42 Cal.App.2d 226, 231-232, 108 P.2d 702, 705 where it is said: "Stated another way, if the original complaint defectively states a cause of action, it may be amended after the running of the statute as long as the cause of action stated in the amended pleading can trace its descent from the original pleading."

But in the instant case it cannot be said that a cause of action based upon the

statutory liability of a municipality under Government Code, section 53051, can trace its descent from the allegations in plaintiff's complaint which merely charge the City with liability for the construction of certain storm drains and makes no allegation of the maintenance of a defective condition of public property owned by the City itself.

We conclude that the court did not err in striking, on behalf of the City, the evidence respecting the bridge, its abutments, and the proposed and completed flood control channel changes; that it did not err in denying plaintiff's motion to amend his complaint to conform to proof in these respects, or in granting the motion for nonsuit.

The Case against the District

The only allegation in the complaint directly charging the District with liability is found in paragraph XI as heretofore quoted. This relates to the removal of the fallen tree from plaintiff's property, thereby removing adjacent and subjacent support therefrom.

Plaintiff relies upon the theory of inverse condemnation, or the taking of private property for a public use without compensation therefor, citing *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1; *Clement v. State Reclamation Board*, 35 Cal.2d 628, 641, 220 P.2d 897, and *Ward Concrete Products Co. v. Los Angeles Flood etc. Dist.*, 149 Cal.App.2d 840, 844, 309 P.2d 546. Plaintiff contends that under this theory article I, section 14, of the California Constitution provides that the state or its agency must compensate the owner whether the damage was intentional or the result of negligence.

Bauer v. County of Ventura, supra, 45 Cal.2d at page 282, 289 P.2d at page 5, was an appeal from a judgment of dismissal based on orders sustaining demurrers to the amended complaint. The court therein laid down the rules and principles governing the doctrine of inverse condemnation in this state, and in doing so said, "California Constitution, Article 1, section 14

provides: 'Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *'. The taking of private property by the state for a public use is universally recognized as one of the indisputable attributes of sovereignty. (Citations.) But the state must, except under special circumstances not here present, follow the constitutional procedure which requires the payment of compensation before the private owner is dispossessed of his property. When this requirement is not fully satisfied, an action will lie against the state to recover the value of the property so taken. (Citations.) Based upon section 14, the appropriate action is sometimes designated a proceeding in inverse condemnation.

"Section 14, however, is designed not to create new causes of action but only to give the private property owner a remedy he would not otherwise have against the state for the unlawful dispossession, destruction or damage of his property. The state is therefore not liable under this provision for property damage that is *damnum absque injuria*. If the property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14. (Citations.) The effect of section 14 is to waive the immunity of the state where property is taken or damaged for public purposes. To bring his complaint within the provision, the plaintiff must show not only a taking or damaging for a public use but also that it is actionable under the general law.

"It is well established that the diversion of water from its natural course resulting in damage to adjacent property is actionable. (Citations.) Mere improvement within an existing watercourse which accelerates rather than diverts the flow does not give rise to a cause of action when damage results from an overflow. Straightening, widening or deepening the channel of a stream to improve the drainage or the collection of surface waters for discharge

into their natural stream entails no diversion in the event of a resulting overflow. But to escape liability the improvements thus described must follow the natural drainage of the country or the natural stream. (Citations.) In the present case, the plaintiffs' allegations show that the waters of the barranca were diverted away from their natural stream into a ditch running close to the plaintiffs' land, and then permitted to overflow and back up in a direction exactly opposite from their natural flow."

The position of defendant District is that the instant case comes within the exception stated in *Bauer v. County of Ventura*, supra, 45 Cal.2d at page 286, 289 P.2d at page 7, namely: "Damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of the rule applied in the present case." It further claims that the removal of the tree was emergency work constituting an exercise of the police power, rather than a damaging or taking for public use, citing *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 391, 153 P.2d 950. But in that case the court, relying upon article I, section 14 of the Constitution, reversed a judgment of dismissal following the sustaining of a demurrer to the complaint, holding that the allegations were sufficient to allege a cause of action for inverse condemnation.

[5] In the present case we are dealing with a judgment of nonsuit. Such a judgment should be granted only when, accepting the full force of the evidence adduced, together with every reasonable inference favorable to the plaintiff, which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the plaintiff from recovering a judgment. *Archer v. City of Los Angeles*, supra, 19 Cal.2d 19, 23, 119 P.2d 1; *Mastrangelo v. West Side U. H. School Dist.*, 2 Cal.2d 540, 544, 42 P.2d 634.

Plaintiff's complaint alleged the removal of the tree by the District thereby removing adjacent and subjacent support from the

property of plaintiff. There is evidence to support this allegation and further evidence that the tree was cut up and used to reinforce the revetment below plaintiff's property. There is also evidence that the removal of this tree resulted in the major portion of plaintiff's damage. There are no allegations in the complaint which would support the testimony of the plaintiff's expert that the revetment was not constructed in accordance with good engineering practice and upon the authorities heretofore cited herein, the trial court was correct in striking that portion of the evidence. There remains evidence however from which a jury could find that there was a revetment constructed by the District; that it was constructed as part of a plan to change the channel of the stream; that its upstream opening was but eighteen feet wide and became clogged during the flood; and that the removal of the tree and its being placed in the revetment was part of the maintenance of the channel and the revetment according to the District's plan.

[6] It was a question of fact for the jury to determine as to whether the removal of the tree constituted faulty maintenance of the District's drainage system within the purview of the Bauer case, *supra*. There the court said in 45 Cal.2d at page 285, 289 P.2d at page 6: "The consequences of faulty maintenance may assume public importance equal in some instances to the original construction. The ultimate objects of construction and maintenance are similar if not coextensive. In some instances, where the original construction artificially diverts a stream from its natural course, more risk of damage to surrounding property may be created from improper maintenance than would exist had the stream been permitted to remain in its natural state. If the original construction had as its function the expeditious drainage of surface waters, then that public purpose is served equally by the proper maintenance of the improvement once it is made. It follows that the taking or damaging of private property for the maintenance of an existing public improvement involving a deliberate act which

has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole constitutes a taking or damaging of property for a public use and the owner of such property is entitled to compensation."

The District attempts to justify its removal of plaintiff's tree by contending that the threat of the flood created an emergency which justified its conduct under the police power. Plaintiff, on the contrary, argues that there was no real emergency and that the removal of the tree would not or did not prevent a flood or flood condition, and indeed caused much of the damage to his property.

This court recently had occasion to discuss the question of the emergency powers of a flood control district in *Ward Concrete Products Co. v. Los Angeles Flood etc. Dist.*, 149 Cal.App.2d 840, at page 847, 309 P.2d 546, 551 and we said: "Furthermore, since the decisions in the cases cited, the Supreme Court has given further consideration to this latter subject matter (police power) in *Bacich v. Board of Control*, 23 Cal.2d 343, 351, 144 P.2d 818, and *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 391, 153 P.2d 950. Those cases indicate that, in the absence of any compelling emergency or the pressure of public necessity, the courts will be slow to invoke the doctrine of police power to protect public agencies in those cases where damage to private parties can be averted by proper construction and proper precautions in the first instance. (Citations.) As stated in the House case, *supra* * * *: 'It is a principle of universal law that wherever the right to own property is recognized in a free government, practically all other rights become worthless if the government possesses an uncontrollable power over the property of the citizen. Upon this premise the plaintiff relies on the unnecessary damage to her property as the result of the defendant district's negligence in the planning, construction and maintenance of the flood channel work to sustain the constitutional basis of her claim. In other words, it is her position that damage suffered by a property

owner as the result of a public improvement undertaken in the exercise of the police power must have some reasonable relation to the purpose to be accomplished under the prevailing circumstances, and that the governmental agency proceeding with such work may not *needlessly* inflict injury upon private property without being liable to make compensation therefor. This accords with the general object of the constitutional guaranties in protection of property rights and but places upon a reciprocal basis the individual's damage in relation to the public benefit. *Unnecessary* damage to his property is of no benefit to the public; rather it only entails unwarranted sacrifice and loss on the individual's part, which should be compensable damage.' Whether the damage suffered by plaintiff exceeded the necessities of the case as expounded in the House case was a question of fact for determination by the court. (Citations.)"

[7] We therefore conclude that there was sufficient evidence to go to the jury on the limited question of liability on the part of the District in removing the tree. It was a question of fact as to whether the removal of this tree was in the performance of the maintenance of the flood control channel and the revetment within the principles laid down in *Bauer v. County of Ventura*, supra, 45 Cal.2d 276, 289 P.2d 1, and the other cases cited. It was also a question of fact for the jury as to whether the employees of the District in removing the tree were acting under an emergency which justified the use of the police power without compensation to the plaintiff.

The Case Against Rosenberg

[8] The only evidence in any way connecting Rosenberg with the claimed injury is the testimony of plaintiff's expert to the effect that because of the paving and other improvements in the subdivision the tract would absorb less water than it had previously in its natural state. He also stated that due to the fact that less water would be absorbed into the ground, more water would go over the sides of the tract into

Rivas Canyon and Rustic Canyon. However, Rosenberg made no change in the drainage. No water was diverted into the stream flowing past plaintiff's property that would not naturally have entered that stream. Furthermore, there is no evidence that any of the eroded material from the subdivision got on the downstream side of Sunset Boulevard. The evidence is in fact to the contrary.

Even if the improvements on the Rosenberg tract did create an increased water run-off into the stream passing plaintiff's property there is no evidence that this was the *cause* of his damage. But assuming that it was a cause, it is not actionable under California law. As was said in *San Gabriel V. C. Club v. Los Angeles*, 182 Cal. 392, 402, 188 P. 554, 558, 9 A.L.R. 1200: "If the surface waters are gathered and discharged into the stream which is their natural means of drainage, so that they come to the land below only as a part of the stream, it is held that no action lies because of their being added. (Citations.) * * * 'We have just noticed the difference between merely draining on to another's land, and draining into a natural channel or watercourse, which flows across such land. So far as streams or natural watercourses are concerned, there can be no doubt that one may drain into them, and thereby increase their volume without subjecting himself to liability for any damage suffered by a lower owner.'"

Plaintiff relies upon the case of *LeBrun v. Richards*, 210 Cal. 308, 316, 291 P. 825, 72 A.L.R. 336, urging it holds that an upper riparian owner cannot increase the drainage of his own land, nor accelerate the flow of the run-off by means of ditches, to the injury of the lower owner. But that is not the situation in the instant case. As the court said in *LeBrun*, supra, 210 Cal. at pages 315-316, 291 P. at page 828: "'The upper proprietor may not divert by artificial means the surface waters upon his own lands to the lands of the lower proprietor, nor may he accelerate by means of ditches or increase the drainage of his own land to the injury of the lower owner. His

right "is limited to the disposition of the water through the chosen channels of nature." (Citation.)"

So it is in the case at bar. Rosenberg did nothing more than improve his property. He did not divert any of the surface water falling on his property into channels other than "chosen channels of nature." It was not his fault that these natural channels were insufficient to contain the waters during a flood period. If it were the law that a subdivider such as Rosenberg is liable to lower riparian owners merely because his improvements increase the flow of surface waters in their natural channels, then every hillside developer would become virtually an insurer against flood damage to all property owners below his development. Such is not the law. There was no error in granting the judgment of nonsuit as to Rosenberg.

The judgment as to the Los Angeles County Flood Control District is reversed; the judgments as to the other defendants are affirmed.

FOX, P. J., and ASHBURN, J., concur.



158 Cal.App.2d 252

George Stanley GAYTON and Harold Raymond Gayton, co-partners doing business as G. T. Gayton & Sons, Plaintiffs and Respondents,

v.

John LEBEDINA and Lois T. Lebedina, Defendants and Appellants.

Civ. 22628.

District Court of Appeal, Second District,
Division 2, California.

March 6, 1958.

Action by owners of dominant estate to enjoin obstruction of driveway constructed on easement. The Superior Court

of Los Angeles County, Charles T. Smith, J., granted injunction, and appeal was taken. The District Court of Appeal, Kincaid, J. pro tempore, held that where easement was created at time two pieces of property were held under common ownership, and deed reserved to common owner for use as driveway a portion of property conveyed, easement was reserved for use of entire property so held without regard for any fence which might have divided it in any particular.

Affirmed.

1. Easements ⇐61(9)

In action by owners of dominant estate to enjoin obstruction of driveway constructed on easement, evidence sustained finding that use of driveway to serve 11 carports or parking spaces was not in excess of rights created by easement.

2. Easements ⇐44(2)

Where easement was created at time two pieces of property were held under common ownership, and deed reserved to common owner for use as driveway a portion of property conveyed, easement was reserved for use of entire property so held without regard for any fence which might have divided it in any particular.

3. Easements ⇐61(9)

In action by owners of dominant estate to enjoin obstruction of driveway constructed on easement, evidence sustained finding that existence or location of wooden fence between house and cottage on property served by easement and garages and parking places on rear of such property was consistent with and had no bearing upon use found to have been made of driveway in behalf of entire property for which original reservation was made.

4. Easements ⇐61(9)

In action by owners of dominant estate to enjoin obstruction of driveway constructed on easement, evidence sustained finding that use of driveway to serve 11 carports or parking spaces on property served by easement did not amount to an improper enlargement of dominant estate.

5. Trial ⇨375

When a trial judge views property involved in an action, his observations on such tour become evidence in the case and that which is then seen may be used alone or with other evidence in support of findings.

6. Easements ⇨61(12)

If conditions change so that use made of easement became excessive and unreasonable, appropriate proceedings might be instituted to vacate or modify injunction restraining owners of servient tenements from interfering with free use by owners of dominant estate of driveway constructed over easement.

Roy J. Brown, Long Beach, for appellants.

Houser & Beam and Everett Houser, Long Beach, for respondents.

KINCAID, Justice pro tem.

This action was instituted by plaintiffs-respondents, hereinafter called "Gaytons," against defendants-appellants, "Lebedinas," to enjoin the obstruction of a driveway by a steel fence and gate, for a mandatory injunction requiring removal of such obstruction and for damages therefor. The complaint is in two causes of action; the first alleging a recorded easement, and the second, an easement by prescription based on open, notorious and adverse usage of the driveway by plaintiffs and their predecessors for more than 12 years past and without any fence, gate or other obstruction. The defendants answered and filed a cross-complaint wherein they sought a declaration of the rights of the parties with respect to said easement, and damages for the improper use thereof by plaintiffs. A judgment followed perpetually enjoining defendants from interfering with the free use by the plaintiffs or their successors in interest of the driveway, from maintaining a gate or obstruction of any description across it and requiring that a gate theretofore established across it by defendants be removed. The judgment further provided

that plaintiffs recover from defendants the sum of \$250 damages, that defendants recover a like sum from the plaintiffs as damages and plaintiffs and their successors in interest be required at their sole expense to maintain the driveway in a reasonable state of repair.

While the appeal is taken from the judgment as a whole, two principal grounds are asserted by defendants as the basis for a reversal. They are: (1) that the present and proposed use of the driveway by plaintiffs is in excess of the rights created by the easement; (2) that the present and proposed use of the driveway by plaintiffs amounts to an improper enlargement of the dominant estate in that the entire plaintiff parcel of land will be served thereby rather than the area south of the line of a wooden fence formerly found on the property. No serious complaint seems to be made by defendants as to the provisions of the judgment requiring the gate and post to be removed, this already having been done, or the requirement that plaintiffs must maintain the driveway in a reasonable state of repair. Damages due each party have already been satisfied of record. The only challenge as to that portion of the findings and judgment relating to plaintiffs and their predecessors having acquired an easement by prescription is limited to a contention that no prescriptive right has accrued to use the driveway to any greater extent than it was used prior to the construction of the new building by plaintiffs.

The evidence discloses that the Gaytons own a deep lot (90' x 284') facing on East Fourth Street in a thickly populated area of Long Beach. The Lebedinas own a lot (60' x 130') sticking out at right angles to Gaytons' lot, like a thumb, and fronting on another public street called Carroll Park East. The driveway in question is over the south eight feet of the Lebedina lot and serves to connect Gaytons' lot with Carroll Park East.

Originally all land mentioned was under common ownership. The common owner deeded to the Lebedinas' predecessor in interest on June 7, 1944, reserving the

driveway easement.¹ The easement was preserved in full force by subsequent deeds to the Gaytons and to the Lebedinas.

The evidence covered a period of many years. In 1908, there was a two-story house on the Fourth Street end of the lot, and a barn in the rear. A cottage was then moved in behind the main house, and a garage built facing Fourth Street. Between 1921 and 1926 the apartments now owned by the Lebedinas were built, also five garages in the rear of the apartments, the concrete driveway in question and a row of nine brick garages on what is now the Gayton property. Until the Lebedinas erected one, there was never any gate across the driveway.

A total of 13 vehicles were accommodated under cover on the rear portion of the Gayton land. In addition some cars or trucks stood out in the open. The nine garages and barn thereon were used by motor vehicles. A transfer man used the space for a half-ton truck, a 1½ ton truck, a 2 ton truck and two vans at different times. This usage covered the period 1944 to 1956. The driveway was used for both ingress and egress. Vehicles could enter the garage facing on Fourth Street but there was no vehicular traffic from Fourth Street to the nine garages, the four-space barn or open parking space in the rear because the front improvements were separated from the back yard by an old wooden fence with a gate for pedestrians.

The concrete driveway served and serves a dual purpose, the portion from Carroll Park East extending to the rear of the Lebedinas' apartment house being used by the Lebedinas and three of their tenants to drive cars to and from the garages on the rear of the Lebedina property. The portion used by the Lebedinas and the straight extension of the driveway past the Lebedina garages is also for the benefit

of the Gaytons and under the plans for the new improvements on the Gayton property will be used exclusively as an exit from the Gayton property.

In April 1956 the Gaytons bought their property, cleared the lot and prepared to erect a 14-unit own-your-own apartment building with 11 carports or parking spaces in place of the 13-car covered garage-barn buildings and open parking space. The design provides that vehicles will all enter from Fourth Street and circulate out to Carroll Park East over the driveway. At the request of the parties the trial judge personally visited and inspected the involved premises during the course of the trial.

[1,2] The evidence is amply sufficient to meet and overcome the Lebedinas' contention that the present use of the driveway by the plaintiffs is in excess of the rights created by the easement. As noted the easement was created at a time when both the Gayton and the Lebedina properties were held under common ownership. The deed reserved to the estate of such common owner the south eight feet of the property then conveyed to the predecessors of defendants to be used for a driveway. This had the effect of reserving it for the use of the entire property so held without regard for any fence which may have divided it in any particular.

The judgment in this regard is further supported by the evidence showing that through the years this driveway over the easement served the present Gayton property by the ingress and egress of automobiles and trucks to the nine brick garages, the barn and the open parking spaces.

Each party cites and relies on the rule that in case of a grant which imposes a burden on the servient tenement in general terms, the particular course or manner of use is fixed by the manner of exercise of the granted right, with the acquiescence

1. On June 7, 1944, Mrs. Beck, as executrix under the will of Clara V. Porter, conveyed the property now owned by defendants to a Mrs. Ida M. Ashley, defendants' predecessor in interest, "reserving to the Estate of Clara V. Porter,

Deceased, and the Heirs, Devisees, Successors and Assigns of said Clara V. Porter, an easement over the South Eight (8) Feet of said property for a driveway."

and consent of both parties. 17 Cal.Jur.2d, p. 127, Easements, § 23; Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 5 L.R.A., N.S., 851; Kern Island Irr. Co. v. City of Bakersfield, 151 Cal. 403, 90 P. 1052; Colegrove Water Co. v. City of Hollywood, 151 Cal. 425, 90 P. 1053, 13 L.R.A., N.S., 904; Signorelli v. Edwards, 120 Cal.App. 614, 8 P.2d 194; San Joaquin & Kings etc. Co. v. Egenhoff, 61 Cal.App.2d 82, 141 P.2d 939.

With the consent and through the acquiescence of the parties and their predecessors in interest some 13 or more automobiles and trucks have used the easement to and from the Gayton property for a period of some 20 years. For all this time the driveway was utilized without protest, obstruction, gate or hindrance. It was only when plaintiffs commenced operations directed toward the construction of the 14-unit apartment building on their premises that defendants registered their objections. These were followed by erection of the fence and gate across the driveway.

While it is understandable that defendants were annoyed and disturbed during the period of construction this was of a temporary nature and was fully considered by the court in the award of damages to them. With completion of the apartment the noise and confusion of building operations will end. Whereas before there were 13 covered parking spaces in addition to open-air parking served by the driveway, now there are but 11 with no open spaces. Before there was two-way traffic whereas now the easement is used for one-way egress only. Examination of the exhibits, when taken with the testimony, demonstrates that there is no substantial change in the location where motor vehicles will be kept. Motor vehicles are still relegated to the side and rear of the lot much as they were before.

[3] The old wooden fence is gone but it never played any real part in the use of the property by the owners or their successors insofar as vehicular traffic was

concerned. From the evidence the trial judge was fully justified in concluding that the existence or location of this fence was consistent with and had no bearing upon the use found to have been made of the driveway in behalf of the entire property for which the original reservation was made.

[4, 5] For the reasons stated the further contention of defendants that the present and proposed use of the driveway by plaintiffs amounts to an improper enlargement of the dominant estate cannot be sustained. The court found, and the evidence sustains the finding, to the contrary. In addition to the oral and documentary evidence considered, the trial judge personally viewed the driveway and the surrounding properties. When a trial judge views the property involved in an action his observations on such tour become evidence in the case (Safeway Stores v. City Council, San Mateo, 86 Cal.App.2d 277, 284, 194 P.2d 720), and that which is then seen may be used alone or with other evidence in support of the findings. Wheeler v. Gregg, 90 Cal.App.2d 348, 203 P.2d 37; see Memorial Hills Ass'n v. Sequoia Investment Corp., Cal.App., 320 P.2d 567.

[6] Defendants additionally complain that the injunction as presently worded restraining them from interfering with the free use by plaintiffs or their successors of the driveway presently constructed over the eight feet covered by the easement is too broad and should be referable to the conditions now existent. The answer to this seems to be that if, in the future, conditions may change so that the use made of the easement becomes excessive and unreasonable, appropriate proceedings may be instituted to vacate or modify the injunctive decree. Sontag Chain Stores Co. v. Superior Court, 18 Cal.2d 92, 113 P.2d 689; Woods v. Corsey, 89 Cal.App.2d 105, 200 P.2d 208.

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.

158 Cal.App.2d 310

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Albert McCULLOUGH, Defendant and
Appellant.

Cr. 3435.

District Court of Appeal, First District,
Division 1, California.

March 10, 1958.

Hearing Denied May 7, 1958.

Defendant was convicted of the illegal sale of narcotics and from a judgment of the Superior Court, City and County of San Francisco, Walter Carpeneti, J., the defendant appeals. The District Court of Appeal, Peters, P. J., held that evidence of another alleged illegal sale by the defendant was inadmissible, where the evidence did not establish that the defendant had committed any crime on that date.

Judgment and order reversed.

1. Criminal Law §369(1)

In prosecution for the unlawful sale of narcotics, evidence of another transaction involving alleged sale of narcotics by the defendant, was inadmissible where the evidence did not establish that the defendant had committed any crime at that time.

2. Criminal Law

§369(1, 2), 370, 371(1, 12), 372(1)

Generally, evidence of other crimes is not admissible, but when not too remote, evidence of other acts of a similar nature may be admitted to prove a material fact, or when the evidence tends to show motive, scheme, plan or system, or where the evidence tends to show guilty knowledge or intent.

3. Criminal Law §369(2), 374

Some connection between the other crime, evidence of which is sought to be admitted, and the crime charged must be shown, and it also must be shown, with some certainty, that the accused committed the other crime, and mere suspicion is not enough.

Edward T. Mancuso, Public Defender of City and County of San Francisco, Waldo F. Postel, Deputy Public Defender, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

McCullough was charged with the sale and possession of narcotics on November 28, 1956. The possession charge was subsequently dismissed. He was convicted on the illegal sale charge. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

Defendant does not challenge the sufficiency of the evidence to sustain the conviction. He does, however, challenge the propriety of the trial court's ruling in admitting evidence of another offense, and contends such ruling was erroneous and prejudicial. We agree.

In order to indicate the prejudicial nature of the challenged evidence, some reference should be made to the evidence introduced on the charged offense. That offense was that defendant sold narcotics on November 28, 1956. Officer Godrum, a plain clothes officer, testified that on that day, in the company of an informer by the name of Rose Thomas, he saw the defendant at Ellis and Fillmore Streets in San Francisco. Rose called the defendant over to the car in which they were riding and asked him if he had anything. The defendant replied: "Yes, but you will have to get out and walk." The officer then handed Rose Thomas a \$10 bill and told her to take a walk with defendant and to keep her hands in sight. Rose got out of the car and joined the defendant, who was accompanied by another woman, and the three started to walk down Ellis Street, with Officer Godrum trailing them about 10 to 12 yards behind. The officer testified that while the three persons were walking down the street he saw the defendant take the \$10 bill out of the hand of Rose Thomas and saw him hand her two white objects. Rose ther

came back to the car driven by the officer and handed him the two white objects, which later were discovered to be two bindles of heroin.

The prosecution, over objection, offered evidence of another transaction that was supposed to have occurred on November 8, 1956. Inspector Ohlsen of the State Bureau of Narcotic Enforcement testified that on that day he and Officer Hogan searched one Frank Thomas, an informer, and then gave him two marked bills. They then drove Thomas to Ellis and Steiner Streets where they let him out of the car. They observed Thomas walk on Ellis to Fillmore. There Thomas met the defendant. Thomas and defendant walked over to an automobile occupied by one Archie Hamilton. Thomas got in the front seat with Hamilton and the defendant in the back seat. This car, with the three men, was then observed being driven to Ellis and Steiner Streets. Thomas got out, and the vehicle proceeded onwards. Thomas rejoined the two officers and handed Inspector Ohlsen two packets which later were found to contain heroin. Thomas no longer had the money. The officers did not see Thomas hand any money to defendant, nor did they see defendant hand anything to Thomas. The third man in the automobile, Archie Hamilton, was arrested several days later.

The defendant denied seeing Rose Thomas or selling her heroin on November 28, 1956, or on any other occasion. He also denied getting into an automobile with Frank Thomas or Archie Hamilton on November 8, 1956. Hamilton refused to testify on constitutional grounds.

On this evidence the jury found defendant guilty of the sale of narcotics on November 28, 1956.

[1] Appellant contends that it was error to permit the prosecution, over objection, to introduce evidence of the November 8th transaction. We agree with this contention. That evidence did not establish that the appellant had committed any crime on that date. No one testified that anything passed from the informer to appellant, or from

appellant to the informer. The automobile did not belong to appellant. There were three men in that car, the informer, appellant and Hamilton. Who gave the informer the heroin or took his money does not directly or indirectly appear.

[2] The general rule is, of course, that evidence of other crimes is not admissible. To this rule there are several exceptions. Thus, when not too remote, evidence of other acts of a similar nature may be admitted to prove a material fact, or when the evidence tends to show motive, scheme, plan or system, or where such evidence tends to show guilty knowledge or intent. *People v. Torres*, 98 Cal.App.2d 189, 219 P.2d 480. In *People v. Lapin*, 138 Cal.App. 2d 251, 291 P.2d 575, a defendant was charged and convicted of illegal possession of marijuana. Evidence of a prior offense was improperly admitted. The judgment was reversed. The proper rule was stated as follows (138 Cal.App.2d at page 259, 291 P.2d at page 581): "The rule is now firmly established that evidence of a distinct, substantive offense cannot be received unless there is some clear connection between that offense and the other charged from which it may be logically inferred that if guilty of one he must be guilty of the other. *People v. Lane*, 100 Cal. 379, 385, 34 P. 856. If that is not the case, such evidence is not admissible. It cannot be received to prove the inclination of an accused towards crime, and in that way, to render more probable his guilt of the charge for which he is on trial. As was said in *People v. Westek*, 31 Cal.2d 469, 476, 190 P.2d 9, 13; 'It is the general rule that evidence of other crimes, where it is offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged, should be excluded because its probative value is outweighed by its prejudicial effect (citations).'"

[3] It is well settled that some connection between the other crime and the crime charged must be shown, and it also must be shown, with some certainty, that the ac-

cused committed the other crime. Mere suspicion that the accused did or may have committed the other act is not enough. These principles are discussed at length in *People v. Albertson*, 23 Cal.2d 550, 145 P.2d 7. At page 576 of 23 Cal.2d, at page 20 of 145 P.2d the court stated:

"Evidence of other crimes may be admitted when it tends directly to establish the crime charged by proving a material fact, where it is part of the *res gestae*, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme. [Citing authorities.]

"The trial court, however, should be guided by the rule that such proof is to be received with 'extreme caution,' and if its connection with the crime charged is not clearly perceived, the doubt is to be resolved in favor of the accused, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt."

After discussing these principles at some length the Supreme Court concluded its discussion as follows (23 Cal.2d at page 580, 145 P.2d at page 22): "Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences in such manner that it reacts as a psychological factor with the result that the proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion that he must also have committed the crime charged. This is but a vicious circle. Here the evidence of suspicious prior occurrences affords no substantial proof whatsoever connecting defendant in any way with the charge on which he was tried."

The instant case falls squarely within the rules announced in the *Lapin* and *Albertson* cases. The evidence relating to the November 8th transaction did not prove that appellant had committed any offense on that day. The trial court instructed that the challenged evidence was admissible to show the

identity of the person who committed the alleged crime or to show common plan, scheme, system or design or to show that the accused possessed guilty knowledge. The evidence, in fact, did not tend to show any of these things. It did not show a common scheme or plan, except in the most general sense, because the methods of operation as to the charged offense and as to the November 8th transaction were quite different. The evidence failed to connect the accused with the offense of November 8th, assuming an offense was committed. There was no issue before the jury of possession without knowledge. The sole purpose of the evidence and its necessary effect was to implant in the minds of the jurors the idea that the accused must have committed a crime on that date and thus was probably guilty of the crime charged. The rule excluding such evidence is designed to keep such highly prejudicial evidence, based on mere surmise, conjecture or suspicion, out of the case. The error was obviously prejudicial.

This conclusion makes it unnecessary to pass on the other contention made by appellant to the effect that he was entitled, as a matter of law, to a continuance. This contention is based on the fact that when Rose Thomas' name was divulged at the trial as the informer-participant in the charged offense appellant requested and was denied a continuance to attempt to locate her, she having moved from her last known address. Apparently, although this does not clearly appear, no request for her name was made at the preliminary. The propriety of the ruling denying the continuance need not be passed upon because the error already discussed requires a reversal. On the new trial the claimed error, if it was error, could not possibly occur because appellant now knows the name of the informer and will have had adequate time to locate and interview her.

The judgment and order appealed from are reversed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

Anthony GOMEZ and Ray Cardinal,
Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF MENDOCINO, and Honorable Hale McCowen, Respondents.*

Civ. 9446.

District Court of Appeal,
Third District, California.

March 6, 1958.

Hearing Granted April 30, 1958.

Prohibition proceeding brought to restrain the Superior Court, Mendocino County, Hale McCowen, J., from proceeding with trial of criminal action. The District Court of Appeal, Van Dyke, P. J., held that notwithstanding reversal of petty theft conviction (for misconduct of district attorney) defendant could be convicted, under indictment charging violation of penal code section, of either grand theft or petty theft, and held that therefore the Superior Court had properly refused to dismiss grand theft charges upon jeopardy plea, and had properly refused to transfer cause to Justice Court, notwithstanding defendant's contention that Superior Court had no jurisdiction to try petty theft charge.

Petition denied.

Criminal Law — 101(3), 193½

Notwithstanding reversal of petty theft conviction (for misconduct of district attorney) defendant could be convicted, under indictment charging violation of penal code section, of either grand theft or petty theft; and, therefore, Superior Court properly refused to dismiss grand theft charges upon jeopardy plea, and properly refused to transfer cause to Justice Court, notwithstanding defendant's contention that Superior Court had no jurisdiction to try petty theft charge. West's Ann.Pen. Code, §§ 484, 486-488.

Merle P. Orchard, Dist. Atty., Ukiah, and Edmund G. Brown, Atty. Gen., by Doris H. Maier, and J. M. Sanderson, Deputy Attys. Gen., for respondents.

VAN DYKE, Presiding Justice.

Petitioners herein seek a writ of prohibition to restrain the Superior Court of Mendocino County from proceeding with the trial of a criminal action. They also seek mandate to compel that court to transfer the cause to the justice court. On March 19, 1957 an information was filed charging petitioners with a violation of Section 484 of the Penal Code in that on or about October 20, 1956, they "did then and there, wilfully, unlawfully and feloniously take one P & H Loading Shovel of the value of Three Thousand and no/100ths (\$3,000.00) Dollars, * * * the personal property of Arthur T. Casteel." They were tried to a jury which returned a verdict finding them guilty of petty theft. They appealed from the ensuing judgment and the judgment was reversed for misconduct of the district attorney. *People v. Cardinal*, 154 Cal.App. 2d 835, 316 P.2d 1001. Thereafter petitioners moved the respondent court to dismiss the charges as to grand theft upon the ground that they had once been in jeopardy and had been acquitted of that charge. They contended further that the respondent court had no jurisdiction to try them upon the remaining charge, petty theft. Their motions were denied and they were ordered to appear for setting of the cause for trial. They thereupon initiated this proceeding.

We have concluded that petitioners' contentions cannot be sustained. There was but one offense charged in the information, the offense of theft. Penal Code, Sec. 484. The code divides theft into two degrees, grand theft and petty theft. Penal Code, Secs. 486-488. Where the charge of theft puts in issue the value of the property charged to have been taken, it is competent for the jury to return a verdict of petty theft. If such a verdict is returned, however, the defendant has

been convicted of theft. There has been no acquittal of the charge of theft. In view of the statute prescribing two degrees of the crime, the situation presented here is comparable to that presented in *People v. Keefer*, 65 Cal. 232, 3 P. 818, wherein a defendant, having been charged with murder, having been found guilty of murder in the second degree, and having obtained a reversal of that conviction, was held to be subject to a second trial involving a charge of murder in the first degree. The Supreme Court declared, 65 Cal. at page 235, 3 P. at page 820:

"* * * The indictment charges the crime of *murder*, and the defendant was not acquitted of murder by the first verdict.

"In dividing the crime of murder into two degrees the legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine, in a particular case, whether the crime deserved the extreme penalty of the law or a less severe punishment.

* * * The fact that a severer penalty is to be imposed in one case than the other does not change the effect of a previous conviction, and the defendant who, on his own motion, secures a new trial, subjects himself to a retrial on the charge of murder, whether the first verdict was guilty of murder of the first or of the second degree. At the second trial he may, if the evidence justify such verdict, be found guilty of murder of the first degree." See, also, *In re Moore*, 29 Cal.App.2d 56, 84 P.2d 57, and *People v. McNeer*, 14 Cal.App.2d 22, 57 P.2d 1018.

Our courts have distinguished the situation presented here from one where a

defendant is charged with an offense which includes other offenses of lower grade. In such cases if the defendant has been convicted of an offense of lower grade, but necessarily included within the charge, the verdict is considered as an implied finding that he was not guilty of the offense charged, or of the offenses of lower grade necessarily included within the charge but of higher grade than the offense of which he was convicted. In such cases, upon reversal our courts have held that the defendant cannot be tried for an offense included within the charge concerning which he has impliedly been found not guilty. *People v. Gordon*, 99 Cal. 227, 33 P. 901; *In re Hess*, 45 Cal.2d 171, 288 P.2d 5. Our attention is called to the case of *People v. Ny Sam Chung*, 94 Cal. 304, 29 P. 642, wherein the court, treating petty theft as, under the facts of that case, a necessarily included crime in a charge of grand theft, applied the rule appropriate under that theory. But the case was decided long before the legislature, by the amendatory legislation of 1927 grouped many theretofore distinct common law crimes under the general definition of theft, and then divided theft into two degrees called grand and petty theft. Therefore we think the case is no longer applicable to prosecutions for theft. Petitioners rely also upon the case of *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199. In that case it was held that, after a conviction of second degree murder in a federal court had been reversed on appeal, the defendant could not be convicted upon a second trial of first degree murder. As noted by the minority, the rule in the federal courts had theretofore been otherwise. However, the decision recognized that the provision against double jeopardy contained in the federal Constitution, Const.Amend. 5, applied to federal court proceedings and did not control the application of that principle in the state courts. Although our constitutional provision is substantially the same as that contained in the federal Con-

stitution, our courts still follow the rule laid down in the cases herein cited.

For the reasons given, the petition is denied as to both writs requested.

SCHOTTKY and PEEK, JJ., concur.



158 Cal.App.2d 129

Pete Diaz ESTRADA, Plaintiff and Respondent,

v.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Defendant and Appellant.
Civ. 5628.

District Court of Appeal, Fourth District,
California.

Feb. 28, 1958.

Rehearing Denied March 25, 1958.

Action by an injured party against insurer based on judgment obtained by injured party in a prior action by injured party against a policeman, who allegedly was an insured under a liability policy, which was issued to city and its officials while acting in their capacity as such. The Superior Court of Fresno County, Edward L. Kellas, J., entered judgment for injured party and insurer appealed. The District Court of Appeal, Barnard, P. J., held that question whether policeman was covered by policy was for trier of facts.

Judgment affirmed.

1. Municipal Corporations ⇨61

A city may act only through its officials, both elected and appointed, or through its employees.

2. Officers ⇨1

Both elected and appointed officials usually have duties and responsibilities differing from those of a mere employee and

the term "officer" is often used as synonymous with the word "official"; the meaning to be given the word "official" depends upon many and varying conditions.

See publication Words and Phrases, for other judicial constructions and definitions of "Officer" and "Official".

3. Municipal Corporations ⇨180(1)

In common use, "policemen" are usually referred to as police officers and to that extent at least they are considered as officers or officials of the city in which they are employed.

See publication Words and Phrases, for other judicial constructions and definitions of "Policemen".

4. Insurance ⇨435

Where insurer issued liability policy to city and its officials while acting in their capacity as such and did not insert the word "elected" before the word "officials", the word "officials" would be interpreted in its broader sense, as commonly understood, as including appointed officials for purposes of determining whether a policeman was an insured person under policy.

5. Appeal and Error ⇨1047(3)

In action by injured party against insurer based on a default judgment obtained by injured party against a policeman who was allegedly an insured under a liability policy issued to city and its officials while acting in their capacity as such, trial court did not commit prejudicial error in striking testimony of insurer's manager to effect that it was a custom in the insurance industry to consider the word "officials" as applying only to elected officials and not to employees, except in case of an employee driving an automobile, in which event he was covered by policy. West's Ann. Insurance Code, § 11580.

6. Insurance ⇨668(10)

In action by injured party against insurer based on a default judgment obtained by injured party against a policeman, who was allegedly an insured under a liability policy which was issued to city and its officials while acting within their capacity as such, question whether policeman, who

had struck injured party with a blackjack, was an insured, covered by the term "city and its officials" in liability policy was for trier of facts. West's Ann. Insurance Code, § 11580.

7. Insurance ⇨435

Policeman, who struck an individual with a blackjack, was an insured under liability policy which was issued to city and its officials while acting within their capacity as such.

8. Insurance ⇨514½

Where insurer which had issued liability policy to city and its officials was informed of filing of injured party's action against policeman and insurer denied liability on ground policeman was not covered by policy, policeman was released from any obligation, under policy, to forward summons to insurer and insurer was not prejudiced, in action against insurer based on default judgment obtained by injured party, by fact summons had not actually been delivered to it. West's Ann. Insurance Code, §§ 554, 11580; West's Ann. Civ. Code, § 1440.

9. Insurance ⇨634(1)

In action by an injured party against insurer based on default judgment obtained by injured party against a policeman, who allegedly was an insured under a liability policy which was issued to city and its officials while acting in their capacity as such, injured party, in order to state a cause of action, was not required to allege that insurer had waived policy requirement that policeman forward summons to insurer, West's Ann. Insurance Code, § 11580; West's Ann. Civ. Code, § 1440.

10. Insurance ⇨76

In action by injured party against insurer based on a default judgment obtained by injured party against policeman who was allegedly an insured under a liability policy issued to city and its officials while acting within their capacity as such, evidence did not establish that individual who signed the original policy and the first three indorsements thereon was not the authorized agent of insurer rather than merely a

broker. West's Ann. Insurance Code, § 11580.

Harold Parichan; Oren, McCartney & Sells, Fresno, for appellant.

Avery, Meux & Gallagher, Fresno, for respondent.

BARNARD, Presiding Justice.

The defendant appeals from a judgment in favor of the plaintiff, based upon a judgment obtained by this plaintiff in a prior action against a third party.

The defendant had issued its Comprehensive Multiple Liability Policy in which the name of the insured is thus stated: "City of Kerman And Its Officials While Acting Within Their Capacity As Such." The policy contained the usual provisions that written notice of each accident or occurrence should be given to the company, and that if suit was brought the insured should immediately forward to the company every summons or other process received by him. Endorsements Number 1, 2 and 3 were attached to and made a part of the policy when it was issued, and "Endorsement No. 4" was later added.

On September 20, 1953, William P. Young, a police officer of the city of Kerman, while acting pursuant to his duties as such, inflicted injuries on the plaintiff Estrada. A verified claim for the resulting damages was served on the city by an attorney on behalf of Estrada. This verified claim was transmitted to the defendant company, which caused its resident adjuster in Fresno to investigate the claim. During the course of this investigation one of the adjusters took a signed statement from Young, at the office of the adjuster in Fresno, and also had a telephone conversation concerning the case with one of the attorneys for the plaintiff. In February, 1954, the adjusters closed the file on said case. In April, 1954, the plaintiff brought an action for damages in the superior court of Fresno County, naming only Young as a defendant. Copies of the complaint and summons were served on Young,

and admittedly Young did not deliver these copies to the defendant company. No appearance in behalf of Young was made in that action, his default was entered on August 9, 1954, and a judgment for \$11,287 was entered in favor of Estrada and against Young on February 18, 1955. That judgment became final and remains fully unsatisfied.

The plaintiff brought the present action pursuant to the provisions of section 11580 of the Insurance Code. The complaint alleged, among other things, that this policy was in full force and effect at all times mentioned; that Young, while acting as a police officer and official of the city of Kerman, negligently struck the defendant on the head with a blackjack causing certain injuries; that the plaintiff had brought an action for damages against Young and obtained a judgment which had become final; that Young was and is insolvent and unable to pay any part of said judgment; that demand had been made upon the defendant under the terms of the policy, and the defendant had refused to pay the amount of said judgment or any part thereof; and that there is now due and owing from the defendant to the plaintiff the amount of the judgment with interest. The defendant answered admitting that it issued this policy which indemnified the city of Kerman and its duly elected officials acting as such against any liability up to the stated amount, and that said policy was in full force and effect on September 20, 1953, but denying that Young "was an official of the city of Kerman". By an amended answer the defendant added an affirmative defense alleging that the defendant had no duty to defend the prior action in that Young did not forward the summons received by him to the company or any of its representatives; and a second affirmative defense alleging that the defendant had no duty to defend the prior action in that Young does not fall within the definition of an insured as set forth in the policy.

At the trial it was stipulated that the insurance policy with the endorsements at-

tached thereto was issued to the city of Kerman; that said policy and endorsements 1, 2 and 3 were in full force and effect on September 20, 1953; that endorsement number 4 was attached to and made a part of the policy subsequent to that date; that on September 20, 1953 Young was a police officer of the city of Kerman, and while acting as a police officer and pursuant to his duties as such inflicted injuries on the plaintiff, for which injuries the plaintiff recovered the judgment in the prior action; and that prior to the commencement of this action the plaintiff had demanded payment from the defendant, and the defendant refused and still refuses to pay said sum or any part thereof. Other evidence was received at the trial. The court found, among other things, that on September 20, 1953, the said Young was an official of the city of Kerman and was acting within his capacity as such; that Young was an insured under the terms of this policy; that at all times subsequent to the filing of the prior action and the service of summons therein on Young the defendant refused to defend said action on the sole ground that Young was not an official of the city of Kerman and was not an assured, within the meaning of the policy; that it is not true that the defendant had no duty to defend the prior action because Young did not forward the summons received by him to the company or any of its representatives; and that it is not true that the defendant had no duty to defend the prior action in that Young does not fall within the definition of insured as set forth in the policy. As conclusions of law it was found that Young, at the time of inflicting injuries on the plaintiff, was an official of the city of Kerman acting as such and was an insured under the terms of the policy, and that the plaintiff was entitled to judgment against the defendant for the amount of the prior judgment with interest. Judgment was entered accordingly and this appeal followed.

The main question on this appeal is as to whether the plaintiff was covered under this policy which named the city of Ker-

man "And Its Officials While Acting In Their Capacity As Such", as the insured. The defendant argues that this provision covered only the elected officials of the city; that Young, being a policeman, was merely an employee of the city and not an official within the meaning of the policy; that his power of making arrests would not clothe him with any part of the sovereign power of the government since a private citizen may make arrests under some circumstances; and that within the insurance industry the term "official" is given the meaning of an "elected" official. In support of these contentions a Wisconsin case and the cases of Cozzolino v. City of Fontana, 136 Cal.App. 2d 608, 289 P.2d 248; Mason v. City of Los Angeles, 130 Cal.App. 224, 20 P.2d 84, and Redding v. City of Los Angeles, 81 Cal. App.2d 888, 185 P.2d 430, are cited. The Cozzolino case did not involve this question. In the Mason case the city charter expressly designated the officers of the city, and it was held that even if the fireman there involved was held to be a public officer his office had become vacant under another provision of the charter. In the Redding case, the question involved was whether or not a police officer had been properly removed from his "career" office.

[1-3] A city may act only through its officials, both elected and appointed, or through its employees. Both elected and appointed officials usually have duties and responsibilities differing from those of a mere employee, and the term "officer" is often used as synonymous with the word "official". As has been pointed out in many cases the meaning to be given to the word "official" depends upon the many and varying conditions and circumstances in connection with which the word is used. In common use, policemen are usually referred to as police officers and to that extent at least they are considered as officers or officials of the city in which they are employed. In 84 A.L.R. at page 310, it is said: "On the ground that the principal duty of policemen is the preservation of the public peace, which is a matter of public concern, it is generally held that police-

men are public officers." That rule has been generally followed in this state. In Logan v. Shields, 190 Cal. 661, 214 P. 45, 46, the court said: "It clearly follows that as the duty of the petitioner herein was to regulate traffic upon the public streets of the county of San Mateo, he was to that extent exercising a part of the sovereign power of the state, and for that reason was a public officer, as distinguished from a mere employee, such as a street sweeper or laborers upon the highway." In Noble v. City of Palo Alto, 89 Cal.App. 47, 264 P. 529, 531, it is said: "There is no doubt but that a policeman is an officer. He is made a peace officer by section 817, Penal Code, and a large part of his duties are such that he must have authority to act, not as the agent for the state or city, but by virtue of the office * * * a policeman in the discharge of his duties does stand in a relationship to the governing authority differing greatly from that of a mere employee or agent, and that relationship for many purposes is indistinguishable from and may be classified as that of a public officer." Other cases supporting the same point of view are Curtin v. State, 61 Cal.App. 377, 214 P. 1030; City of Oakland v. Lyckberg, 95 Cal.App. 71, 272 P. 606; Brown v. Boyd, 33 Cal.App.2d 416, 91 P.2d 926; Michel v. Smith, 188 Cal. 199, 205 P. 113; Schaefer v. Superior Court, 113 Cal.App.2d 428, 248 P.2d 450; People ex rel. Chapman v. Rapsey, 16 Cal.2d 636, 107 P.2d 388, and Bennett v. Superior Court, 131 Cal.App.2d 841, 281 P.2d 285.

[4] In ordinary usage and as commonly understood the words "City of Kerman, And Its Officials While Acting In Their Capacity As Such" would be taken as including appointed officials, and would not normally be considered as intended to refer only to the city and its elected officials. If it is so considered by insurance companies generally, and if it was intended here to be thus limited, it would have been an easy matter for the defendant to have inserted the word "elected" before the word "Officials". Not having done so, the word "Officials" as here used should be inter-

preted in its broader sense, as commonly understood, and as recognized in many decisions under similar circumstances. That this language of the policy was not considered by the defendant as applying to appointive officers or officials, at the time the policy was written, is indicated by two of the endorsements which were attached to the policy when it was issued. The first of these endorsements provides that it is understood and agreed that the coverage afforded by the policy shall not apply to bodily injury or death "of any volunteer fireman who is injured or killed in the course of activities as a volunteer fireman." This indicates that regular firemen employed by the city would be covered. The second endorsement excluded from coverage property damage arising from blasting, excavating or drilling operations in the streets. The third endorsement excluded from coverage any injury or death caused by or resulting from malpractice or any medical or surgical treatment by any doctor, nurse or any professional attendant. The first and third endorsements would be unnecessary and largely meaningless if the policy had been intended to cover only acts of the elected officials of the city, as distinguished from certain appointed officials, including a city physician. The intention of the city in taking out this policy may be somewhat indicated by endorsement number 4, which was added to the policy after the defendant's agent had notified the city that Young was not covered by the policy. That endorsement provides that, for an additional premium to be determined on audit, the name of the insured is amended to read "City of Kerman, Its Officials And Its Employees While Acting Within Their Capacity As Such."

[5-7] In this connection the defendant further contends that the court erred in striking out the testimony of its manager to the effect that it was a custom in the insurance industry to consider the word "officials" as applying only to elected officials and not to employees except in the case of an employee driving a car, in which event he was covered. An offer of proof was

also made which related only to the intention of the company and not to the intention of both parties. The rulings of the court on these matters are sustainable on technical grounds but, in any event, no prejudice appears since this could not have affected the result in view of the evidence as a whole. The question as to whether Young was covered by this policy was one of fact for the court, and the court's finding and conclusion thereon are sustained by the evidence and the inferences which could reasonably be drawn therefrom.

[8-10] The defendant further contends that even if Young was covered by this policy it had no duty to defend the prior suit, and is not liable here, because Young failed to deliver the summons he received to the company or its representatives, or to otherwise give the company notice of that suit. It is argued that the requirement of the policy that this be done was a condition precedent; that the complaint in this action failed to allege performance in this regard or to allege a waiver of such performance; that noncompliance with the condition requiring such notice of suit was pleaded by the defendant and was conclusively established by the evidence; that there was no evidence showing that such performance was waived by the company; and that prejudice conclusively appears since judgment by default was taken in the prior action and the company had no chance to defend that action. In this connection it is further argued that there is no evidence in the record showing that a Mr. Ackley, who signed the original policy and the first three endorsements thereon, was an authorized agent of the company rather than merely a broker.

Most of these contentions are sufficiently answered by the fact that the evidence discloses that the defendant, through its authorized agent, denied any liability in connection with this matter on the ground that Young was not covered by the policy. There was evidence that a verified claim was filed with the City of Kerman by one of the attorneys for this plaintiff. A Mr. Kristy testified that he was the resi-

dent adjuster for the defendant company in Fresno, and that he had had an office there since 1949; that his assistant was Mr. Schmidgall; that a special agent for the defendant and a secretary were also in that office; that he first received notice of the incident involving this coverage in the middle of December, 1953, by receiving a copy of the verified claim filed with the city of Kerman on behalf of Estrada; that this claim was given a company number and assigned to Schmidgall for investigation; that he did not receive a copy of the summons and complaint in the prior action; and that in May, 1954, he learned that a default judgment had been entered in that action. Schmidgall testified that he was an adjuster employed by the defendant company; that in the middle of December, 1953, Kristy assigned this matter to him, handing him a verified claim filed with the city of Kerman; that he went to Kerman, interviewed the chief of police, and made a neighborhood canvass at the scene of the incident; that he took a signed statement from Young at his office on December 23, 1953; that he talked to Ackley about this case; that he must have talked with Ackley before the date of the prior judgment "since he was our agent"; that the file on this case was closed in February, 1954, because "it seemed like a claim of no liability in our opinion. We wished to make no payment"; and that the file on this case was later reopened after it was learned that a default judgment had been entered.

The mayor of the city of Kerman testified that Mr. Ackley was the man who arranged for the issuance of this policy, and that at that time Mr. Ackley did not make any explanation to him or to the city council as to the meaning of the word "officials". The final sentence of this policy states that the defendant company has caused this policy to be signed by its president and secretary "and countersigned by a duly authorized agent of the company." The policy is countersigned "Booth Insurance Agency Edward F. Ackley au-

thorized agent". Each of the three original endorsements attached to the policy is on a printed form of the company, contains a statement that it is not valid unless countersigned by a duly authorized agent of the company, and is countersigned in the same manner as the policy itself by Booth Insurance Agency and Edward F. Ackley as authorized agent. The mayor of Kerman further testified that when the claim was filed against the city the city clerk or the city chief of police contacted either the company or the Booth Insurance Agency; that in April, 1954, Young told him that he had been sued and asked him if the city's insurance did not cover him; that he told Young that he thought it did but would find out; that he called the Booth Insurance Agency and talked to Edward Ackley; that he told Ackley that Young had been served with papers, and that this was the purpose of calling; that Ackley said he would call the head office and report back; that Ackley called him back that afternoon or the next day, and told him that Young would be considered as an employee and that he was not covered under the policy; and that he conveyed this information to Young. Mr. Young testified that he was told by the mayor, the chief of police, and the city attorney of Kerman that the insurance company said that they did not have him covered. Mr. Schmidgall also testified that the investigating file for this claim indicated that Young came to the adjuster's office on April 30, 1954, with papers and the secretary referred him to the attorney who represented the defendant; that Young had then gone to this attorney's office with a copy of the summons and complaint; that this attorney requested a fee; and that Young did not return to the office of that attorney.

It thus appears that the defendant had full knowledge of the facts and circumstances on which the prior claim was based since it received a copy of the verified claim served and made an investigation, including the taking of a signed statement

from Young. It also sufficiently appears that after the prior action was filed the defendant, through its authorized agent, was informed of the filing of that action and denied liability on the sole ground that Young was not covered by the policy. The defendant, having denied liability on that ground, was in no way prejudiced by the fact that the summons, etc., was not actually delivered to it. Under these circumstances it would have been an idle act to have forwarded the summons and complaint to the defendant company, and Young was released by the act of the defendant from any obligation for such performance. An insurer may not thus repudiate a policy, deny all liability thereon, and at the same time be permitted to stand on the failure to comply with a provision inserted in the policy for its benefit. *Grant v. Sun Indemnity Co.*, 11 Cal.2d 438, 80 P.2d 996; *Mercer Casualty Co. v. Lewis*, 41 Cal.App.2d 918, 108 P.2d 65; *Comunale v. Traders & General Ins. Co.*, 116 Cal.App.2d 198, 253 P.2d 495; Civil Code, Sec. 1440; Insurance Code, Sec. 554. Under the circumstances shown here the complaint was sufficient to state a cause of action. The claim with respect to the failure to forward the summons and complaint was raised as an affirmative defense in the defendant's answer, and the usual rule that a waiver must be alleged in the complaint is not applicable. The finding to the effect that the defendant denied liability on the sole ground that Young was not an official of the city of Kerman within the meaning of this policy, and that he was not an insured under the terms of the policy, is supported by the evidence. There is no merit in the contention that Ackley was not sufficiently shown to be an authorized agent of the defendant. No attempt was made to prove that Ackley was not an authorized agent of the company at the time in question, and the only reasonable inference from the evidence is that the defendant, after making an investigation, denied all liability on the sole ground that Young was not an assured with-

in the meaning of the policy. Whether Young was so covered is the controlling question, and in view of our holding in that regard the defendant's other contentions cannot be sustained.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



158 Cal.App.2d 213

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ramiro TORRES, Defendant and
Appellant.

Cr. 6046.

District Court of Appeal, Second District,
Division 2, California.

March 5, 1958.

Prosecution for unlawful sale of narcotic marijuana. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Herndon, J., held that evidence sustained finding that defendant, who had not been placed under arrest at the time, freely gave his consent to police officers to search his premises.

Affirmed.

I. Criminal Law ⚙️394

Searches and Seizures ⚙️7(28)

Search of a house with express, free and voluntary consent of householder suspected of possessing narcotics is neither unreasonable nor unlawful, and contraband

found and seized in the course of such a search may lawfully and properly be received in evidence against the accused.

2. Searches and Seizures ☞7(28)

It is not necessary that one forcibly resist an officer's assertion of authority to search in order to render search unreasonable, but if party freely consents to search then neither the search nor seizure of evidence found in the course thereof is unreasonable.

3. Searches and Seizures ☞7(28)

Whether in a particular case an apparent consent to search of premises was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the surrounding circumstances.

4. Criminal Law ☞1158(1)

Since question of whether voluntary consent of search of premises was given is one of fact primarily for the trial court's determination, finding of that court, supported by substantial evidence, is binding upon an appellate court.

5. Searches and Seizures ☞7(28)

In prosecution for unlawful possession of narcotic marijuana, evidence sustained finding that defendant who had not been arrested at the time, freely gave his consent to search of his premises on which narcotics were found. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 995.

Robert W. Armstrong, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Morris Schachter, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

In an information filed by the district attorney, appellant was accused of violat-

Cal.Rep. 321-322 P.2d-39

ing section 11500 of the Health and Safety Code in that he wilfully and unlawfully had in his possession the narcotic marijuana. After his motion to set aside the information (Penal Code, § 995) had been denied, appellant entered a plea of "not guilty."

A trial by jury having been duly waived, the parties stipulated to a submission of the cause on the transcript of the preliminary hearing, each side reserving the right to offer additional evidence. Appellant testified at the trial. The court found him guilty as charged, denied both his motion for a new trial and his application for probation and sentenced him to state prison.

This appeal is from the judgment and from the order denying the motion for a new trial. The sole question presented is whether the incriminating evidence against appellant was seized unlawfully and in contravention of his constitutional right to be protected against unreasonable searches and seizures.

The facts bearing upon this narrow issue may be stated briefly. At approximately 6:00 p. m. on March 19, 1957, Officer King of the Narcotics Division of the Los Angeles Police Department was informed by Sergeant Bitterhoff of the Robbery Division that a man named Tony residing at 136 West 69th Street was selling narcotics. At approximately 9:45 p. m. on March 19, 1957, Officer King was standing in front of the residence at the given address when appellant (whose nickname was Tony) opened the door and came out. The officers identified themselves as police officers and stated to appellant that they had information that he was using and dealing in narcotics. He denied the accusatory statement. The officers then asked him whether "it would be all right if we'd look in the house." Appellant answered, "Yes, go ahead."

The officers thereupon entered the house and made a search. They had neither search warrant nor warrant of arrest. In

the course of the search the officers found in a drawer of the front bedroom dresser a brown handkerchief which contained a portion of a medicine dropper and hypodermic needle. Also in the same drawer was a brown wrapped cigarette. In an ash tray by the bedstand, Officer King found two portions of a brown wrapped cigarette. These cigarettes contained marijuana according to the testimony of a forensic chemist. In the pocket of a suit was found a brown paper bag containing 13½ grams of material identified as marijuana. On a shelf on the back porch there was found a can containing a small quantity of the same narcotic substance.

After making the discoveries above mentioned, the officers placed appellant under arrest. Before they left the house appellant told the officers that the suit and the brown paper bag found therein belonged to him. He told them he had found the medicine dropper and hypodermic needle in the back yard and had put them in the dresser drawer. He also admitted that the brown cigarette was his and that he had forgotten about it. On the way to the Police Building, in response to the officers' questions, appellant stated that he was buying his marijuana on the "East Side" and that he had bought the contents of the paper sack about a month before, paying \$14 for a can of the substance.

In the course of his very brief testimony, appellant did not directly dispute the truth of any of the testimony given by the officers. If appellant denied that he gave his consent to the search, such denial was only by implication. He testified that after he had denied there were narcotics in the house one of the officers said, "He can stand a shake-down, come on." Thereupon, appellant said that he went into the house with the officer who told him to keep his hands in a certain indicated position.

[1-4] A search of a house with the express, free and voluntary consent of a

householder suspected of possessing narcotics is neither unreasonable nor unlawful. It follows that contraband found and seized in the course of such a search may lawfully and properly be received in evidence against the accused. *People v. Burke*, 47 Cal.2d 45, 301 P.2d 241; *People v. Michael*, 45 Cal.2d 751, 290 P.2d 852; *People v. Hood*, 149 Cal.App.2d 836, 309 P.2d 135. It is true, as pointed out in *People v. Michael*, supra, that one need not forcibly resist an officer's assertion of authority to search, but if he freely consents to a search, then neither the search nor the seizure of evidence found in the course thereof is unreasonable. As the court there stated (45 Cal.2d at page 753, 290 P.2d at page 854), "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances." To the same effect are *People v. Lujan*, 141 Cal.App.2d 143, 296 P.2d 93, and *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469. Since the question is one of fact primarily for the trial court's determination, the finding of that court, supported by substantial evidence, is binding upon an appellate court. *People v. Hood*, supra, 149 Cal.App.2d 836, 838, 309 P.2d 135; *People v. Allen*, 142 Cal.App.2d 267, 281, 298 P.2d 714; *People v. Smith*, 141 Cal.App.2d 399, 402, 296 P.2d 913.

Appellant, while recognizing that the controlling question is one of fact, argues that the conduct of an accused must be judged in the light of certain cautionary principles: (1) that when consent to a search has been given by an accused after he has been placed under the compulsion of arrest, a court should carefully scrutinize the contention that the consent was voluntarily given; and (2) that a search cannot be justified merely because it resulted in a disclosure that the defendant was in fact guilty of a felony.

[5] These principles are unavailing to appellant. In the first place, the evidence here clearly indicates that appellant voluntarily gave his consent before there was any arrest or threat of arrest. In the second place, the People have not sought to justify the search in this case upon the

ground that it produced abundant evidence of guilt. The evidence of a free and voluntary consent revealed by the record under review is manifestly sufficient.

The judgment and order appealed from are affirmed.

FOX, P. J., and ASHBURN, J., concur.

49 Cal.2d 787

**COUNTY of ALPINE, Plaintiff and
Appellant,**

v.

COUNTY of TUOLUMNE, County of Calaveras, and County of Amador, Defendants and Respondents.

Sac. 6654.

Supreme Court of California.

In Bank.

March 7, 1958.

Rehearing Denied April 2, 1958.

Action for a judicial determination of boundaries between counties. From a judgment of the Superior Court, Stanislaus County, H. L. Chamberlain, J., in favor of defendant the plaintiff appealed. The Supreme Court, Schauer, J., held, inter alia, that a county which had requested State Lands Commission to make a survey of boundaries between plaintiff county and defendant counties was not precluded from maintaining action for judicial determination of the disputed boundaries until commission had finally determined issues tendered to it, since under statutes primary jurisdiction for determination of disputed boundaries arising from uncertain description in statute rested in the courts.

Reversed and remanded with directions.

Traynor, J., and Gibson, C. J., dissented.

Opinion, Cal.App., 308 P.2d 354, vacated.

1. Counties ⇨7

Under statutes providing a special remedy for determination by survey of inadequately marked county boundary lines, such survey, when properly made and finally approved, is conclusive of subject lines and corners. West's Ann.Gov.Code, §§ 23171-23175.

2. Counties ⇨7

The statutes providing a special remedy for determination by a survey of inadequately marked county boundary lines relate to "determination" of disputed bound-

ary lines only through the making of surveys to mark the boundary lines defined by the legislature and not to define those lines by interpreting legislative language which leaves uncertain the point where the survey shall start or the courses it must follow, and in respect to disputes of the latter character legislative plan contemplates a resolution by judicial proceedings. West's Ann.Gov.Code, §§ 23171-23175.

3. Counties ⇨7

Under section 23171 of the Government Code providing that State Lands Commission may make a survey, on request, when county boundary is not adequately marked by natural objects or lines or by surveys lawfully made, and under section 51000 providing for judicial determination when boundary is indefinite or uncertain, or obliterated, legislative plan contemplates that the two methods are not necessarily alternative in a given case but rather that provisions of sections 51000-51009 may be invoked where language of boundary statute is unclear as well as where the line has been obliterated, while remedy provided by sections 23171-23175 is to be availed of only where language of boundary statute is clear and only ministerial action on part of surveyor in adequately marking the line is required. West's Ann.Gov.Code, §§ 23171-23175, 51000-51009.

4. Municipal Corporations ⇨25

Under statute providing for judicial determination when boundary of local agency is "indefinite or uncertain", construction of quoted language is a matter exclusively for the courts, and location of the boundaries is a question of fact to be judicially determined. West's Ann.Gov.Code, § 51000.

See publication Words and Phrases, for other judicial constructions and definitions of "Indefinite or Uncertain".

5. Counties ⇨8

While the fixing and defining of county boundaries is a legislative function, interpretation of statute so fixing such boundaries is a judicial question, to be exercised by the courts. West's Ann.Gov.Code, §§ 23171-23175, 51000-51009.

6. Counties ⚡7

A county which had requested State Lands Commission to make a survey of boundaries between plaintiff county and defendant counties was not precluded from maintaining action for judicial determination of the disputed boundaries until commission had finally determined issues tendered to it, since under statutes primary jurisdiction for determination of disputed boundaries arising from uncertain description in statute rested in the courts. West's Ann.Gov.Code, §§ 23102, 23171-23175, 51000-51009.

7. Administrative Law and Procedure ⚡303

An administrative agency can act only as to those matters which are within the scope of the powers delegated to it.

8. Counties ⚡7

The sole power conferred on the State Lands Commission with respect to county boundary lines is to "survey and mark" them, and the power to make a prior determination that statutory line has been altered by mutual use and recognition is neither expressly nor impliedly included in powers conferred, for such determination is not a necessary part of ministerial function of surveying and marking. West's Ann.Gov.Code, §§ 23170-23175, 23177.

9. Counties ⚡7

The mutual recognition statutes providing for fixing of county boundary lines because of mutual use and recognition represent a codification of the common law doctrine of acquiescence which doctrine is properly invoked in fixing boundary line where true location of line is uncertain, but where location of boundary line is in dispute because of uncertainty or indefiniteness in statutory description, primary jurisdiction over dispute is in the courts rather than the administrative agency. West's Ann.Gov.Code, §§ 23170, 23177.

10. Administrative Law and Procedure

⚡229

The rules that where administrative remedy is provided by statute relief must be sought before the administrative body and such remedy exhausted before courts

will act, and that it lies within power of administrative agency to determine in first instance, and before judicial relief may be obtained, whether a given controversy falls within statutory grant of jurisdiction, are inapplicable where agency is given no jurisdiction to make a judicial determination.

11. Counties ⚡7**Estoppel** ⚡62(3)

A county's erroneous request to State Lands Commission to make a survey and determine disputed boundary between plaintiff county and defendant counties could not invest commission with jurisdiction beyond that conferred on it by law or estop plaintiff county from pursuing its proper remedy in the courts. West's Ann.Gov.Code, §§ 23171-23175, 51000-51009.

Ward H. Coffill, Oakdale, and Jeremy C. Cook, Turlock, for appellant.

James H. Phillips, Sacramento, amicus curiæ on behalf of appellant.

Ross A. Carkeet, Special Counsel, Hardin & Gorgas, James R. Hardin, Sonora, Joseph S. Huberty, Dist. Atty., San Andreas, and Anthony A. Caminetti, Jr., Dist. Atty., Jackson, for respondents.

SCHAUER, Justice.

Plaintiff Alpine County appeals from a judgment of dismissal entered pursuant to an order sustaining defendant counties' demurrers to the amended complaint without leave to amend. By its complaint Alpine seeks a judicial determination of the boundary between it and defendant counties, and to restrain those counties from exercising jurisdiction over certain territory alleged to be situated within the boundaries of Alpine. Each of the defendants demurred on the grounds that the complaint does not state a cause of action, that the court has no jurisdiction of the persons of the defendants or of the subject of the action, and that there is another action pending between the parties for the same causes alleged in the complaint. We have concluded that the complaint states a cause of

action for judicial interpretation of an unclear boundary line statute, that the court has jurisdiction over the matter, that the complaint does not show that any other action is pending between the parties on a similar cause, and that the judgment of dismissal should therefore be reversed.

The boundaries of Alpine County are defined in section 23102 of the Government Code as follows: "Beginning at the north corner, at a point where the state line crosses the east summit of the Sierra Nevada Mountains * * *; thence southwesterly along said summit to a point two miles west of James Green's house, in Hope Valley, called Thompson's Peak; thence southwesterly in a direct line to a point on the Amador and Nevada turnpike road in front of Z. Kirkwood's house * * *; thence south across the north fork of the Mokelumne River to the road leading from West Point, in Calaveras, to Big Tree road, near the Big Meadows; thence easterly along said West Point road to the Big Tree road; thence easterly in a direct line to where the Sonora trail strikes the middle fork of the Stanislaus River; thence easterly along said trail to the summit of the Sierra Nevada Mountains; thence northerly along said summit to the dividing ridge between the West Walker and Carson Rivers; thence northeasterly along said dividing ridge to the state line * * *; thence northwest along said state line to the place of beginning."

By resolutions dated June 16, 1950, and July 21, 1950, the Board of Supervisors of Alpine County petitioned the State Lands Commission to investigate and survey the problem of a disputed boundary common to Alpine and Tuolumne Counties, and by resolution dated July 6, 1953, the same board made the same request with respect to Alpine's common boundaries with Amador and Calaveras Counties. The only source of authority of the State Lands Commission to act in a matter of this type is section 23171 of the Government Code read together with section 6204 of the Public Resources Code. Section 23171 provides that "All common boundaries and common

corners of counties not adequately marked by natural objects or lines, or by surveys lawfully made, shall be definitely established by surveys made jointly by the surveyors of all the counties affected, and approved by the boards of supervisors of the counties, or by a survey made by the State Lands Commission, on application of the board of supervisors of any county affected." Section 6204 of the Public Resources Code states that "The [state lands] commission shall when required, survey and mark the boundary lines of counties and cities."

According to the subject pleading, the dispute as to the boundaries here involved arose from two sources: (1) uncertainty as to the terminal point of the line running south from Z. Kirkwood's house "to the road leading from West Point, in Calaveras, to Big Tree road, near the Big Meadows"; and (2) uncertainty as to the location of "the Sonora trail," as those terms are used in the statutory boundary description of Alpine.

Pursuant to the above mentioned requests of Alpine's Board of Supervisors, the State Lands Commission undertook investigations and conducted hearings in an effort to determine the true boundary line. Subsequently, certain findings adverse to the position of Alpine were approved by the commission. Alpine then instituted the present action, and the commission suspended its proceedings pending the outcome of this litigation.

In its complaint Alpine alleges that "there is, and for many years last past has been, dispute and disagreement and uncertainty existing between" Alpine and Amador, Calaveras, and Tuolumne Counties due to the above mentioned uncertainties in statutory boundary descriptions; that the exact location of the boundary lines in question "is in dispute and has never been actually or judicially determined"; that no survey marking the lines at the disputed points "can be made until the [uncertainties in location are] judicially determined"; that defendant counties have been en-

croaching in certain specified respects on the jurisdiction of Alpine County, over the protest of Alpine, on certain portions of Alpine lying to the east and north of the true boundary line; and that Alpine "has no adequate remedy at law or by administrative process." Alpine prays for a judicial determination of the western and southern boundary lines of the county, and for a decree enjoining defendant counties from asserting jurisdiction over the land areas lying east and north of the court-determined line and from receiving or using funds from the United States Forest Service based on acreage of national forest lands within the disputed areas. As noted earlier, demurrers of Amador, Calaveras, and Tuolumne Counties to this complaint were sustained without leave to amend, and Alpine appeals from the judgment of dismissal thereafter entered.

The crucial question presented is whether the courts have any jurisdiction over the controversy in its present state, or whether Alpine is precluded from judicial relief until the administrative agency (the State Lands Commission) has finally determined the issues tendered to it. We have concluded, for reasons hereinafter stated, that primary jurisdiction in this case rests in the courts, and that the courts are not required to delay their proceedings until the commission has concluded its hearings.

[1] Defendant counties contend that under the above quoted provisions of section 23171 of the Government Code and section 6204 of the Public Resources Code, the State Lands Commission is granted the power to settle boundary disputes by surveying and marking the true boundary line, and therefore Alpine cannot seek judicial relief until the administrative proceedings requested by Alpine are concluded. It is true that in sections 23171-23175 of the Government Code the law provides a special remedy for the determination by *survey* of inadequately marked boundary lines. Such a survey, when properly made and finally approved, is conclusive of the subject lines and corners. (Gov.Code, §

23175; *People ex rel. Borrell v. Boggs* (1880), 56 Cal. 648.)

[2] However, it is to be noted that sections 23171-23175 are located in Government Code, title 3, division 1, dealing with "Counties Generally." Article 2 of chapter 2 of that division defines the boundaries of the several counties and is followed by article 3 which relates to "Settlement of Boundary Disputes." Section 23171 is found in article 3 and, as hereinabove mentioned, provides that "All common boundaries and common corners of counties not adequately marked by natural objects or lines * * * shall be definitely established by surveys * * *" and section 23173, also in article 3, declares that "Upon the reports made by the county surveyors the State Lands Commission shall finally determine and establish the common boundaries and corners, if it can collate a satisfactory description therefrom. If the reports are insufficient for the purpose, it shall cause surveys to be made, and when approved by it, the surveys establish the common boundaries and corners." It is manifest that the language of the sections above quoted relates to the "determination" of disputed boundary lines only through the making of surveys to *mark the boundary lines defined by the Legislature* in article 2, not to define those lines by interpreting legislative language which leaves uncertain the point where the survey shall start or the courses it must follow.

In respect to disputes of the latter character (i. e., those which involve not merely running a survey to mark legally defined lines but, rather conducting a proceeding to legally define the lines so that thereafter they can be marked on making a survey) it is clear from the language above quoted, read in the context of related provisions, that the legislative plan contemplates resolution by judicial proceedings. In this connection, it is noted that section 23178 of article 3 provides that "Whenever a common boundary * * * has been legally established in accordance with Article 3 of this chapter, or by judicial proceedings," etc. Furthermore, we find that in title 5,

division 1, chapter 5, of the same code, dealing specifically with "Boundaries" and proceedings to establish them, section 51000 provides that "When the location of a boundary line of a local agency¹ is indefinite or uncertain, or the boundary line has been obliterated from any cause, it may be determined, defined, and established pursuant to this chapter." Section 51001 declares that "The legislative body of the local agency having an indefinite, uncertain, or obliterated boundary may cause a proceeding to be brought in the name of the local agency to have the boundary line determined, defined, and established." In the proceeding thus instituted, "The [superior] court shall determine the location of the boundary line by courses and distances or by giving such other definite description as is necessary or desirable." (Gov.Code, § 51007.) After the court has determined the boundary line, a copy of its judgment is filed with the Secretary of State (Gov. Code, § 51008), and "From the date of filing, the boundary line is established and fixed for all purposes and constitutes the true and official boundary line of the local agency" (Gov.Code, § 51009). Sections 51000-51009 of the Government Code were derived from a statute first enacted in 1921 (Stats.1921, chap. 838, p. 1607) which contained almost identical language. In *City of Crescent City v. Dodd* (1933), 131 Cal. App. 153, 21 P.2d 140, it was held that this latter statute "furnishes a full and complete remedy to cities [and counties], and by its provisions allows a full and complete investigation as to indefinite or uncertain boundaries; allows the introduction of testimony and maps, and gives a direct method of determining the true boundaries of cities, towns and counties," and under such circumstances "a complete remedy is afforded" in the courts.

[3-5] Two procedures for determining boundary lines are thus provided in the Government Code. However, while section 23171 provides that the State Lands

Commission may make a survey, on request, when a common boundary is "not adequately marked by natural objects or lines, or by surveys lawfully made," section 51000 provides for a judicial determination when the boundary is "indefinite or uncertain, or * * * obliterated." It thus appears that the legislative plan contemplates that the two methods are not necessarily alternative in a given case; rather, that the provisions of sections 51000-51009 may be invoked where the language of the boundary statute is unclear as well as where the line has been obliterated, while the remedy provided by sections 23171-23175 is to be availed of only where the language of the boundary statute is clear and only ministerial action on the part of the surveyor in adequately marking the line is required. In other words, where the language used by the Legislature is "indefinite or uncertain," construction of such language is a matter exclusively for the courts, and the location of the boundaries is a question of fact to be judicially determined. (*County of Sierra v. County of Nevada* (1908), 155 Cal. 1, 13, 99 P. 371.) The foregoing construction is in accord with the generally recognized rule that while the fixing and defining of county boundaries is a legislative function, the interpretation of a statute so fixing such boundaries is a judicial function, to be exercised by the courts. (*Roy O. Martin Lumber Co. v. Baird* (1954), 225 La. 14, 71 So.2d 865, 868; *Ballard v. W. T. Smith Lumber Co.* (1953), 258 Ala. 436, 63 So.2d 376, 378 [3]; 2 *McQuillin, Municipal Corporations*, 261, § 7.05.)

In the case of *County of Sierra v. County of Nevada* (1908), supra, 155 Cal. 1, 99 P. 371, there was a dispute as to the boundary line between Sierra and Nevada Counties. The boundary statute there involved provided in pertinent part that the line ran "west to the source of and down the South Fork and Middle Yuba River." The dispute related to the location of the "source of

1. The term "local agency" as used in the subject portion of the code refers

to "county, city, or city and county" (Gov.Code, § 50001).

the South Fork." (At page 4 of 155 Cal. at page 372 of 99 P.) No official survey of the boundary between the two litigating counties had ever been made. The trial court determined the location in question and this court affirmed the judgment as based upon substantial evidence.

It was contended in the Sierra case that under the provisions of sections 3969-3972 of the Political Code (now sections 23171-23173, 23175 of the Government Code) a mode was "fixed by the legislature whereby the boundaries of counties must be ascertained; that this legal remedy must be exhausted before the matter of conflicting boundaries can be presented for judicial determination in a court of equity. (People ex rel. Borrell v. Boggs [(1880), *supra*], 56 Cal. 648.)" (County of Sierra v. County of Nevada (1908), *supra*, 155 Cal. 1, 12, 99 P. 371, 376.) The court in rejecting such contention held (155 Cal. at pages 13-15, 99 P. at pages 376-377): "[I]t is obvious that the question presented in the case at bar, and the matter before the court in the case cited, call for the application of different principles of law. In the case cited the court grounded its conclusion on the fact that the statute defining the boundary had fixed the boundary line of the counties as the summit of the dividing ridge, and that the act which the code section directed the surveyor-general [the predecessor of the State Lands Commission] to do with reference to the establishment of said boundary, was simply to go on the ground and in his ministerial capacity run his lines along the ridge. Of course, where the legislature has fixed a boundary along a ridge, a well-defined course readily determinable and ascertainable, there is no action on the part of the surveyor-general called for but to run his survey line thereon on the ground. Where the language of an act so clearly defines the line that there is nothing to be done but run a survey along it, there is no room for question, but the sections of the code relied on by appellant furnish a plain, speedy, and adequate remedy for the establishment of the line, and that a court of equity cannot be called

upon to do what the law in the first instance provided for having done. But this legal remedy can only be availed of where the language of an act defining a boundary is clear. Where it is not clear, and where the description of the boundary is of doubtful import, or where it requires the interpretation of a court to ascertain what is meant by the language of the statute when mentioning localities, natural objects, or sources of streams as matters of boundary, the sections of the code have no application. * * * When the courts have interpreted the language of the act, and declared what the boundaries in dispute are as a matter of law, then only can surveyors or the surveyor-general act, and they act then in establishing the line on the ground solely in a ministerial capacity * * *. What the source of the South Fork is is not definitely fixed or determined by the act, and could only be determined by judicial inquiry to ascertain its location. It is only upon its ascertainment that the line therefrom to the state line could be run, or a surveyor be able to locate by survey the line called for. If it could be said that it was purely a ministerial act of the surveyor-general to ascertain from the language used in the act this source and make his survey accordingly, it would be difficult to conceive of a case where the language of an act could be so uncertain or indefinite as to boundaries of a county, or with reference to any point from which boundaries were to be measured, so that a court of equity could be ever invested with jurisdiction to construe the language of an act and determine as matter of law what the boundaries intended to be fixed by it were."

[6] The Sierra case appears indistinguishable from the case at bar as to the pertinent issues involved. The record in this case discloses that there are four possible locations of the "Sonora trail," that the location of the "West Point road" is similarly uncertain, and that the uncertainty as to the true location of these points is the cause of the present boundary disputes. Which of the several possible loca-

tions of these markers was intended by the Legislature to delineate the boundaries of Alpine County is a fact question to be determined by the courts. It follows from the foregoing that the State Lands Commission is not empowered to settle the boundary disputes in this case, and that Alpine's action is tenable. The complaint alleges the cause and nature of the disputes, Alpine's interpretation of the language in question, and the acts of defendant counties which are claimed to constitute infringements on Alpine's rights; such complaint states a cause of action for the relief sought.

Defendant counties further urge that one of the duties of the State Lands Commission is to determine whether a boundary line has been fixed because of mutual use and recognition within the meaning of either section 23170² or section 23177³ of the Government Code, and therefore that the courts cannot in any event act in this case until the commission has completed its determination on this matter. This argument also is untenable.

[7,8] To begin with, the commission is not empowered to determine the applicability of the mutual recognition statutes. An administrative agency can act only as to those matters which are within the scope of the powers delegated to it. (State Comp. Ins. Fund v. Industrial Acc. Comm. (1942), 20 Cal.2d 264, 266 [2], 125 P.2d 42 (Industrial Accident Commission); Wheeler v. City of Santa Ana (1947), 81 Cal.App. 2d 811, 816 [1], 185 P.2d 373 (Civil Service Commission); 2 Cal.Jur.2d 30, § 16.) The powers delegated to the State Lands Commission deal generally with title to and usage of public lands, minerals and oil and

gas on such lands, and navigable waters of the state. (Pub. Resources Code, § 6216.) Aside from section 6204 of the Public Resources Code (322 P.2d 451), no reference to city or county boundary lines is made in the statutes establishing the commission and defining its powers, and no power to fix or ascertain such boundaries with reference to usage and custom is expressly or impliedly conferred. (See Pub. Resources Code, §§ 6101-6223; see also California Administrative Code, tit. 2 div. 3, ch. 1.) The sole power conferred on the commission with respect to boundary lines is to "survey and mark" them; the power to make a prior determination that the statutory line has been altered by mutual use and recognition is neither expressly nor impliedly included in the powers conferred, for such determination is not a necessary part of the ministerial function of surveying and marking.

[9] The mutual recognition statutes represent a codification of the common law doctrine of acquiescence. (See 2 McQuillin, Municipal Corporations, 274-276, § 7.09; Starry v. Lake (1933), 135 Cal.App. 677, 682, 28 P.2d 80.) That doctrine is properly invoked in fixing a boundary line where, as here, the true location of the line is uncertain. (City of Alameda v. City of Oakland (1926), 198 Cal. 566, 576 [2], 246 P. 69.) But, as noted hereinabove, where the location of a boundary line is in dispute because of uncertainty or indefiniteness in the statutory description, primary jurisdiction over the dispute is in the courts rather than the administrative agency. Since the State Lands Commission has no primary jurisdiction in the case of a disputed

2. Government Code, § 23170, provides as follows:

"Every common boundary between counties which has been mutually recognized and used by the counties adjacent thereto for the purpose of assessment and collection of taxes for a period of 25 years continuously prior to July 30, 1927, is confirmed, validated, and declared to be legally established."

3. Government Code, § 23177, provides as follows:

"Every common boundary between counties which has been mutually used by the counties adjacent thereto for the purpose of the assessment and collection of taxes for a period of 15 years continuously prior to the effective date of this section [September 22, 1951] is hereby confirmed, validated, and declared to be legally established."

boundary line where the dispute is based upon an unclear definition in a boundary statute, and since the applicability of sections 23170 and 23177 of the Government Code in this case is merely a facet of a boundary dispute of the type mentioned, it follows that the commission has no power to make any initial determination of the true boundaries here involved, whether based on the mutual recognition statutes or otherwise.

[10,11] Defendants rely on the established rules that "where an administrative remedy is provided by statute, relief must be sought before the administrative body and this remedy exhausted before the courts will act" (*Abelleira v. District Court of Appeal* (1941), 17 Cal.2d 280, 292 [6], 109 P.2d 942, 132 A.L.R. 715), and that "it lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction" (*United States v. Superior Court* (1941), 19 Cal.2d 189, 195 [3], 120 P.2d 26). But these rules are inapplicable where, as here, the agency is given no jurisdiction to make a judicial determination of the type involved. Alpine's erroneous request to the commission to determine the disputed boundaries could not invest the commission with jurisdiction beyond that conferred on it by law or estop Alpine from pursuing its proper remedy.

Once the court has determined the boundaries here involved, based either on a legal interpretation of the allegedly uncertain language contained in section 23102 of the Government Code, or on the terms of the mutual recognition statutes if such statutes are found to be applicable, and the facts as the court may find them, then the State Lands Commission may well have jurisdiction, if called upon, to proceed with its survey and to mark the true line as judicially determined. However, in accordance with the principles hereinabove enunciated, the initial determination of the boundaries in question

must be made by the courts, and it was error for the trial court to have sustained defendants' demurrers without leave to amend.

For the foregoing reasons the judgment is reversed and the cause is remanded to the trial court with directions to overrule the demurrers and permit the defendants to answer, if they be so advised, within such reasonable time as the court may fix.

SHENK, CARTER, SPENCE and
McCOMB, JJ., concur.

TRAYNOR, Justice.

I dissent.

Sections 23171-23175 of the Government Code provide an administrative procedure and sections 51000-51009 of that code provide a judicial procedure for determining disputed boundaries. Plaintiff was therefore entitled in the first instance to invoke one procedure or the other. *City of Susanville v. Lee C. Hess Co.*, 45 Cal.2d 684, 689, 290 P.2d 520; *Scripps Memorial Hospital, Inc. v. California Emp. Comm.*, 24 Cal.2d 669, 673, 151 P.2d 109, 155 A.L.R. 360; see *River Plate & Brazil Conferences v. Pressed Steel Car Co.*, 2 Cir., 227 F.2d 60, 64. Since it elected to proceed before the State Lands Commission before this action was commenced, the trial court correctly concluded that the alternative remedy was not available. When "two or more tribunals in this state have concurrent jurisdiction, the tribunal first assuming jurisdiction retains it to the exclusion of all other tribunals in which the action might have been initiated. * * * One reason for the rule is to avoid unseemly conflict between courts that might arise if they were free to make contradictory decisions or awards at the same time or relating to the same controversy; another reason is to protect litigants from the expense and harassment of multiple litigation." *Scott v. Industrial Accident Comm.*, 46 Cal.2d 76, 81-82, 293 P.2d 18, 21. The Scott case makes clear that the rule is equally applicable when one of the tribunals is an administrative agency.

See also, *Elbert v. Johnson*, 2 Cir., 164 F.2d 421, 423-424; *Majors v. Thompson*, 5 Cir., 235 F.2d 449, 452; *United States v. Interstate Commerce Commission*, 337 U.S. 426, 434, 69 S.Ct. 1410, 93 L.Ed. 1451.

This rule makes good sense and should be followed in the present case. Pursuant to plaintiff's request, the State Lands Commission held extensive hearings and it has approved findings that are sufficient to permit an accurate survey to be made. By holding that it has no jurisdiction to resolve the boundary dispute, the majority not only render the commission's work nugatory, but permit plaintiff to harass defendants by compelling them to relitigate the dispute in another proceeding after the tribunal first selected by plaintiff made findings adverse to it. The orderly administration of justice demands that plaintiff abide by its election. Having chosen the administrative remedy, it must seek judicial relief by way of review of the commission's decision, not by an independent action.

Government Code section 23175, providing that "Any survey finally approved pursuant to this article is a conclusive ascertainment of the lines and corners included in the survey," does not negate the right to judicial review of the commission's action, for if review is available, approval of a survey is not final until the commission's action has been affirmed or the time for seeking review has elapsed. *People ex rel. Borrell v. Boggs*, 56 Cal. 648, is not to the contrary, for in that case the survey was not attacked in a proceeding brought to review the agency's action, but in a collateral proceeding brought to recover taxes paid under protest. Moreover, Code of Civil Procedure section 1094.5 now expressly provides for the review of the commission's proceedings, even though it is not one of the agencies enumerated in the Administrative Procedure Act. Gov.Code, § 11501. "The framers of section 1094.5 intended it to set forth 'the procedure by which judicial review can be had by the writ of mandate after a formal adjudicatory decision by any administrative agency.' Emphasis added; see Tenth Biennial Report of the

Judicial Council of California, Appendix A, p. 45." *Temescal Water Co. v. Dept. of Public Works*, 44 Cal.2d 90, 101, 280 P.2d 1, 7. By its terms section 1094.5 applies "for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer." Commission determination of the location of a disputed landmark or whether a boundary had been mutually recognized or used for a period sufficient to "legally establish" it (Gov.Code, §§ 23170, 23177) is a quasi-judicial function and accordingly, in the absence of any provision to the contrary, the requirement of a hearing is implied. *Fascination, Inc., v. Hoover*, 39 Cal.2d 260, 271, 246 P.2d 656; *Ratliff v. Lampton*, 32 Cal.2d 226, 230, 195 P.2d 792, 10 A.L.R.2d 826; *La Prade v. Department of Water and Power*, 27 Cal. 2d 47, 53, 162 P.2d 13; *Steen v. Board of Civil Service Commissioners*, 26 Cal.2d 716, 723-725, 160 P.2d 816; *Carroll v. California Horse Racing Board*, 16 Cal.2d 164, 168, 105 P.2d 110; cf., *Keeler v. Superior Court*, 46 Cal.2d 596, 599, 297 P.2d 967; *DiGenova v. State Board of Education*, 45 Cal.2d 255, 259-260, 288 P.2d 862. Moreover, since the commission has been granted the power of the head of a department of the state under Government Code sections 11180 to 11191 (Pub.Res.Code, § 6103), it is fully equipped to meet the hearing requirement. Its powers include the power to make investigations concerning all matters relating to the subjects under its jurisdiction; to inspect books and records; to hear complaints; to administer oaths; to issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding pertinent or material thereto in any part of the state; to delegate its investigative and hearing powers to an officer of the commission; to petition the superior court in the county in which the hearing is pending for an

order compelling witnesses to attend and testify or produce the papers required, and to cause the depositions of persons residing within or without the state to be taken by petitioning the superior court of Sacramento County. Any party to a commission hearing has the right to the attendance of witnesses in his behalf at the hearing or upon deposition. Such provisions are adequate to enable the commission to proceed and they demonstrate that it has the power sought to be exercised here.

The majority hold, however, that the administrative remedy "provided by sections 23171-23175 is to be availed of only where the language of the boundary statute is clear and only ministerial action on the part of the surveyor in adequately marking the line is required. In other words, where the language used by the Legislature is 'indefinite or uncertain,' construction of such language is a matter exclusively for the courts, and the location of the boundaries is a question of fact to be judicially determined." Such a limitation on the commission's power is unworkable, productive of waste, and casts a cloud on the validity of all of its determinations. Whether the language of the statute is indefinite or uncertain may appear only after it is sought to be correlated with objects on the ground. Apparent clarity may disappear only in the light of extensive surveys undertaken by the commission that will then go for nought, and disputants will be enabled to relitigate settled boundaries, not because they were erroneously determined, but only because ambiguity in the statutory language can be demonstrated. The applicable statutes themselves refute any such limitation on the commission's powers.

There is no occasion to invoke sections 23171 to 23175 unless there is a dispute as to the location of the landmarks and lines establishing boundaries. Not only are those sections included in the article of the Government Code entitled "Settlement of Boundary Disputes" (Tit. 3, Div. 1, Ch. 2, Art. 3) but their very purpose is the settlement of such disputes. If there is any need to have a boundary "definitely established"

it can arise only because of doubt as to its location, either because, in the language of section 23171, "all common boundaries and common corners" are "not adequately marked by natural objects or lines" or because such boundaries and corners are not adequately marked by "surveys lawfully made." It is only because of uncertainty as to the adequacy of the markings of common boundaries and corners or the legality of previous surveys that boards of supervisors of the counties affected are authorized to apply to the commission and the commission is given jurisdiction definitely to establish such "common boundaries" and "common corners." Section 23172 explicitly provides for reports by county surveyors "to the State Lands Commission, with surveys, maps, notes, and explanations touching *disputed* points." (*Italics added.*) If these reports are insufficient to enable the commission to collate a satisfactory description therefrom, the commission "shall cause surveys to be made, and when approved by it, the surveys establish the common boundaries and corners." (Gov.Code, § 23173.) There would be no purpose in reporting to the commission about "*disputed* points" with "surveys, maps, notes, and explanations" if the commission did not have power to settle the "*disputed* points." The commission's jurisdiction to establish by surveys common boundaries and corners necessarily includes jurisdiction to determine in the first instance the meaning of the statutory language defining the boundary or the existence of facts bringing into play the mutual recognition and use statutes (Gov.Code, §§ 23170, 23177), for only after it has decided such preliminary questions, can a final survey be undertaken. "A public officer or board has not only the powers expressly enumerated by law, but also those implied powers which are necessary to the exercise of the powers expressly granted." *Crawford v. Imperial Irrigation Dist.*, 200-Cal. 318, 334, 253 P. 726, 732. The majority concede that if the language of the boundary statute were clear, the commission could act upon it to establish a boundary by survey. The power to do so is just

as essential to the commission's function when the language is unclear, and nothing in the statutes justifies the distinction that the majority make. It is ironic that the commission is denied authority to act in the very situations in which the disputes it is empowered to settle are most likely to arise.

Language in *County of Sierra v. County of Nevada*, 155 Cal. 1, 99 P. 371, unquestionably supports the position taken by the majority herein. In that case, however, the court was reviewing a judgment that had determined a disputed boundary after a full trial in the trial court. The plaintiff had not invoked the administrative remedy but after an adverse judgment sought to switch to another tribunal. It may reasonably be assumed that the court was reluctant to reverse a judgment entered after a full and accurate determination of the issues solely because another remedy had not been invoked. In any event, to sustain its decision it was only necessary for the court to hold that the administrative remedy was not exclusive. It was not necessary to hold that the administrative remedy did not exist. The precise problem there presented is now governed by statutes allowing the plaintiff an election of remedies in the first instance (Gov.Code, §§ 51000-51009), so it is unnecessary to determine whether the court erred in the *Sierra* case in holding in effect that the administrative remedy was not exclusive. Obviously, however, the language in that decision indicating that the Legislature could not constitutionally invest the State Lands Commission with authority in the first instance to determine the questions involved in this case should be disapproved. The power to find facts upon which the application of a statute depends is an essential part of administrative authority. In 1917 this court said, "from necessity, if for no better grounded reason, it has become increasingly imperative that many *quasi* legislative and *quasi* judicial functions, which in smaller communities and under more primitive conditions were performed directly by the legislative or judicial

branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.'" *Gaylord v. City of Pasadena*, 175 Cal. 433, 436-437, 166 P. 348, 349.

More recent decisions of this court resting on the premise that "judicial functions" cannot constitutionally be given to a statewide agency have at most given a broad scope to judicial review of agency action. *Standard Oil Co. v. State Board of Equalization*, 6 Cal.2d 557, 59 P.2d 119; *Whitten v. California State Board of Optometry*, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1; *Drummey v. State Board of Funeral Directors*, 13 Cal.2d 75, 87 P.2d 848; *Bodinson Mfg. Co. v. California Employment Commission*, 17 Cal.2d 321, 109 P.2d 935; *Laisne v. California State Board of Optometry*, 19 Cal.2d 831, 123 P.2d 457; *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 136 P.2d 304; *Sipper v. Urban*, 22 Cal.2d 138, 137 P.2d 425; *Moran v. State Board of Medical Examiners*, 32 Cal.2d 301, 196 P. 2d 20. They have not gone so far as to deny any administrative agency the power in the first instance to pass upon questions of law or fact. Certainly, fixing the location of a disputed landmark or determining whether a boundary line has been mutually recognized for a sufficient time legally to establish it is no more an exclusive function of courts than determining the extent of the penalty for violation of the Insurance Code (*Nardoni v. McConnell*, 48 Cal.2d 500,

507, 310 P.2d 644) or determining whether there is unappropriated water available for an applicant (*Temescal Water Co. v. Dept. of Public Works*, 44 Cal.2d 90, 106, 280 P.2d 1), to cite but two recent instances in which this court has upheld the exercise of quasi-judicial power by a state-wide administrative agency. See also dissenting opinion in *Laisne v. California State Board of Optometry*, 19 Cal.2d 831, 859-862, 123 P.2d 457 and cases cited. Clearly the reasons given for the decision in the *Sierra* case were aberrational, and they should not be given fresh currency now merely because this is another boundary dispute case.

The judgment should be affirmed.

GIBSON, C. J., concurs.

Rehearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.



49 Cal.2d 805

Maylon COOTS, Appellant,

v.

**SOUTHERN PACIFIC COMPANY, a
corporation, Respondent.**

Sac. 6841.

**Supreme Court of California,
In Bank.**

March 7, 1958.

Action under Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to recover damages for injuries due to dermatitis. The Superior Court, Sacramento County, Jay L. Henry, J., entered judgment for defendant, and plaintiff appealed. The Supreme Court, Carter, J., held that three-year period of limitations under Federal Employers' Liability Act, § 6 as amended, 45 U.S.C.A. § 56, did not begin to run against cause of action for injuries due to dermatitis at any time before condition became "real worse", though it had been diag-

nosed several years earlier as dermatitis traceable to employment.

Judgment reversed.

McComb, J., dissented.

Opinion, 311 P.2d 40, vacated.

Limitation of Actions ⇨55(6)

Three-year period of limitations did not begin to run against cause of action under Federal Employers' Liability Act for injuries due to dermatitis attributable to contact with chemical solution during employment by defendant at any time before condition became "real worse", though it had been diagnosed several years previously as dermatitis traceable to employment without, however, any indication of ultimate disability. Federal Employers' Liability Act, § 6 as amended 45 U.S.C.A. § 56.

Perkins & Carr and Thomas C. Perkins, Sacramento, for appellant.

Devlin, Diepenbrock & Wulff and Forrest A. Plant, Sacramento, for respondent.

CARTER, Justice.

This is an appeal by plaintiff, Maylon Coots, from a judgment entered after trial by the court upon the defendant's motion, pursuant to section 597 of the Code of Civil Procedure, that the applicable statute of limitations as set forth in defendant's fourth special defense barred plaintiff's cause of action.

Plaintiff, an employee of defendant Southern Pacific Company, commenced his action under the provisions of the Federal Employers' Liability Act on October 11, 1954, to recover for personal injuries sustained by him. Section 56 of the act (45 U.S.C.A.) provides that no action can be maintained thereunder unless commenced within three years from the date the cause of action accrued.

Plaintiff began working in silver cyanide solution in defendant's plating department in either December, 1947, or January, 1948. Sometime in 1949 he noticed small blisters

and pimples on his hands which caused itching. In July, 1949, he went to the Southern Pacific Hospital where one of defendant's doctors diagnosed the difficulty as "Dermatitis, moderately severe, both hands." The report, under date of July 8, 1949 (Defendant's Exhibit B), shows that plaintiff signed a statement which attributed the skin difficulty on his hands with "Filtering cyanide solution which gets on hands causing a dermatitis" and "Having hands in solution." The report shows that the hands were "dressed with lotion" and plaintiff was "advised." The condition of plaintiff's hands became "real worse" in May or June of 1953; thereafter the condition spread to other parts of his body and became more severe and as of June, 1955, he was unable to work. On July 14, 1955, plaintiff was admitted to defendant's hospital. Apparently plaintiff was not advised to discontinue his work until he was discharged from defendant's hospital on September 12, 1955. On the report (under date of July 8, 1949) signed by defendant's doctor, appears the following question and answer: "11 Give probable duration of disability." "None." (Emphasis added.)

Plaintiff contends that his cause of action did not accrue until he became disabled and unable to work in June, 1955. Defendant's position is that plaintiff's cause of action accrued when he first became aware of his employment-connected injury. Both plaintiff and defendant rely on the decision of the United States Supreme Court in *Urie v. Thompson*, 337 U. S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282, in support of their arguments.

In the *Urie* case the claimant sought relief under the Federal Employers' Liability Act for injury due to silicosis contracted during the course of his employment. The Supreme Court there rejected the defendant's argument that because the claimant had been exposed to silica dust for 31 years prior to the commencement of his action he was barred by the provisions of section 56, Title 45, of the United States Code. Defendant here argues that

the court held that "awareness" of the disease rather than "disability" from it was the controlling factor in the *Urie* case. We do not so understand the *Urie* case.

The court in the *Urie* case had this to say (337 U.S. at page 168 et seq., 69 S.Ct. at page 1024):

"*Urie* filed suit on November 25, 1941. Under the terms of the then prevailing three-year statute of limitations [45 U.S.C.A. § 56], the court could not entertain the claim if *Urie's* 'cause of action accrued' before November 25, 1938. Respondent contends that *Urie*, having been exposed to silica dust since approximately 1910, must unwittingly have contracted silicosis long before 1938, and hence that his 'cause of action' must be deemed to have 'accrued' longer than three years before the institution of this action. Alternatively it may be argued that each inhalation of silica dust was a separate tort giving rise to a fresh 'cause of action,' and that *Urie* is therefore limited to a claim for inhalations between November 25, 1938, and the spring day in 1940 when he became incapacitated.

"In our view, however, neither of the outlined constructions of the statute of limitations can be sustained. For, if we assume that Congress intended to include occupational diseases in the category of injuries compensable under the Federal Employers' Liability and Boiler Inspection Acts [45 U.S.C.A. §§ 51 et seq., 22 et seq.], such mechanical analysis of the 'accrual' of petitioner's injury—whether breath by breath, or at one unrecorded moment in the progress of the disease—can only serve to thwart the congressional purpose.

"If *Urie* were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded *Urie* only a de-

lusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

"Nor can we accept the theory that each intake of dusty breath is a fresh 'cause of action.' In the present case, for example, application of such a rule would, arguably, limit petitioner's damages to that aggravation of his progressive injury traceable to the last eighteen months of his employment. Moreover petitioner would have been wholly barred from suit had he left the railroad, or merely been transferred to work involving no exposure to silica dust, more than three years before discovering the disease with which he was afflicted.

"We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date. 'It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the

afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves * * *.' Associated Indemnity Corp. v. Industrial Accident Commission, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076. The quoted language, used in a state workmen's compensation case, seems to us applicable in every relevant particular to the construction of the federal statute of limitations with which we are here concerned."

Defendant attaches much significance to the phrase "blameless ignorance" used by the court and to the fact that only part of the sentence found in the California Industrial Accident Commission case was quoted by the court. If we were to construe the phrase "blameless ignorance" as contended for by defendant we would have to hold as a matter of law that the "moderately severe" dermatitis suffered by defendant in 1949 which was dressed by defendant's doctor with a "lotion" and which was considered by the doctor as not disabling was notice to the plaintiff that his work would eventually cause permanent and total disability. As the Supreme Court of the United States said in the Urie case: "Moreover petitioner would have been wholly barred from suit had he left the railroad, or merely been transferred to work involving no exposure to silica dust, more than three years before discovering the disease with which he was afflicted." In this connection it is noteworthy that at no time prior to the time plaintiff became totally disabled from exposure to the solution with which he was working did defendant's doctor advise him to stop that particular work.

The balance of the quotation from the California case (124 Cal.App. at page 381, 12 P.2d at page 1076) is as follows: "[A]nd this would be when the employee becomes disabled and entitled to compensation, that is, when under the well-established meaning of the term 'disability,' as used in compensation law, there is a combination of partial or total physical incapacity and of inability to work." Defendant argues that because

the Supreme Court of the United States did not include in its quotation the entire sentence in the California decision that it did not mean to hold that the time of partial or total physical incapacity and inability to work was the time from which the statute of limitations began to run. It will be recalled that the Supreme Court approved the holding of the California court that "the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves.

* * * (Emphasis added.) As the Supreme Court said in the Urie case (337 U.S. at page 187, 69 S.Ct. at page 1033): "We do not think the mere difference in the time required for different acts of negligence to take effect and disclose their harmful, disabling consequences would justify excluding the one type of injury from the Act's coverage or that such an exclusion would be consistent with its language, purposes, or unvarying standards of construction." The Supreme Court in the Urie case specifically notes that it has followed a "constant and established course of liberal construction * * *" of the remedial and humanitarian purposes of the Federal Employers' Liability Act (337 U.S. 163, 181, 182, 69 S.Ct. 1018, 1030, 93 L.Ed. 1282). In Jamison v. Encarnacion, 281 U.S. 635, 640, 50 S.Ct. 440, 442, 74 L.Ed. 1082, it was held that "The act is not to be narrowed by refined reasoning. * * * It is to be construed liberally to fulfill the purposes for which it was enacted * * *."

In an exhaustive note on this subject in 11 A.L.R.2d at pages 277, 279, 297, the writer notes that "As to a claim arising under a workmen's compensation or occupational disease statute, it is much more reasonable to regard the time of disability as the time of the beginning of the running of limitations than is true of a cause of action for tort causing exposure to, and eventual, disease, the usual purpose of the occupational disease and workmen's compensation statutes being simply to provide for disability. But if it happens in a particular negligence case, as it often must, that disability is approximately coincident with manifesta-

tion of the disease, a reference to the statute as running from the time of disability may not be objectionable, as limited to that case."

We have concluded that plaintiff was "blamelessly ignorant" that the "moderately severe" dermatitis suffered by him in 1949 would lead to disability and that under no view of the evidence can it be said that the statute begins to run at any earlier time than in the year 1953 when the condition became "real worse." It is not necessary, however, for us to determine whether the statute began to run in 1953 or in 1954 when, according to the allegations of plaintiff's complaint, his employment-connected disease prevented him from performing his usual work "from time to time" inasmuch as either time is well within the statute of limitations.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, and SCHAUER, JJ., concur.

SPENCE, Justice.

I concur in the reversal of the judgment.

In my opinion, however, this court should more clearly set forth the rule for determining when the cause of action accrues and the statute of limitations commences to run in cases which are brought under the federal act and which involve progressive diseases. The majority opinion necessarily holds that the statute did not commence to run in this case at the time of the first minor manifestation of plaintiff's dermatitis in 1949; but it implies that the statute may not have commenced to run until some five years thereafter when plaintiff became disabled for work in 1954 or 1955. The vice of the failure of the majority to determine just when the statute did commence to run is that it leaves the decision here open to the charge that it is inconsistent with the decision of the United States Supreme Court in Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282.

Both plaintiff and defendant rely upon their conflicting versions of the effect of

the decision in the Urie case. That was a silicosis case in which the first known manifestation of that serious disease was practically simultaneous with the employee's disability to work. As the court there said at page 170 of 337 U.S., at page 1025 of 69 S.Ct.: "The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date." It was further said that the afflicted employee can be held to be "injured" only "when the accumulated effects of the deleterious substance manifest themselves." Defendant would have this court adopt a strict construction of this language and hold that the statute commenced to run in the present case at the time of the first minor manifestation of plaintiff's dermatitis in 1949. On the other hand, plaintiff would have us adopt the reasoning of the Missouri Supreme Court in the Urie case (*Urie v. Thompson*, 352 Mo. 211, 176 S.W. 2d 471), and hold that the statute did not commence to run until plaintiff became disabled in 1954 or 1955. Both courts reached the same result in the Urie case upon different lines of reasoning but only because there the time when the accumulated effects of the deleterious substance manifested themselves and the time when the employee became disabled were for all practical purposes one and the same time. It is significant, however, that the United States Supreme Court carefully refrained from adopting the reasoning of the Missouri Supreme Court in deciding the Urie case.

It appears to me that the reasoning in the majority opinion tends to confuse the time of the commencement of the period of limitations in a workmen's compensation case with the time of such commencement in a negligence case. The distinction between the two types of cases for this purpose is clearly indicated in an annotation to *Urie v. Thompson*, *supra*,

337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 A.L.R.2d 277.

The present action is a negligence action, as it is based upon the Federal Employers' Liability Act (45 U.S.C.A. § 51 et seq.). Unlike the ordinary proceeding instituted under a workmen's compensation statute or an occupational disease statute, negligence rather than disability is the basis upon which liability is predicated. Such liability may therefore exist prior to actual inability to work, and even in the absence of any such inability. Thus the following language, quoted in the majority opinion from 11 A.L.R.2d at page 297, indicates the factual background which caused the United States Supreme Court and the Missouri Supreme Court to reach the same result in the Urie case despite the use of different lines of reasoning: "As to a claim arising under a workmen's compensation or occupational disease statute, it is much more reasonable to regard the time of disability as the time of the beginning of the running of limitations than is true of a cause of action for tort causing exposure to, and eventual, disease, the usual purpose of the occupational disease and workmen's compensation statutes being simply to provide for disability. *But if it happens in a particular negligence case, as it often must, that disability is approximately coincident with manifestation of the disease, a reference to the statute as running from the time of disability may not be objectionable, as limited to that case.*" (Emphasis added.)

In the present case, however, the uncontradicted factual background shows that "disability" was not "approximately coincident with manifestation of the disease," and therefore any implication in the majority opinion that the statute of limitations may not have commenced to run until the time of plaintiff's actual inability to work is not only objectionable, but it appears to be inconsistent with the rule above quoted from the opinion of the United States Supreme Court in the Urie case.

The question then arises as to whether the conclusion can be reached here under

the uncontradicted facts that the statute of limitations had not barred plaintiff's action in line with the "constant and established course of liberal construction" of the federal act (*Urie v. Thompson*, supra, 337 U.S. 163, 181-182, 69 S.Ct. 1018, 1030), and without doing violence to the rule enunciated in the *Urie* case. I believe that this conclusion can and should be reached. A brief statement of that factual background should suffice.

Plaintiff's dermatitis, which is defined as "Inflammation of the derma, or true skin" (*Webster's New International Dictionary*, 2d Ed.), first manifested itself on his hands in a relatively minor way in 1949. He then claimed that it was caused by "having hands in solution [cyanide]" while engaged in his work. Defendant's doctors, who treated plaintiff at that time, knew of that claim and apparently agreed. His hands were then merely "dressed with lotion" and he was "advised." Plaintiff evidently desired to continue his work, and he did so with the knowledge and consent of defendant employer. While plaintiff claimed in 1949 that his condition resulted from his employment, both plaintiff and his employer apparently believed it to be a mere minor and temporary condition rather than one of a serious or permanent nature. Furthermore, there is no evidence to show that if plaintiff had not been further exposed to contact with the cyanide solution while continuing his employment, he would have experienced any more than a minor and temporary condition which would have promptly terminated. He nevertheless continued his work and his contact with the cyanide solution. It was not until May or June of 1953 that the condition of his hands became "real worse" and spread to other parts of his body. The progressive condition did not actually prevent him from working until 1954 or 1955.

Under the particular circumstances of this case, I am of the opinion that it should be held that plaintiff's cause of action accrued and the statute of limitations commenced to run in 1953, when there was the first manifestation of *substantial* harm to

plaintiff, and that therefore his cause of action was not barred by the three year statute when the suit was commenced in 1954.

While no case directly in point has been found, this may be explained by the fact that negligence cases involving progressive diseases, where the "injury" results from continued exposure rather than from traumatic causes, have been relatively few in number; and by the further fact that in the few cases, including the *Urie* case, which have reached the appellate courts, the disease was of such nature that the manifestation of substantial harm has ordinarily been practically simultaneous with the inability to continue work. Hence this case, in a very real sense, must be considered one of first impression. This is not the first time, however, that this court has been called upon to innovate rules to meet the peculiar problems facing the employee who may suffer from a progressive disease resulting from his employment. See *Colonial Ins. Co. v. Industrial Accident Commission*, 29 Cal.2d 79, 172 P.2d 884. Nevertheless, we are here dealing with a case arising under the federal act, and it is imperative that any rule which we apply should be consistent with the federal decisions such as *Urie v. Thompson*, supra, 337 U.S. 163, 69 S.Ct. 1018, and *James v. Pennsylvania R. Co.*, 3 Cir., 196 F.2d 1021. The above suggested theory is consistent with those decisions, but the implication in the majority opinion that the cause of action may not have accrued with plaintiff's actual inability to work appears to be inconsistent therewith.

The theory that the cause of action should not be deemed to have accrued here until the manifestation of *substantial* harm finds support in the comments on the *Urie* decision. "It would seem preferable, in all cases where the harm is of a gradually increasing and inherently unknowable nature, to delay commencement of the statutory period until manifestation of *substantial* harm." Emphasis added; *Development in the Law, Statutes of Limitations*, 63 Harv. L.Rev. 1177, 1207. It further finds support

in the language used in *Piukkula v. Pillsbury Astoria Flouring Mills Co.*, 150 Or. 304, 42 P.2d 921, 929, 44 P.2d 162, 99 A.L.R. 244, where the court speaks of the time when the disease has reached "*substantial proportions and had inflicted upon him an appreciable injury.*" (Emphasis added.)

This theory offers a practical approach to the problem, and it achieves a just result. The minor manifestation of skin trouble on plaintiff's hands prior to 1953 was of such nature that it may be treated as *de minimus*. It was so treated by the parties and it is a maxim of our jurisprudence that "The law disregards trifles." Civ.Code, § 3533. Human experience indicates that comparable conditions ordinarily terminate with the passage of a brief period of time; and it does not comport with sound public policy to require an employee, at his peril, to engage in litigation with his employer when an apparently minor and temporary manifestation of skin trouble occurs. It now appears that with the continuation of his work and continued exposure to the cyanide solution; the harm was essentially of a "gradually increasing and inherently unknowable nature," at least until such time as it had resulted in substantial harm to plaintiff. That harm which appeared minor and temporary prior to 1953 clearly became substantial in that year, when the skin trouble became worse and spread to other parts of plaintiff's body. Thus it was not until 1953 that it may be fairly said that the accumulated effects of the exposure manifested themselves in substantial harm to plaintiff. Under these circumstances it seems logical to conclude that the statute did not begin to run until such "manifestation of substantial harm" in 1953. In my opinion, the United States Supreme Court would have arrived at a similar conclusion if it had had this particular problem before it in the *Urie* case.

In view of my conclusion that it should be held that the statute of limitations did not commence to run until the manifestation of substantial harm in 1953, it is unnecessary to consider whether, in any event, defendant employer should be held to have

waived the running of the statute of limitations for the period during which plaintiff continued to work at the same employment with defendant's consent and continued to receive treatment from defendant's medical facilities for an affliction which appeared to be of a relatively minor and temporary nature.

For the reasons stated, I concur in the reversal of the judgment.

McCOMB, Justice.

I dissent, for the reasons expressed by Mr. Justice Warne in the opinion prepared by him for the District Court of Appeal, Cal.App., 311 P.2d 40.



158 Cal.App.2d 264

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Jessie Angris BLINKS, Defendant and
Appellant.
Cr. 6033.**

District Court of Appeal, Second District,
Division 2, California.

March 6, 1958.

Rehearing Denied March 25, 1958.

Hearing Denied April 30, 1958.

Defendant was convicted of possession of heroin and from a judgment of the Superior Court, Los Angeles County, Maurice C. Sparling, J., the defendant appealed. The District Court of Appeal, Ashburn, J., held, *inter alia*, that evidence was sufficient to show physical possession or control of the drug or that defendant knew of existence of the heroin.

Affirmed.

I. Criminal Law ⚖️569

A mere possibility affords no evidence whatever, and mere conjecture, surmise or

suspicion is not the equivalent of reasonable inference and does not constitute proof.

2. Poisons ☞9

In prosecution for possession of heroin, the possibility that some one other than defendant threw the drug into light well did not rise to dignity of a probability and was no evidence whatever in support of defendant's claim of innocence. West's Ann.Health & Safety Code, § 11500.

3. Poisons ☞9

In prosecution for possession of heroin, evidence was sufficient to show physical possession or control of the drug or that defendant knew of existence of the heroin. West's Ann.Health & Safety Code, § 11500.

John J. Guerin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Convicted of possession of heroin (Health & Safety Code, § 11500), defendant's appeal rests upon the claim that the evidence is insufficient to show physical possession or control or that appellant knew of the existence of the heroin.

Police officers knocked on the door of a room of a hotel at 333 East Fourth Street, Los Angeles. In response to an inquiry they called out "police officers." In a few seconds the door was opened by a person known as Brown. As they entered the officers observed a curtain moving and the appellant's foot, clad in a tan sock, going out the window. Officer Leete went out the window in hot pursuit and saw appellant standing in the light well, six or seven feet from the window. He found a package containing four bindles lying near appellant's feet and close to a small drain in the center of the light well. Appellant denied knowing anything about the bindles, but he admitted using narcotics and stated he was "shooting two half papers" a day. He said he went out the window to avoid being arrested for "marks." A search of

the room was made and an eyedropper and finger stall were found. The contents of the four bindles proved to be heroin.

[1] The light well of the hotel is four-sided and two floors high. Each of the eight rooms facing it has two windows upon it. Appellant's contention is that any one could have thrown the bindles into the light well and that no logical deduction can be made from the facts leading to a conclusion that appellant had physical possession or control of the bindles of heroin at any time or that he knew of their existence. Thus he rests his case upon the possibility that some unknown third person was guilty of the offense in question, which possibility he presents as outweighing the probabilities emanating from the circumstances immediately surrounding his own apprehension. But a mere possibility affords no evidence whatever. *People v. Williams*, 151 Cal.App.2d 173, 179, 311 P.2d 117. "Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof." *People v. Bender*, 27 Cal.2d 164, 186, 163 P.2d 8, 21.

[2] At the word "police" defendant, a confessed narcotics user, fled from the hotel room to the light well outside. Officer Leete pursued him as closely as possible. Officer Sowiak said that Leete "leaped and brought the defendant back into the room." When Leete cleared the window curtain and could see outside, defendant was standing in the light well close to a drain therein. At or near his feet were bindles of heroin and the reasonable inference is that he had not had time to kick them into the drain or to lift the cover and drop them in if that was necessary. No one else was seen near the heroin. Appellant was undoubtedly bent upon secreting or otherwise disposing of the same when prevented by the police. Brown, who was the other occupant of the hotel room, was not seen to be engaged in disposing of the narcotic. He admitted the police as appellant disappeared through the window. He sat on the bed and talked to the officers. Though

arrested, Brown was released at the preliminary hearing. The dropper and the finger stall found on the dresser are well-known aids to administration of the drug and were of immediate interest to appellant. As defendant stood in the light well in the dark with the heroin near his feet and the drain, Officer Leete threw the beam of his flashlight into a darkened room on the side of the light well opposite the room from which appellant had fled. One of its windows was open about 12 to 18 inches but the light revealed no one in the room. In all there were 16 windows on the light well, but Officer Leete saw none of them open except the two just mentioned. All the circumstances point to the probability that appellant took the bindles of heroin with him when he left the hotel room, dropped them at his feet when he neared the drain and lacked time to get them into the drain and out of sight. The possibility that some one else threw the drug into the light well does not rise to the dignity of a probability and is no evidence whatever in support of defendant's claim of innocence.

[3] Appellant cites two cases involving a drug found in a light well of a building (*People v. Bassett*, 68 Cal.App.2d 241, 156 P.2d 457 and *People v. Eberhard*, 114 Cal.App.2d 133, 249 P.2d 590) and argues that the facts were stronger there and hence those cases do not support a conviction at bar. Let that be granted; it helps appellant none. However, the drug involved in the Bassett case seems to have been equally accessible to apartment 101, occupied by defendant, and to the adjoining apartment 102. The possibility that some one from 102 had placed the drug where it was found was not permitted to overthrow the circumstantial showing that defendant had done it by operating from his own apartment 101. At page 247 of 68 Cal.App.2d, at page 460 of 156 P.2d the court said: "'Possession' of a chattel is established when it is shown that a person has physical control thereof with the intent to exercise such control, or having had such physical control, has

not abandoned it and no other person has that possession (Rest., Torts, Sec. 216). The statute does not require 'proof of possession' at the very time of arrest (*People v. Belli*, 127 Cal.App. 269, 271, 15 P.2d 809), nor is it necessary to prove that the accused had the unlawful article on his person, *People v. Sinclair*, 129 Cal. App. 320, 322, 19 P.2d 23." This court, in *People v. Flores*, 155 Cal.App.2d 347, 318 P.2d 65, 66, said: "Possession and knowledge may be proved circumstantially and the evidence at bar is sufficient to support those inferences. Exclusive possession of the premises is not necessary nor is physical possession of the drug of the essence. [Citations.] The defense rests solely upon defendant's testimony. When that is discarded, and the trial court had that prerogative, the record leaves defendant in ownership and possession, actual or constructive, of the drug whose character he could not deny in the face of his equipment for injection which was found in the bathroom."

"We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances seasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 780. So viewing the evidence it appears to be amply sufficient to sustain the jury's finding.

In his reply brief appellant's counsel challenges the Attorney General's statement that appellant had waived a jury trial. The record was duly augmented by a showing which established beyond question that such a waiver actually was made.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

158 Cal.App.2d 243

Cite as 322 P.2d 469

Leo TELLEFSEN, Plaintiff and Respondent,
v.

KEY SYSTEM TRANSIT LINES, a California corporation, and Andrew M. Bailey,
Defendants and Appellants.

Civ. 17689.

District Court of Appeal, First District,
Division 2, California.

March 6, 1958.

Rehearing Denied April 4, 1958.

Hearing Denied April 30, 1958.

Action by passenger for personal injuries sustained when train struck the terminal bulkhead at the end of the line. The Superior Court, County of Alameda, Thomas J. Ledwich, J., rendered judgment in favor of passenger against the transit lines and its motorman, and they appealed. The District Court of Appeal, Draper, J., held that evidence raised question for jury as to whether there was causal connection between the accident and the atrophy of a portion of plaintiff's brain.

Affirmed.

1. Damages ⇨208(1)

In personal injury action, evidence raised question for jury as to whether there was causal connection between accident and the atrophy of a portion of plaintiff's brain.

2. Appeal and Error ⇨930(1)

The District Court of Appeal views the evidence in the light most favorable to the verdict.

3. Appeal and Error ⇨1002

The resolution of conflicts in the evidence is for the jury rather than the appellate court.

4. Evidence ⇨560

In personal injury action, where neurosurgeon called by plaintiff testified on direct examination that he was on the staffs of two hospitals and on cross-examination he was asked "Have you attempted to get on the staff" of another hospital, and he answered "No, not recently", defendants could not prove by the business manager of the latter hospital that the neurosurgeon

had applied for such appointment and was not accepted.

5. Witnesses ⇨405(1)

One who cross-examines upon irrelevant matter solely for the purpose of eliciting something to be contradicted is bound by the answer.

6. Trial ⇨108½, 109

In voir dire of the jury and in opening argument to jury it was improper to imply that settlement had been attempted and to suggest that liability could be imposed without fault.

7. Trial ⇨133(6)

The prompt and clear admonition of the court to disregard the implication that settlement had been attempted and the suggestion that liability could be imposed without fault, made in voir dire of the jury and in opening argument to jury, removed the prejudicial effect of the error.

8. Trial ⇨133(6)

Only in extreme cases will an admonition to disregard objectionable matter raised in the voir dire of the jury and in the opening argument to the jury fail to remove the prejudicial effect.

9. Appeal and Error ⇨1060(1)

Misconduct in the voir dire of the jury and in the opening argument to the jury must be of willful or persistent nature in order to constitute reversible error.

10. Appeal and Error ⇨1015(5)

Where the trial court denied motion for new trial on ground of misconduct in voir dire of the jury and in opening argument to the jury, the District Court of Appeal must give weight to the trial judge's view that the jury was not prejudicially influenced.

11. Carriers ⇨321(9)

In passenger's action for personal injuries sustained when train struck terminal bulkhead at end of line, where instruction on res ipsa loquitur clearly specified that doctrine should apply only if the jury found that, as plaintiff claimed, the train stopped abruptly and that plaintiff was injured by that accidental occurrence, later instruction

that if the jury "find from all of the evidence, including the inference of negligence which arises from the happening of the accident, as you have been instructed" that conductor was negligent, then the verdict should be against both conductor and the transit lines did not improperly instruct that the accident did occur as claimed by passenger.

12. Appeal and Error ◊1041(2), 1064(1)

In passenger's action against motorman and transit lines, there was no prejudicial effect in permitting passenger to amend his complaint to allege negligent maintenance and management and then instructing that transit lines could be held liable even if motorman were not, where the jury held both the motorman and transit lines liable.

Donahue, Richards & Gallagher, Oakland, for appellants.

T. G. Fitzgerald, San Rafael, for respondent.

DRAPER, Justice.

Plaintiff sought damages for injuries suffered while he was a passenger on a train of defendant corporation. At the end of the line in Berkeley, the train struck the terminal bulkhead. The sudden stop threw plaintiff, in a sitting position, into the seat in front of him. He "had the feeling of being propelled back and forth between the seats," and "ended up between the seats on the floor." Judgment was entered upon jury verdict for \$62,282.69 against defendant corporation and its motorman. Defendants' motion for new trial was denied, and they appeal.

[1-3] The principal injury claimed by respondent is atrophy of a portion of the brain. Appellants contend that the evidence is insufficient to establish a causal connection between the accident and this condition. They argue that respondent's principal medical witness based his testimony that the cerebral atrophy resulted from this accident upon the assumption that respondent suffered a blow to the head,

whereas, they say, respondent's testimony does not support the view that he received such a blow. But we are required to view the evidence in the light most favorable to the verdict (*Jordan v. Guerra*, 23 Cal.2d 469, 476, 144 P.2d 349; 4 Cal.Jur.2d 449). So viewed, the record supports neither of appellants' premises. The neurosurgeon testified that such atrophy could result from "shaking or a blow." And respondent's testimony on deposition, relied upon by appellants to negative the occurrence of a blow to the head, does not have this effect. Rather, respondent testified that he was not "aware of" striking his head. In view of the force with which he was thrown about in the train, as well as his testimony that he was stunned, the jurors could reasonably conclude that in fact his head forcibly struck the seat ahead of him, as he testified at trial. At most, there is a conflict of evidence, and the resolution of conflicts is for the jury, rather than the appellate court.

[4,5] The neurosurgeon called by respondent testified on direct that he was on the staffs of two hospitals. On cross-examination, he was asked "Have you attempted to get on the staff" of another hospital, and answered "No, not recently." As part of their case, appellants called the business manager of the latter hospital, and offered to prove through him that the doctor had applied for such appointment and was not accepted. Respondent's objection to this offer was sustained, and appellants urge this ruling as error. The offer was properly rejected. Appellants now suggest that in some way the doctor's failure to gain admission to this staff reflects upon his qualifications as an expert. To the extent that the offered testimony might have such effect, it would be obvious hearsay. To the extent that the testimony was competent, it was wholly collateral to any issue in the case. The cross-examination as to membership on this staff did not go to the doctor's credibility, as he had not claimed such membership on direct. At most, the cross-examination was designed to elicit an answer which could be contradicted. But

one who cross-examines upon irrelevant matters solely for the purpose of eliciting something to be contradicted is bound by the answer (*Trabing v. California Navigation etc. Co.*, 121 Cal. 137, 145, 53 P. 644; *In re Estate of Gird*, 157 Cal. 534, 548, 108 P. 499; *Sales v. Bacigalupi*, 47 Cal.App.2d 82, 87, 117 P.2d 399; 27 Cal.Jur. 107).

[6-10] Appellants claim prejudicial misconduct by respondent's attorney. In voir dire of the jury, respondent's counsel asked one juror:

"The fact we are in court today, Mr. Rozzell, shows that this case has not been settled prior to trial. Does the fact that myself and my adversary in the case have not succeeded in settling the case, does that have any influence whatsoever upon your thinking with respect to the case?"

Two weeks later, in his opening argument to the jury, respondent's counsel said:

"The cause of action for personal injuries is a part of our social organization. It is a part of the scheme of security that has been developed over many years in this country. It is an integral part. Each time you buy a bunch of carrots at seven cents, your pay in some way reflects itself in this scheme in the same way that seven cent bunch of carrots is in some ways reflected in the fire insurance the grocer carries on his building and the social security he has to pay to his employees. This is something to which, if Mr. Tellefsen under the rules is entitled to recover, he is entitled to recover in the same way as he would be entitled to recover on an accident insurance policy that he has been paying two bits a week into."

In each instance the court, promptly upon objection, fully and carefully admonished the jury to disregard the objectionable matter. In each instance, however, the court denied appellants' motion for mistrial. The implication that settlement had been attempted and the suggestion that liability could be imposed without fault were im-

proper. However, the prompt and clear admonition of the court removed the prejudicial effect of the errors (*Downey v. Bay Cities Transit Co.*, 94 Cal.App.2d 373, 210 P.2d 713). Only in extreme cases will such an admonition fail to remove the effect of counsel's conduct (*Tingley v. Times Mirror*, 151 Cal. 1, 23, 89 P. 1097). Here the misconduct does not appear to be of that "willful or persistent nature" which constitutes reversible error (*Willoughby v. Zylstra*, 5 Cal.App.2d 297, 302, 42 P.2d 685, 687). In our case, appellants' motion for new trial was denied, and we must give weight to the trial judge's view that the jury was not prejudicially influenced (*Aydrott v. Key System Transit Co.*, 104 Cal. App. 621, 629, 286 P. 456; *Music v. Southern Pacific Co.*, 91 Cal.App.2d 93, 98, 204 P.2d 422).

[11] Plaintiff concedes that the doctrine of *res ipsa loquitur* applies, but urges error in the form of the instruction. However, the instruction was in precisely the form modified and approved by our Supreme Court (*Hardin v. San Jose City Lines, Inc.*, 41 Cal.2d 432, 260 P.2d 63). In a later instruction, the court said "if you find from all of the evidence, including the inference of negligence which arises from the happening of the accident, as you have been instructed," that the conductor was negligent, then the verdict should be against both conductor and corporation. Appellants argue that this amounted to an instruction that the accident did occur as claimed by respondent. However, the instruction on *res ipsa loquitur* had clearly specified that the doctrine should apply only if the jury found that, as plaintiff claimed, the train stopped abruptly and that plaintiff was injured by that accidental occurrence. The later reference to this instruction could have been phrased more aptly. However, this reference to the *res ipsa* inference was qualified by the phrase "as you have been instructed," and we are satisfied that the jury was not misled.

[12] Appellants complain that the court permitted respondent to amend his com-

plaint to allege negligent "maintenance and management," and then instructed that appellant corporation could be held liable even if appellant motorman were not. On the facts of this case, it is difficult to find error in the instruction. In any event, there was no prejudicial effect, since the jury held both defendants liable. Appellants assert other errors in the instructions, but these assignments are without substance. The instructions, read as a whole, are fair and accurate.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J.,
concur.



158 Cal.App.2d 394

Sue ENOS, a minor, by her Guardian ad Litem, Everett J. Enos, and Everett J. Enos,
Plaintiffs and Respondents,

v.

Pete S. MONTROYA, Defendant and
Appellant.

No. 17552.

District Court of Appeal, First District,
Division 1, California.

March 17, 1958.

Rehearing Denied April 16, 1958.

Guest's action for injuries sustained when defendant's automobile failed to complete one of the sharp curves in a winding uphill road and went over steep bank. The Superior Court, Marin County, Carlos R. Freitas, J., rendered judgment on verdict for guest, and defendant appealed. The District Court of Appeal, McMurray, J. pro tem., held that evidence relating to defendant's competition with a trailing automobile, at a speed almost twice that estimated to be prudent, raised question for jury as to defendant's wilful misconduct.

Affirmed.

1. Evidence ⚡507

In guest's action for injuries sustained when defendant's automobile failed to complete one of the sharp curves in a winding uphill road and went over steep bank, it was within discretion of trial judge to permit state highway patrolman who investigated accident to give his opinion as to what was a reasonable or prudent speed at the curve, and such opinion evidence did not improperly invade fact-finding power of jury on any theory that matter was within common experience of man and that consequently jury needed no specialized knowledge.

2. Evidence ⚡507

Expert testimony is admissible or not depending on whether the subject matter is within common experience or whether it is a special field where opinion of one of skill and experience will be of greater validity than that of the ordinary jurymen.

3. Evidence ⚡539

A traffic officer, who has spent years investigating automobile accidents, and who has been required to render official reports not only as to the facts of the accidents but also as to his opinion of their causes, including his opinion, where necessary, as to point of impact of colliding automobiles, is an "expert".

See publication Words and Phrases, for other judicial constructions and definitions of "Expert".

4. Evidence ⚡539

State highway patrolman who had attended training school conducted by highway patrol and had investigated 175 to 200 accidents in his more than two years of service with the highway patrol and who had made reports of such accidents to his superiors was properly qualified as an expert witness upon the subject of what was a reasonable speed on the curve where the automobile accident investigated by patrolman occurred.

5. Automobiles ⚡245(24)

In guest's action for injuries sustained when defendant's automobile failed to com-

plete one of the sharp curves in a winding uphill road and went over steep bank, evidence relating to defendant's competition with a trailing automobile, at a speed almost twice that estimated to be prudent, raised question for jury as to defendant's willful misconduct.

6. Automobiles Ⓒ246(58)

In guest's action for injuries sustained when defendant's automobile failed to negotiate curve and went over steep bank, evidence disclosed no such obvious intoxication of defendant and no such participation by guest in drinking activities as to require the giving of instruction on contributory negligence.

7. Automobiles Ⓒ224(8)

Under certain circumstances an automobile guest who knows that his host has been drinking will be precluded from recovery; the circumstances arise when the guest has sufficient knowledge so that he knows or should have known that host is incapable of careful driving or the guest has so participated in the drinking activities as to be in equal fault with host.

8. Trial Ⓒ296(6)

In guest's action for injuries sustained when defendant's automobile failed to negotiate curve and went over steep bank, instruction that assumption of risk would not bar guest's recovery if guest did what a reasonable person would have done in the exercise of ordinary care for his own safety was not prejudicially erroneous in view of accompanying instructions correctly stating the rules on assumption of risk.

9. Automobiles Ⓒ246(36)

In automobile guest's action against host, instruction that if host was guilty of either willful misconduct or intoxication, then assumption of risk was not a defense unless guest had reasonable opportunity to leave automobile or refused to ride in it, was not error on any theory that the use of the word "refused" instead of "refuse" deprived host of defense of assumption of risk.

10. Automobiles Ⓒ246(54)

In guest's action for injuries sustained in defendant's automobile which failed to complete one of the sharp curves in a winding uphill road and went over steep bank, instruction that defendant was guilty of willful misconduct if he was speeding to stay ahead of following automobile or the two automobiles were competing in any way as to speed or the speed at which curves could be negotiated correctly stated the law to be applied to the particular facts disclosed by the testimony.

11. Appeal and Error Ⓒ1064(1)

Trial Ⓒ241

In automobile guest's action against host, instruction which quoted the basic speed law statute and which stated that 55 miles per hour was the prima facie speed law and which did not otherwise instruct on the prima facie speed limit statute might well have been omitted; however, the instruction did not harm the host. West's Ann.Vehicle Code, §§ 510, 511.

Nelson, Boyd & Menary, D. Kenneth MacDonald, Jr., San Rafael, for appellant.

Charles R. Garry, Dreyfus & McTernan, San Francisco, for respondents.

McMURRAY, Justice pro tem.

Plaintiff Sue Enos, acting through her guardian ad litem, recovered a verdict against the defendant Pete S. Montoya in an action for damages for personal injuries sustained while a guest in defendant's automobile. This appeal is from the judgment on such verdict. The complaint alleged intoxication and willful misconduct on the part of defendant.

Sue Enos, aged 18, in company with Marshall Dixon, Diane Pollock and Pete Montoya went to a beach party at Muir Beach. There were a number of other young people at that party. Pete Montoya bought a case of beer to take to the party and there is testimony that he drank four cans of beer while at the beach, one can quite rapidly. There is also evidence that

he had two bottles of beer at 10:00 or 10:30 a. m. on the day of the accident, and that after the accident he had told an investigator that he had "about two beers" at about 5:00 p. m., the day of the accident, a statement which defendant admitted making, but, at the time of trial, stated was false. There was also testimony that defendant drank a beer while driving to the beach party. After the accident, defendant told the investigating Highway Patrolman that he had not been drinking before the accident.

It also appears that while at the beach defendant sang louder than usual, giggled a lot and made affectionate advances toward Diane Pollock.

Upon leaving the beach party at about 11:00 p. m., there was no beer left in the case taken there by defendant for his group, although there was testimony that generally the members of each group drank only beer brought for that group. The party had lasted for about an hour and a half to two hours.

Sue Enos had been working during the day and had been out the night before. Upon entering defendant's car on the homeward trip, she almost immediately fell asleep in the back seat, and did not waken until the car went over the bank off the road.

From the testimony, the jury could well have found that a car driven by Doyle Nance followed defendant's car up the grade over a winding road at a distance of from 10 to 15 feet behind. While proceeding up this road, defendant steadily accelerated the speed of his car until he was driving at about 35 miles per hour when he failed to complete one of the sharp turns in the road and went over a steep bank with resultant injuries to plaintiff.

There is conflict in the evidence, but the foregoing facts were all before the jury.

After the accident, defendant told the investigating Highway Patrol Officer that his speed was 20 to 25 miles per hour and that an oncoming car with blinding headlights had come down the wrong side of

the road and forced him to go over the side. He also stated that he had not been drinking. Under the undisputed evidence at the trial, these were untrue statements.

[1] In this appeal, appellant contends that the trial judge erred in admitting opinion evidence of the California Highway Patrolman who investigated this accident as to what was a reasonable or prudent speed at the curve where the accident occurred.

This officer testified that he had examined the curve at which this accident took place and had driven automobiles comparable to appellant's around the curve a number of times under road conditions comparable to those that existed at the time of the accident, that he had formed an opinion that, having due regard to the surface and width of the highway and the curve and without danger to the safety of persons or property, the reasonable or prudent speed at that curve was 15 to 18 miles per hour.

The appellant complains that this was not a proper subject for expert testimony, as it is on a matter which is within the common experience of men and needs no specialized knowledge to assist the jury in reaching a conclusion.

[2, 3] However, as is said in *Zelayeta v. Pacific Greyhound Lines*, 104 Cal.App.2d 716, 723, 232 P.2d 572, 577: "* * * in our opinion, it was within the discretion of the trial court to admit this opinion evidence" and at pages 726-727 of 104 Cal. App.2d, at page 579 of 232 P.2d: "* * * expert testimony is admissible or not dependent upon whether the subject matter is within common experience or whether it is a special field where the opinion of one of skill and experience will be of greater validity than that of the ordinary jurymen. It is quite obvious that the conclusion, based upon the facts of the particular case, as to just where a collision between two vehicles occurred, may be so obvious that any reasonable person, trained or not, can draw that inference from the facts. It is equally clear that cases may occur where the opinions of trained experts in the

field on this subject will be of great assistance to the members of the jury in arriving at their conclusions. In such cases a traffic officer who has spent years investigating accidents in which he has been required to render official reports not only as to the facts of the accidents but also as to his opinion as to their causes, including his opinion, where necessary, as to the point of impact, is an expert. Necessarily, in this field, which must be left to the common sense and discretion of the trial court."

In *Risley v. Lenwell*, 129 Cal.App.2d 608, at page 631, 277 P.2d 897, at page 913, it is said: "It seems to be well established that traffic officers whose duties include investigations of automobile accidents are qualified experts and may properly testify concerning their opinions as to the various factors involved in such accidents, based upon their own observations."

Where, as was here the case, the jury's knowledge of the roadway must be limited to that shown by the evidence, it would seem to be an unrealistic position to insist that what was a prudent speed on the subject curve was a matter exclusively within the jury's fact finding power which should not be "invaded" by opinion evidence. The proper rule would appear to be to allow such opinion evidence to assist the jury, if the jury, applying proper instructions, such as were here given, deems such evidence to be helpful. As was said in *People v. Cole*, 47 Cal.2d 99 at page 105, 301 P.2d 854, 857, 56 A.L.R.2d 1435: "The jurors, of course, were not bound by the opinion of the witness but were free to determine the weight to which it was entitled and to disregard it if they found it to be unreasonable, and they were so instructed."

[4] Appellant also argues that the officer's testimony should not have been admitted because he was not properly qualified as an expert upon the subject of what was a reasonable speed on the curve where the accident occurred.

The officer had attended a training school conducted by the Highway Patrol and had investigated 175 to 200 accidents in his more than two years of service with the Highway Patrol and had made reports of such accidents to his superiors.

Furthermore, it should be remembered that the opinion evidence was based upon the officer's personal observations as to a reasonable and prudent speed around the curve, gained by experiment on a number of occasions under comparable conditions and in cars comparable to that driven by appellant at the time of the accident.

[5] Appellant also contends that there is insufficient evidence to establish wilful misconduct. This contention ignores the abundant evidence adduced at the trial and attempts to impose upon a party seeking to establish wilful misconduct the almost impossible burden of proving the intention of the actor to be charged by positive evidence of such intention. We do not deem the rule to be such. Where, as here, there is evidence which, if believed, would justify the jury in finding that defendant, while racing up a road he knew to be winding and steep in a competition with a trailing car, failed to negotiate a curve at almost twice the speed estimated to be prudent, it would appear to be extremely artful to urge that such facts could not be the basis for a finding that defendant's actions were not intentionally done under circumstances which disclosed knowledge, express or implied, that an injury to a guest would be a probable result. If such evidence was believed by the jury, it would be difficult to justify any result other than that reached here. The case of *Rawlins v. Lory*, 44 Cal.App.2d 20 at pages 24 and 25, 111 P.2d 973, at page 975, contains language particularly apposite here, although the facts were somewhat different: "It is also a legitimate inference from the testimony that the defendant driver was racing to overtake the other car and that he was engaging in what may be termed skylarking in 'hanging the corner' into North street. By the term 'skylarking' we mean

the indulging in antics or the cutting of capers with such automobile. See Webster's New International Dictionary, 2d ed. It is a matter of common knowledge that such skylarking at high rates of speed is engaged in at times by drivers, and particularly by youthful drivers, merely for the sake of the thrill which it produces and with reckless indifference to consequences. A driver who engages in such conduct is 'knowingly flirting with danger' without necessity compelling him to take the chance. See *Francesconi v. Belluomini*, 28 Cal.App.2d 701, 705, 83 P.2d 298; *Chandler v. Quinlan*, 25 Cal.App.2d 646, 648, 78 P.2d 235. The probability of injury to a guest from such conduct is an apparent consequence to any person of ordinary prudence and, applying the external standard above mentioned, any driver engaging in such conduct is charged with implied knowledge of the probability of such injury. The type of conduct which we have termed skylarking appears to be the precise type of conduct, or at least one of the types of conduct, which the legislature had in mind when it used the term 'wilful misconduct' in the so-called guest statute and whenever the testimony shows, directly or by legitimate inference, that a driver was engaging in such conduct, such evidence is sufficient to show wilful misconduct and to support a finding thereof."

[6] Appellant next contends that it was prejudicial error for the court not to instruct on the defense of contributory negligence. This contention appears to be made in relation to evidence that respondent had also been drinking beer and thereby had been guilty of misconduct which entered into or induced the misconduct or intoxication of the host or it is supposed, in this case, into both such intoxication and misconduct.

The presentation of this argument is further supplemented by an urging that elaborate instructions on the difference between assumption of risk and contributory negligence should have been given.

[7] It is true that under certain circumstances a guest who knows that his host has been drinking will be precluded from recovery; the circumstances arise when the guest has sufficient knowledge so that he knows or should have known that the host is incapable of careful driving (*Lindemann v. San Joaquin Cotton Oil Co.*, 5 Cal.2d 480, 55 P.2d 870) or the guest has so participated in the drinking activities as to be in equal fault with him. *Pennix v. Winton*, 61 Cal.App.2d 761, 143 P.2d 940, 145 P.2d 561.

In the facts here presented, neither of these circumstances was present. The testimony shows no evidence that appellant was obviously intoxicated nor does it show such participation in the drinking activities by respondent as to bring her within the rule.

Factually, respondent's act of going to sleep on entering the car is far different from the case of *Whitsett v. Morton*, 138 Cal.App. 628, 33 P.2d 54, cited by appellant, and here the only misconduct of appellant took place after respondent was asleep and unaware of appellant's reckless acts. The court acted properly in refusing the instruction requested.

Appellant states that certain instructions relative to assumption of risk was prejudicially erroneous.

[8] The first of these instructions was: "If you find that plaintiff, Sue Enos, under all the circumstances as you find them to have been on the evening of the accident, did what a reasonable person would have done in the exercise of ordinary care for his, or her, own safety, then I instruct you that assumption of risk would not bar plaintiff from recovery."

Appellant renews his argument that by omitting the instruction on contributory negligence and giving this instruction the court eliminated both contributory negligence and assumption of risk as defenses if the jury found that respondent acted reasonably.

These contentions are not persuasive under the facts here under review and the

instruction complained of was merely one instruction among several which did correctly state the rules on assumption of risk. Even if the jury had acted under the portion of the instruction complained of, it is difficult to understand how this could harm appellant. The instruction was more advantageous to appellant than to respondent insofar as the duty of care required is concerned.

In any event, a full and sensible reading of the instruction in context, in view of the facts before the jury and in view of accompanying correct instructions, was not prejudicially erroneous.

[9] The other instruction relative to assumption of risk of which appellant complains read: "If you find the defendant Pete Montoya guilty of either wilful misconduct or intoxication, as these have been defined to you, then assumption of risk would constitute no defense to the action unless you find, first that the plaintiff, Sue Enos, had a reasonable opportunity to leave the car, or refused to ride in it, and second, that a person exercising ordinary care for her own safety under the circumstances would have taken that opportunity."

The appellant earnestly argues that the use of the word "refused" instead of "refuse" deprived him of the defense of assumption of risk.

A focusing of attention upon one word, in one instruction of many, and an urging that such single word constitutes reversible error might sometimes be valid. Here it does not so appear. The ordinary elision of the spoken words "refuse to" and "refused to" would usually make it impossible to distinguish between the two tenses of the word and this court will not apply such meticulously surgical refinement to the dissection of an instruction to arrive at an interpretation adverse to reason.

[10] An instruction which reads as follows was given: "If you find from the evidence that the defendant, Pete Montoya, was speeding to stay ahead of the car following him, or that he and the driver of the car behind him were competing in any

way concerning the speed of their cars, or the speed at which they would negotiate the curves on the road, then I instruct you that the defendant is charged by law with the implied knowledge of the probability of injury to his guests and is guilty of wilful misconduct."

While this instruction is probably not a valid statement of the abstract rule relative to wilful misconduct in speeding to stay ahead of a car behind, or competing with such other car as to the speed at which a curve could be negotiated, as it does not contain a limiting statement that unless these acts were done under circumstances disclosing knowledge, express or implied, that an injury to a guest was a probable result, nevertheless, the jury in applying the instruction given were applying it to the particular facts as disclosed by the testimony in this particular case.

When so applied, that is, to the testimony relative to competing and the surrounding circumstances including the testimony of Diane Pollock that just before the accident she said to appellant: "Take it easy, Pete. Don't let him rattle you," the instruction would appear to be a correct statement of the law, particularly when the record discloses that appellant was familiar with the road. *Rawlins v. Lory*, supra, 44 Cal. App.2d 20, 111 P.2d 973.

[11] Appellant also argues that the court erred by instructing the jury: "You have heard, through the evidence and otherwise in this case, something with regard to the speed law of fifty-five miles an hour. That is the prima-facie speed law in this State. I will now instruct you with regard to the basic speed law in this State. You are instructed that Section 510 of the Motor [Sic] Vehicle Code reads as follows:

"Basic Speed Law. No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on and the surface and width of the highway, and in no event at a speed which endangers the safety of persons or property."

Although appellant did not submit an instruction on Section 511 of the Vehicle Code, he states that he did request the court to so instruct if the above instruction was given. The court did not so instruct.

The quoted instruction might well have been omitted, but no harm appears to have been done appellant by its being given.

The judgment appealed from is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



138 Cal.App.2d 304

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Rudolph AGUIRRE, Defendant and
Appellant.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joseph Gonzales AGUIRRE, Defendant and
Appellant.

Cr. 3408, 3409.

District Court of Appeal, First District,
Division 1, California.

March 10, 1958.

Defendants were convicted in the Superior Court, Santa Clara County, M. G. Del Mutulo, J., for robbery, and they appealed. The District Court of Appeal, Fred B. Wood, J., held that testimony of identifying witnesses descriptive of their identification of defendant from pictures and at line-up was relevant and proper.

Affirmed.

1. Criminal Law ☞404(4)

Positive identification is not required when gun is introduced for purpose of illustration; and trial court, in robbery

prosecution, would not be put in error for admitting in evidence a gun alleged to resemble one carried by a confederate of defendants at time of robbery, notwithstanding defendants' objection that mere showing of resemblance was insufficient identification.

2. Criminal Law ☞1038(3)

Having failed to request instruction telling jury that gun put in evidence as resembling one carried by a confederate of defendants at time of drug store robbery had been introduced for purpose of illustration only, it was too late for defendants to complain on appeal of failure to give such an instruction.

3. Criminal Law ☞339

In robbery prosecution, testimony of identifying witnesses descriptive of their identification of defendant from pictures and at line-up was relevant and proper. West's Ann.Pen.Code, § 211.

4. Criminal Law ☞395

On record presented, in prosecution for robbery of market and for robbery of drug store, it was not error to admit in evidence a codeine bottle identified as taken from drug store and found in defendant's bedroom, notwithstanding objections that arrest had been made without warrant, that search had been made without search warrant, that officer had had time to get warrants, and that officer had been looking for gun used during the robbery of market and not for anything which pertained (as did codeine bottle) to robbery of drug store.

5. Arrest ☞71

Search incident to arrest is not rendered unlawful by finding and seizure of evidence other than that which officer was looking for.

6. Arrest ☞71

Where officer had reasonable cause to believe that defendant had committed felony and search was incident to arrest, search was not invalidated by fact that bedroom searched might also have been used by defendant's father.

7. Witnesses $\S$ 380(2)

In robbery prosecution, wherein defendant testified that he did not know for sure where he had been on night market was robbed, extrajudicial statements of defendant to police officer with regard to his activities on night in question were admissible for purposes of impeachment.

8. Criminal Law $\S$ 338(4), 1169(1)

Testimony that defendants' confederate in drug store robbery had been arrested, had pleaded guilty, and had been sentenced, was irrelevant, but could not have resulted in different verdict than jury would have given without it.

9. Criminal Law $\S$ 1169(5)

On record presented, in prosecution for robbery of market, prejudicial error could not have resulted from action of prosecutor in adducing evidence (subsequently stricken) to effect that automobile similar to one in which defendants traveled had stopped in front of another store near market robbed on day after market robbery.

10. Criminal Law $\S$ 855(8)

It is improper for juror to talk with prosecution witness, but, on record presented in robbery prosecution, trial court could not be charged with an abuse of discretion in failing to grant defendants' motion for mistrial because of conversation between jury foreman and prosecution witness on social subjects.

Milton L. Ageson, San Jose, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., San Francisco, for respondent.

FRED B. WOOD, Justice.

Charged by separate informations but tried together, Rudolph and Joseph Aguirre were convicted upon two counts each for robbery (Penal Code, $\S$ 211), one on November 3, 1956, at a drug store in Santa Clara, the other on November 24, 1956, at a

market on Stevens Creek Road. Rudolph was convicted of carrying a gun at the time of the robbery of the market.

Each defendant has appealed. Neither of them questions the sufficiency of the evidence. Each claims that evidence of identification was weak and that asserted errors in the submission of evidence and asserted misconduct upon the part of the district attorney and of the jury foreman were prejudicial.

I. Asserted Errors in the Admission of Evidence.

[1] *A gun was put in evidence as resembling a gun carried by a confederate of the defendants* at the time of the drug store robbery. Defendants objected for lack of a proper foundation, claiming identification was incomplete when the showing is merely that "this resembled the gun" carried at the time. A positive identification is not required when a gun is introduced for purposes of illustration. *People v. Sampsell*, 104 Cal.App. 431, 441, 286 P. 434; *People v. Ferdinand*, 194 Cal. 555, 563, 229 P. 341.

[2] Defendants did not request an instruction telling the jury that the gun was introduced for the purpose of illustration only. Had they done so, it presumably would have been given. It is too late now for them to complain of the failure to give it.

[3] *Testimony of identifying witnesses descriptive of their identification of a defendant from pictures and at a lineup* was relevant and proper. In *People v. Slobo-dion*, 31 Cal.2d 555, 559-560, 191 P.2d 1, 4, the court concluded, after a review of the cases: "the evidence by the prosecutrix that she identified defendant in a lineup after the offense was admissible to corroborate her story and to rebut the suggestion that her identification at the trial was the result of recent contrivance. The same considerations apply to the testimony of the police officer that he saw the witness identify defendant." See also *People v. Hood*, 140 Cal.App.2d 585, 588, 295

P.2d 525; *People v. Bennett*, 119 Cal.App.2d 224, 226, 259 P.2d 476.

[4] *A codeine bottle identified as taken from the drug store and found in defendant Rudolph's bedroom, was properly admitted in evidence.* The objections interposed were that the arrest was made without a warrant, the search was made without a search warrant, the officer had time to get warrants, and the officer was looking for the gun used during the robbery of the market, not for anything which pertained (as did the codeine bottle) to the robbery of the drug store. These matters were considered by the trial court and determined adversely to defendants' contentions. We find in the record no basis for disturbing that determination.

From photographs presented to her, a clerk at the market informed officer Hutchings that Rudolph was one of the robbers. Hutchings, ascertaining that Rudolph was on parole, phoned to the parole officer, who was in San Francisco, and the next morning the two of them went to Rudolph's home. Rudolph came to the door. Hutchings told him they wanted to talk to him. Rudolph suggested talking in their automobile. Hutchings said it was cold. Rudolph let the officers into the house and after Hutchings asked which was Rudolph's room, let them upstairs. After they got there, Hutchings informed Rudolph he was under arrest for robbery. Hutchings found the codeine bottle on the floor by the side of the mattress where Rudolph said he slept. This was a different room and Rudolph had previously closed the door to this room after being informed he was under arrest.

[5,6] The trial court found the officer had reasonable cause to believe that Rudolph had committed a felony; hence, the arrest without a warrant was legal and the search, incident to the arrest, was proper. Such a search is not rendered unlawful by the finding and seizure of evidence (a bottle that had been taken from the drug store) other than that which the officer was looking for (the gun used

during the market robbery). See *People v. Villarico*, 140 Cal.App.2d 233, 238, 295 P.2d 76, and authorities cited, as to legality of such an arrest and of a reasonable search incident thereto; *People v. Jiminez*, 143 Cal.App.2d 671, 300 P.2d 68, discovery and seizure of evidence of a crime different from that under search. Nor does the fact that Rudolph's bedroom may also have been used by his father invalidate the search. See *People v. Littlejohn*, 148 Cal. App.2d 786, 791, 307 P.2d 425; *People v. Guerrera*, 149 Cal.App.2d 133, 136, 307 P.2d 940; *Trowbridge v. Superior Court*, 144 Cal.App.2d 13, 300 P.2d 222; *People v. Guy*, 145 Cal.App.2d 481, 302 P.2d 657.

[7] *Certain extrajudicial statements of Rudolph to a police officer were admissible by way of impeachment.* Upon direct Rudolph testified he did not know for sure where he was the night the market was robbed. He said that probably he was in a movie or at a dance, because every Saturday he went to a movie or a dance. In the statement to officer Hutchings he said that on that day he walked around town from 5 to 6 o'clock, went home, got his automobile and went to Jackson Street. He said that he saw "kids—small kids" there but did not state their names. Between 7:30 and 8 o'clock he left with a friend whose name he did not give and went to a cafe on Post Street. From there he went to the Flamingo and stayed until 2 o'clock in the morning.

The statement included what Hutchings said to Rudolph at the time, some of which might well have been excluded if defendant had objected to specific portions of it. But he did not do so. He should not be heard now to complain. Nor do we think it prejudicial even if defendant had pointedly objected and had been overruled.

[8] *Testimony that defendants' confederate in the drug store robbery, Gary Perry, was arrested, pleaded guilty and was sentenced, was irrelevant.* See *People v. Ford*, 89 Cal.App.2d 467, 200 P.2d 867; *People v. Townsend*, 28 Cal.App. 204, 151 P. 745; 48 A.L.R.2d 1016, 1017.

Officer Hutchings testified that, according to his information, three men were involved in the November 3 robbery, that "the light complected one, whose name was Gary Perry" was arrested. A general objection to this question was overruled. In response to a question whether he was "charged," and before the court ruled on a general objection to the question, the witness volunteered that Perry had pleaded guilty and was sentenced. The court sustained an objection to the question after the answer had been given, remarking that he thought this was hearsay. The prosecuting attorney then asked, "And the light complected person was known as Gary Perry and was arrested on November 12th? A. That's correct." This question incorporated the prior hearsay in assuming that the officer was competent to testify as to Gary Perry's participation in the November 3 robbery, but the objection was not renewed, and no motion to strike the testimony of this witness was made. Moreover, we do not think that this testimony could have resulted in a different verdict than the jury would have given without it.

II. Asserted Misconduct of the District Attorney.

[9] Upon rebuttal the prosecutor called Raymond Cappa, who operated a grocery store about three-quarters of a mile from the market here involved. He testified that at about 7:30 p.m. of the day after the market robbery, a two-toned green Chevrolet with two men in the front seat (there is evidence that the defendants traveled in such a car) stopped in front of his store, but did not come in. Cappa was unable to describe those men.

Upon the conclusion of this testimony, defendants moved that it be stricken and the jury instructed to disregard it. It was stricken. The judge did not immediately admonish the jury. He may have done

so later but none of the instructions given after argument of counsel are in the record.

We cannot say as a matter of law that the prosecutor put Cappa upon the witness stand other than in good faith. Nor did defendants assign such action as misconduct.

We do not consider that this incident resulted in prejudicial error.

III. Was the Foreman of the Jury Guilty of Misconduct?

[10] During a recess the jury foreman was observed talking with one of the prosecution witnesses. Defendants moved for a mistrial.

It developed that they were discussing social subjects only. The judge decided that the incident was unimportant, admonished the juror not to let it happen again, and proceeded with the trial.

Such activities upon the part of a juror are disapproved. *People v. Dunne*, 80 Cal. 34, 36, 21 P. 1130; *People v. Phelan*, 123 Cal. 551, 567-568, 56 P. 424. But the record does not show that the trial court committed an abuse of discretion under the circumstances of this case. See *People v. Cobb*, 45 Cal.2d 158, 161, 287 P.2d 752; *People v. Quiel*, 68 Cal.App.2d 674, 675, 679-680, 157 P.2d 446.

Though some errors did occur during the course of the trial we do not find them prejudicial in view of the convincing character of the evidence identifying Rudolph and Joseph as active participants in each of the two robberies charged.

Defendants' counsel upon this appeal, appointed by the court, did not represent them at the trial. His brief shows a thorough and painstaking search of the record and able representation of every point that conceivably might be presented in defendants' behalf.

In each case the judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

158 Cal.App.2d 493

**Henry S. GREENSTONE, Plaintiff and
Respondent,**

v.

**CLARETIAN THEOLOGICAL SEMINARY,
Clareville, a California Corporation,
Defendant and Respondent.**

**Jacoba C. Buchenau, Defendant and
Appellant.**

Civ. 22495.

**District Court of Appeal, Second District,
Division 3, California.**

March 18, 1958.

Hearing Denied May 14, 1958.

Action by buyer against seller for specific performance of a contract for sale of realty wherein a prior owner asserted claim of ownership to the property. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment against prior owner and she appealed. The District Court of Appeal, Patrosso, J. pro tem., held that trial court was fully warranted, under evidence, in concluding that prior owner's conveyance to seller had been made as a gift with a donative intent.

Judgment affirmed.

1. Jury ⇨28(5)

Where a prior owner asserted property interest in land which was subject of a specific performance suit between seller and buyer and cross-complained for property in nature of conventional form of quiet title and demanded jury trial, and thereafter amended cross-complaint to state a cause of action based on fraud, to even assuming prior owner was entitled to a jury trial as a matter of right, she effectively waived such right when she agreed that trial should proceed before jury in an advisory capacity.

2. Jury ⇨28(16)

Assuming the prior owner of property was entitled to a jury trial as a matter of right in an action based on fraud, where fact of prior owner's waiver of jury trial appeared in transcript of oral proceedings and trial court's findings expressly recited that counsel stipulated that there was no longer a right to a jury and that jury there-

after remained in an advisory capacity only, waiver was effective against prior owner even though not entered in the minutes or docket. West's Ann.Code Civ.Proc. § 631.

3. Gifts ⇨49(4)

In action by buyer against seller for specific performance of real estate contract wherein former owner of property asserted claim to property, trial court, under evidence, was fully warranted in concluding that prior owner's conveyance to seller had been made as a gift with a donative intent.

Merton L. Schwartz, Beverly Hills, and Irving H. Green, Los Angeles, for appellant.

Kopald & Mark, Beverly Hills, for respondent Greenstone.

Marcus L. Roberts, Hollywood, for respondent Seminary.

PATROSSO, Justice pro tem.

Plaintiff instituted this action for specific performance of a contract of sale of real property which contract was executed between plaintiff as buyer and the defendant Claretian Theological Seminary (hereinafter referred to as Seminary) as seller; the defendant Jacoba C. Buchenau being joined as a defendant under an allegation that she asserted some claim of ownership to the subject property. The Seminary filed an answer admitting all of the allegations of the complaint, alleging its willingness to complete the contract of sale, but that it had been prevented of so doing by reason of the claim of ownership asserted by defendant Buchenau. The latter filed an answer and also a cross-complaint against the plaintiff and the Seminary. The cross-complaint is in two counts, the first being in the conventional form of an action to quiet title and the second for damages for deprivation of possession. The cross-complainant demanded a trial by jury and upon the opening of the trial the court stated that the issues raised by the cross-complaint and the answers thereto would first be tried before the jury and if necessary that the issues raised by plaintiff's complaint and

the answers thereto would later be tried before the court without a jury.

A jury was thereupon impaneled and the cross-complainant sought to establish her case by proof designed to show that she had been induced to execute a deed to the property in question to the Seminary as a result of certain false and fraudulent representations made by certain representatives of the Seminary. The trial court sustained objections made to such proffered evidence upon the ground that the cross-complaint did not plead fraud. Thereupon cross-complainant moved that she be permitted to file an amended cross-complaint pleading fraud and over objections of the cross-defendants her motion was granted. Cross-complainant thereupon filed an amended cross-complaint, adding two additional causes of action. In the first of these she alleged that she was the owner of the property in suit; that the same was encumbered by a first deed of trust in favor of the New York Life Insurance Company and a second deed of trust in favor of Family Rosary, Inc. securing a note in the sum of \$32,000 payable on December 31, 1954, and which said second deed of trust was on May 20, 1955, past due and the payee of the note secured thereby was demanding immediate payment; that cross-complainant was without funds to discharge this indebtedness and that she discussed her situation with a representative of the Seminary who orally promised and agreed that the Seminary would on or before June 30, 1955, pay the said sum of \$32,000; that in her discussion with the representative of the Seminary she had informed him that she was going to leave the territorial limits of the United States for a period of approximately 90 days and that said representative requested that, in consideration of the payment of cross-complainant's indebtedness by the Seminary, "cross-complainant should deposit as security with cross-defendant Seminary a deed to said property;" that thereafter on the 27th day of May 1955, cross-complainant executed and delivered a deed of the subject property to a representative of the Seminary

"to hold, in reliance upon his representations as aforesaid;" and that said representative orally represented that he would retain possession of said deed until the return of the said cross-complainant; that the execution and delivery of said deed was induced by said representations and promises which were believed and relied upon by cross-complainant and that said representations and promises were false and untrue and were made for the purpose of deceiving and defrauding the cross-complainant. It is further alleged that subsequently and without the knowledge and consent of the cross-complainant, and while she was absent from the State of California, the Seminary caused said deed to be presented to a notary public for the purpose of acknowledging the signature of the cross-complainant thereto although cross-complainant never appeared before said notary, and that thereafter the said deed was recorded in the office of the County Recorder in Los Angeles County; that the Seminary did not and has not made payment of the sum of \$32,000 or any part thereof to Family Rosary, Inc. and that the cross-complainant would not have affixed her signature to said deed had she known that the Seminary would not carry out its promise to make immediate payment of said indebtedness; that on or about September 1, 1955, cross-complainant learned for the first time that the said statements and representations made to her were false and untrue and further learned that the Seminary was attempting to sell the property to the plaintiff Greenstone, whereupon cross-complainant "filed a written claim that she was the rightful and sole owner of said property and entitled to the possession thereof." The second cause of action added by the amendment to the cross-complaint was one to the effect that by reasons of the facts hereinbefore stated, there had been a total failure of consideration for the alleged transfer of the property in question by cross-complainant to the Seminary.

After the filing of the amended cross-complaint the following colloquy took place between court and counsel:

"The Court: I seriously question whether this case now can go ahead with the jury except in an advisory capacity. Do you agree to that?"

"Mr. Green: [counsel for cross-complainant] I think, your Honor, that that would be the situation, that it could go ahead only in an advisory capacity to the Court. Frankly, as far as I am concerned I am perfectly willing to submit the matter to the Court without a jury.

* * * * *

"The Court: I think the Court will retain the jury in an advisory capacity if the plaintiffs are willing to.

"Mr. Mark: [attorney for plaintiff] Regardless of cost, we have not requested them, we do not think they are proper.

"Mr. Green: It is within the discretion of the Court when a motion is made for it for there is a jury already impaneled. It is discretionary with the Court. We are advancing the cost for the jury.

* * * * *

"The Court: The amended cross complaint is now one in equity.

"Mr. Green: Yes, your Honor.

"The Court: You would not be entitled to a jury as a matter of right.

"Mr. Green: True.

"The Court: You agree to that?"

"Mr. Green: Yes, your Honor, but I believe that under the circumstances I would even as amicus curiae in a situation involving the particular situation here, where a church is involved, and so forth, the Court might prefer to have an advisory jury and we are willing to do this, your Honor, in order to hold them we are willing to from now on pay for the jury without the right to tax it as costs so there can't be costs involved to the defendants. We will waive the taxing of costs on jury fees from this date on.

* * * * *

"The Court: * * * If the plaintiff is willing to stand all costs of the jury from this point on, the Court will retain the jury in an advisory capacity. But it must be stipulated by the cross plaintiff that all

costs of the jury from this point on are to be borne by cross plaintiff and are not to be taxable as costs against the defendant.

"Mr. Green: We will so stipulate, your Honor."

After the close of testimony upon the issues raised by the cross-complaint and answers thereto, the cause was submitted to the jury upon a number of special interrogatories, in answer to which the jury found that the cross-complainant did not intend to make a gift of the property to the Seminary; that the Seminary did not agree to pay the cross-complainant's indebtedness to Family Rosary, Inc. if she would give the property to the Seminary; that the Seminary agreed with cross-complainant to pay her indebtedness of \$32,000 to Family Rosary, Inc. if cross-complainant would deed the apartment house to the Seminary as security and that cross-complainant did so convey the property to the Seminary in reliance upon said agreement and as such security only; that at the time that cross-complainant signed the deed to the Seminary it did not contain a description of the property and cross-complainant did not sign and acknowledge the deed in the presence of the notary public who affixed his name and seal to the acknowledgment thereon; that the Seminary, through its representative, represented to cross-complainant that he would hold the deed in his possession until cross-complainant's return from her contemplated trip to Europe and that such promise was made by the Seminary's representative without any intention of keeping his promise; that cross-complainant believed and relied upon the promise and the representation of the representative of the Seminary that he would hold the deed in his possession until cross-complainant's return from Europe, and that cross-complainant signed and delivered the deed as a result of being deceived by the promises and representations of the Seminary.

The trial court refused to accept the findings made by the jury and made its own findings generally to the effect that the allegations of fraud contained in the amend-

ed cross-complaint were untrue; that the cross-complainant intended to make a gift of the property to the Seminary and that the deed executed by her was a deed of gift executed with donative intent. Judgment was thereupon entered in favor of the cross-defendants and against the cross-complainant, from which the latter appeals.

In support of her appeal, appellant contends (1) that she was entitled to a jury trial as a matter of right and that the trial court erred in retaining the jury in an advisory capacity only and (2) that the evidence is insufficient to sustain the trial court's findings.

[1] The first contention need not long detain us for, if it were to be conceded that cross-complainant was entitled to a jury trial as a matter of right, she effectively waived such right when, as we have seen, her counsel agreed that the trial should proceed before a jury only in an advisory capacity.

Indeed counsel for appellant expressly stated that they were prepared to try the case before the court without a jury, and the jury was finally retained in an advisory capacity at the suggestion of the court with the full acquiescence, if not insistence, of the appellant.

[2] Appellant, however, undertakes to assert that in any event the waiver was ineffectual because her oral consent thereto was not entered in the minutes or docket as required by § 631 of the Code of Civ. Proc. The answer to this suggestion is to be found in *Ford v. Palisades Corp.*, 1950, 101 Cal.App.2d 491, at page 499, 225 P.2d 545, at page 550, wherein it is said:

"Trial by jury may be waived by oral consent, in open court, entered in the minutes or docket. Code Civ.Proc., Sec. 631, subd. 3. It has been held that the oral consent must be entered in the minutes or docket. *People v. Metropolitan Surety Co.*, 164 Cal. 174, 178, 128 P. 324 [Ann.Cas. 1914B 1181]. In the latter case, it was said that the purpose of the requirement was to furnish record evidence of a consent

which would otherwise merely rest on parol proof. In the present case, the findings specifically recite what took place, and state that plaintiff 'consented to the discharge of said jury.' We think this was sufficient compliance with the statute. Further, the reporter's transcript shows precisely that plaintiff waived a trial by jury by oral consent. Cf. *Farnsworth v. Hunter*, 11 Cal.2d 27, 32, 77 P.2d 840. The purpose of the statute was served."

Here, as in the cited case, the fact of waiver not only appears from the reporter's transcript of the oral proceedings referred to but the findings expressly recite that "all counsel stipulated that there was no longer any right to a jury, and the jury thereafter remained in an advisory capacity only."

[3] Appellant's contention with respect to the asserted insufficiency of evidence to support the trial court's findings is equally without merit. While the evidence was conflicting and susceptible of different inferences, when viewed in the light most favorable to the respondents, it is to the effect that the appellant, upon her own initiative and without being solicited or urged by anyone on behalf of the Seminary so to do, freely and voluntarily offered the property as a gift to the Seminary because of her stated interest in the work which it was doing; that at this time she was expressly told by the representative of the Seminary with whom she discussed the making of the gift that the Seminary could not undertake to pay the indebtedness due Family Rosary but that such payment, if made, must come from the property; that she requested the Seminary to prepare a deed to the property and she later appeared before a notary public and executed and acknowledged the same; that after the transfer appellant stated to others that she had conveyed the property to the Seminary as a gift and expressed her satisfaction in having done so. Later when during her absence from the State, her attorney stated to representatives of the Seminary that he was not authorized to surrender possession of the property to it,

the attorney was requested to communicate with her for the purpose of ascertaining her intentions and desires in the premises, and he (the attorney) later reported to the Seminary that appellant had confirmed to him the fact that she had transferred the same to the Seminary as a gift. It was only later, after she learned that the Seminary had sold the property, that she seemingly had a change of heart and for the first time advanced the claim that the conveyance had been made in consideration of the Seminary's promise to pay the indebtedness due Family Rosary, and later, as alleged in her amended cross-complaint, that the conveyance was by way of security for the payment of this indebtedness by the Seminary. Upon the basis of this evidence, if believed as it was by the trial court, it was fully warranted in concluding that the conveyance had been made as a gift with donative intent.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



158 Cal.App.2d 391

Jay MASON, Plaintiff and Appellant,
v.

Henry Boyd RUSSELL, Jr., Defendant and
Respondent.
Civ. 9191.

District Court of Appeal, Third District,
California.

March 14, 1958.

Hearing Denied May 7, 1958.

Action for injuries sustained when plaintiff was pinned by automobile driven by defendant. From a judgment of the Superior Court, Merced County, Gregory P. Maushart, J., dismissing the action, the plaintiff appealed. The District Court of Appeal, Peek, J., held, *inter alia*, the neg-

ligence of a permissive driver of automobile is not imputed to owner so as to bar recovery by owner for injuries in action by him against the driver.

Reversed.

1. Pleading $\S$ 251

Allegations omitted from amended complaint could be considered by trial court in ruling upon sufficiency of amendatory pleading.

2. Negligence $\S$ 89(1)

The statutory provision that negligence of person driving automobile with permission of owner shall be imputed to owner for all purposes of civil damages was inapplicable to action by owner against permittee for injuries to owner resulting from permittee's negligence, since legislative intent was to protect innocent third parties from careless use of automobiles. West's Ann.Vehicle Code, $\S$ 402(a).

3. Negligence $\S$ 89(1)

The negligence of a permissive driver of automobile is not imputed to owner so as to bar recovery by owner for injuries in action by him against the driver. West's Ann.Vehicle Code, $\S$ 402(a).

C. Ray Robinson, Winton & Edlefsen,
Merced, for appellant.

Landram, Silveira, Garrett & Goul, Merced, for respondent.

PEEK, Justice.

Plaintiff appeals from a judgment of dismissal in an action for personal injuries which was entered following the order of the court sustaining defendant's demurrer to his amended complaint without leave to amend.

[1] The amended complaint alleged that with the owner's knowledge and consent the defendant operated an automobile on private property in the city of Merced; that as a direct and proximate result of the negligent operation by defendant, the automobile collided with plaintiff, pinning

him against the wall of a building on the premises, thereby resulting in serious injuries to plaintiff. The original complaint averred that plaintiff was the owner of the automobile and consented to its operation by defendant. These allegations were omitted from the amended complaint but could be considered by the trial court in ruling upon the amendatory pleading. *Wennerholm v. Stanford Univ. Sch. of Med.*, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358.

The sole issue on this appeal is whether the negligence of a permissive driver of an automobile is imputed to the owner under the provisions of section 402 of the Vehicle Code so as to bar recovery by the owner for injuries in an action by him against the driver.

Section 402, subdivision (a), of the Vehicle Code provides: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, *and the negligence of such person shall be imputed to the owner for all purposes of civil damages.*" (Emphasis added.)

The italicized portion above was added in 1937 and is the portion pertinent to this appeal. It was the theory of respondent, and the same was adopted by the court, that the italicized matter forbade recovery. The court said it was of the opinion that " * * * Sec. 402(a) of the Vehicle Code is controlling and that its language is clear and unambiguous, and the statement contained therein 'and the negligence of such person shall be imputed to the owner for all purposes of civil damage', would prevent the plaintiff from a recovery."

[2] We hold that section 402, subdivision (a), has no application in this proceeding. "A reading of the language of the statute and a review of the decisions in this state reveal that the legislative purpose in the enactment of section 1714¼ of the Civil Code (now section 402 of the

Vehicle Code), was to protect innocent third parties from the careless use of automobiles and that this protection should be paramount to the rights of an owner who has permitted the use of his car by others even though he, personally, was not guilty of negligence." *Burgess v. Cahill*, 26 Cal.2d 320, 323, 158 P.2d 393, 394, 159 A.L.R. 1304.

[3] Necessarily, therefore, when the rights of third persons are not involved, such as in the present case where the action is by the owner against the permittee, an entirely different situation is presented, and hence the reason for the imputation of negligence ceases. In the case of *Ledgerwood v. Ledgerwood*, 114 Cal.App. 538, 300 P. 144, a mother riding in a car which was the community property of herself and her husband and was then being driven by an adult son, sought damages for injuries as the result of his negligent operation of the car. In affirming the judgment in her favor the court held that " * * * where the injured party brings an action against the driver based upon the negligence of such driver, neither the fact that such injured party is the owner of the car, nor the fact that he is the employer or principal for whom the driver is acting, nor the fact that he is engaged in a joint enterprise with the driver, should defeat the action." 114 Cal.App. at page 543, 300 P. at page 146.

The fact that the *Ledgerwood* case was decided prior to the addition of the particular phrase here in question is of no consequence in this proceeding. As the court noted in *Milgate v. Wraith*, 19 Cal.2d 297, 298, 300, 121 P.2d 10, 11, the phrase, *shall be imputed to the owner for all purposes of civil damages*, " * * * can be interpreted in no other sense than to include actions by the owner against third persons. Indeed, that was undoubtedly the very purpose of the amendment. If the section were not so interpreted, the added portion would be meaningless * * *" Again, in a somewhat similar situation the court stated in *Brown v. Rowland*, 40 Cal.App.2d Supp. 825, 827, 104 P.2d 138, 140. "The

obvious meaning of that section [402, subdivision (a)] is that the liability imposed on one who lends a car is for damage to the person or property of others. To say that he becomes liable for damages to himself would be absurd."

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



158 Cal.App.2d 516

**Carl KALASH and Olga Kalash, his wife,
Paul H. Hardy and Shirley James Hardy,
his wife, and Willis E. Huson, Plaintiffs
and Appellants,**

v.

**CHARLES L. HARNEY, Inc., a corporation,
Charles L. Harney et al., Defendants
and Respondents.**

No. 17356.

District Court of Appeal, First District,
Division 1, California.

March 19, 1958.

Action to recover damages for removing loam from property of plaintiffs. Verdict for plaintiff and from an order of the Superior Court, City and County of San Francisco, Clarence W. Morris, granting motion of defendants for new trial, the plaintiffs appealed. The District Court of Appeal, McMurray, J. pro tem., held that the order granting new trial for excessive damages would not be disturbed.

Order affirmed.

1. Appeal and Error ⇨979(2, 3)

Granting or denial of a new trial on grounds of insufficiency of evidence is almost completely within discretion of trial court, and only question for an appellate court on appeal from such order is whether

the trial court abused its discretionary powers, and unless it can be said as a matter of law that there is no substantial evidence to support a contrary judgment, appellate court cannot reverse.

2. Appeal and Error ⇨1015(1)

An order granting a new trial for excessive damages will not be disturbed if there is reasonable or fairly debatable justification therefor.

3. Appeal and Error ⇨1015(2)

In action for damages for removing loam from property of plaintiff, where there was a conflict in evidence as to damages sustained by the plaintiff, order granting defendants new trial for excessive damages would not be disturbed.

Raymond H. Levy, Courtney L. Moore, Marcel E. Cerf, Robinson & Leland, San Francisco, for appellants.

Cooley, Crowley & Gaither, San Francisco, for respondents.

McMurray, Justice pro tem.

After a jury verdict and judgment thereon, in which plaintiffs recovered damages for removing loam from their property, the trial judge granted a new trial on the grounds of "insufficiency of the evidence to sustain or justify the verdict in whole and in each part thereof, errors in law, and excessive damages actual and exemplary."

This is an appeal by the plaintiffs from such order granting a new trial.

[1] It is well established that the granting or denial of a new trial on the grounds of insufficiency of the evidence is almost completely within the discretion of the trial court, and that the only question for an appellate court on an appeal from such order is whether the trial court abused its discretionary powers. *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48. Unless it can be said, as a matter of law, that there is no substantial evidence to support a contrary judgment, this court cannot reverse the trial court's determina-

tion on such a motion. *Richardson v. Ham*, 44 Cal.2d 772, 285 P.2d 269.

[2, 3] From the record before us, there assuredly appears to be a conflict in the evidence as to the damages sustained by the plaintiffs by reason of the defendant's acts. Under such a state of the record, the trial court could well have discredited the testimony presented by plaintiffs as to the amount of the damages, both actual and exemplary. An order granting a new trial for excessive damages will not be disturbed, if there is a reasonable or fairly debatable justification therefor, and from the record before us it appears that such justification appears here. The order appealed from is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



158 Cal.App.2d 320

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Charles Jesse THOMPSON, Defendant and
Appellant.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

David L. THOMPSON, Defendant and
Appellant.

Cr. 6056, 6057.

District Court of Appeal, Second District,
Division 3, California.

March 11, 1958.

Defendants were convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., for petty theft, and they appealed. The District Court of Appeal, Shinn, P. J., held that carrying of goods through checkstand of self-service store constituted an asportation of goods.

Affirmed.

1. Larceny § 65

Petty theft convictions were sustained by evidence. West's Ann.Pen.Code, §§ 666, 667.

2. Larceny § 1

In prosecution for petty theft, people must prove an unlawful taking and asportation of property of some intrinsic value with intent to deprive owner thereof. West's Ann.Pen.Code, § 484.

3. Larceny § 17

Carrying of goods through checkstand of self-service store constituted an asportation of goods. West's Ann.Pen.Code, §§ 666, 667.

4. Larceny § 68(2)

In prosecution for petty theft, whether defendants intended to steal goods was question of fact to be resolved by court from all of the circumstances in evidence. West's Ann.Pen.Code, §§ 666, 667.

5. Larceny § 17

Fact that thief was frustrated in attempt to carry away stolen property does not relieve him of responsibility for theft. West's Ann.Pen.Code, § 484.

John H. Marshall, Los Angeles, for appellant David L. Thompson.

Edmund G. Brown, Atty. Gen., Albert Bianchi, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Charles Jesse Thompson was accused by information of petty theft with a prior felony conviction of forcibly assaulting a United States customs officers. Pen.Code, § 667. By separate information, his brother, David L. Thompson, was accused of petty theft with a prior conviction of petty theft. Pen.Code, § 666. Defendants pleaded not guilty and each cause was submitted to the court on the transcript of the preliminary hearing. No defense was offered in either case. The court found defendants guilty as charged in the two informations and each was sentenced to

imprisonment in the county jail for the term of one year. Defendants appeal from the judgments of conviction. Although there are separate appeals the defendants were together when the offenses were committed and the evidence against each was substantially the same. The sole contention in each case is that the evidence was insufficient to prove the offense of theft.

There was evidence of the following facts: Ross L. Childers is a police officer for the City of Los Angeles, assigned to the Wilshire Detective Division. In his spare time he is employed at the Thrifty Drug Store located at Wilshire and Fairfax in Los Angeles. Childers testified that he was on duty at the store on December 9, 1956. Defendants entered the store around 1:30 p. m. and went to the phonograph record section. David Thompson selected seven long-playing records from a display rack, concealed them inside his coat and started to leave the store. Childers testified: "I placed the defendant [David Thompson] under arrest after he had gone through the checkstand without paying for anything * * *." At the moment of the arrest, David was about 10 feet past the checkstand at the cigarette counter; he was still in a portion of the store where there was merchandise available for customers to choose.

Immediately after the arrest of David, Childers saw Charles select eight phonograph records from a display rack, slip them inside his coat and walk through the checkstand without paying for the records. Childers stopped him and ordered the brothers to remove the records from their coats, which they did. The officer then asked defendants to step back past the checkstands into the main part of the store. After the arrests were made and a police car was called Charles offered to pay for the records. He then attempted to escape, but he was forcibly restrained by two other store employees.

Upon being questioned by the officer, each defendant told Childers that another man had persuaded them to go to the store and take the records. When asked by the

officer whether they stole the records for the purpose of sale, each defendant replied that he was taking them for his own use.

Martin Wellerstein is the assistant manager of the drugstore. He testified that the records taken by defendants were of the value of \$1.49 each.

The former convictions were established by evidence which was introduced without objection. Its sufficiency is not questioned.

[1] There was sufficient evidence to prove each defendant guilty of theft.

[2] Theft is characterized as the felonious taking of property which is not one's own. Pen.Code, § 484; *People v. Moorhead*, 104 Cal.App.2d 688, 694, 232 P.2d 268. In a prosecution for petty theft, the People must prove an unlawful taking and asportation of property of some intrinsic value with the intent to deprive the owner thereof. *People v. Williams*, 73 Cal.App.2d 154, 157, 166 P.2d 63.

All the elements of the offense were established by the testimony of Officer Childers. An assertion is made in defendants' briefs that they did not carry the records past any place where payment would be expected. The assertion is contrary to the officer's testimony that the Thompsons carried them past the checkstand without paying for them.

[3-5] The carrying of the records through the checkstand constituted an asportation of the goods, as the act effectively removed them from the store's possession and control, even if only for a moment. *People v. Quiel*, 68 Cal.App.2d 674, 679, 157 P.2d 446. Whether defendants intended to steal the records was a question of fact to be resolved by the court from all the circumstances in evidence. *People v. Jeffries*, 47 Cal.App.2d 801, 808, 119 P.2d 190. The court could properly infer from the concealment of the records, from Charles' attempt to escape from custody, and from defendants' subsequent admissions, that the Thompsons had the requisite intent. It is, of course, immaterial that defendants were apprehended before they were able to leave the store, for the fact

that a thief is frustrated in an attempt to carry away stolen property does not relieve him of responsibility for the theft. *People v. Post*, 76 Cal.App.2d 511, 514, 173 P.2d 48, and cases cited.

The judgments are affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



M. C. NELSON and W. K. Dunne, Plaintiffs,
Cross-Defendants and Appellants,

v.

C. H. REISNER, Defendant, Cross-Com-
plainant and Respondent.*

Civ. 5607.

District Court of Appeal,
Fourth District, California.

March 11, 1958.

Rehearing Denied April 1, 1958.

Hearing Granted May 7, 1958.

Action by landlord against assignee of lease of farm land for damages on account of alleged breaches of lease wherein assignee cross-complained for breach of lease provision giving tenant right of first refusal of a new lease. From a judgment of the Superior Court of Kern County, R. B. Lambert, J., in favor of assignee landlord appealed. The District Court of Appeal, Barnard, P. J., held that where lease gave tenant "right of first refusal of a new lease" without any other provision respecting terms or conditions of new lease, clause was too uncertain to be enforceable as a contract right and gave rise to no legal obligation.

Reversed.

1. Landlord and Tenant ⇨49(2)

In action by landlord against tenant of farm land for damages on account of alleged breaches of lease, evidence sus-

* Opinion vacated 331 P.2d 17.

tained finding that tenant had farmed property in a good and farmerlike manner.

2. Landlord and Tenant ⇨86(1)

In tenant's action against landlord for alleged breach of lease giving tenant right for first refusal of a new lease, evidence supported findings that tenant had informed landlord that he desired a new lease and intended to exercise his rights under first refusal clause, and that landlord did not extend to tenant right of first refusal of new lease of property.

3. Damages ⇨40(1)

Usual rule applicable to loss of future profits is that there must be some evidence disclosing a satisfactory basis for determining what the probable earnings would have been, and award must be predicated on something more than mere possibilities.

4. Damages ⇨40(2)

Where prospective profits can be related naturally and directly to breach of contract, guilty party may not wholly escape on account of difficulties of devising a perfect measure of damages caused by his own wrong.

5. Landlord and Tenant ⇨86(1)

Court may not fix all terms of a new lease without ascertainable standards in option agreement.

6. Landlord and Tenant ⇨86(1)

Where lease of farm land gave tenant "right of first refusal of a new lease" without any other provision respecting the terms or conditions of such a new lease, clause was too uncertain to be enforceable as a contract right and gave rise to no legal obligation.

7. Landlord and Tenant ⇨86(1)

In action by tenant for alleged breach of lease giving tenant "right of first refusal of a new lease" without any other provisions being made respecting what the terms or conditions of a new lease would be, evidence was insufficient to support finding that tenant was entitled to a new lease on the same terms contained in

lease which became effective after tenant's lease had expired.

Albert Picard, San Francisco, Mack, Bianco, King & Eyherabide, Bakersfield, Burton M. Greenberg, San Francisco, for appellants.

Hackett & Hubbard, Los Angeles, Borton, Petrini, Conron & Brown, Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment based on the alleged breach by plaintiffs of defendant's "right of first refusal of a new lease."

The plaintiffs leased 160 acres of land to one Schnaidt for a period of five years beginning August 15, 1947 and ending August 14, 1952. The lease provided that the lessee should drill a well of sufficient size and capacity to irrigate all of said land; that he should then level the land in such a manner as to enable it to be irrigated; that he should pay a rent of \$7 per acre per year; that he should cultivate the land in a good and farmerlike manner; and that he should have the right to place other improvements on the land, and to remove them at the expiration of the lease unless the lessors elected to buy them at their cost price less depreciation. The lease also contains this provision:

"Lessors covenant and agree to extend to lessee the right of first refusal in the event of the sale of the premises during the term of this lease and the right of first refusal of a new lease at the expiration of the term of this lease."

The plaintiffs later leased an adjoining 160 acres to Schnaidt for the term beginning February 1, 1949, and ending January 31, 1952. This lease provided that the lessee agreed to level said land so that it could be irrigated by gravity, to drill a well and install pipelines sufficient to irrigate the property and to cultivate the land in a good and farmerlike manner. This was a "share

crop lease" and it contained no provision for the right of first refusal of a new lease.

Both of these leases were assigned by Schnaidt to the defendant Reisner on December 29, 1950, with the consent of the lessors. The defendant paid Schnaidt \$28,000 for these leases, including the crops then on the land. The expiration day of the first lease was extended to December 31, 1952, with a reasonable time thereafter to harvest and remove any crops then on the land.

The plaintiffs brought this action for damages on April 12, 1954, alleging with respect to the first lease that the defendant had failed to remove a reservoir which the plaintiffs were compelled to remove at their own expense, that he had failed to properly maintain certain water stacks and pipes, and that he had damaged the land by double cropping it. In a second cause of action, it was alleged that the defendant had not paid the plaintiffs the full amount due under the share crop lease, and that he had damaged that land by double cropping it. The defendant answered and also filed a cross-complaint alleging that he had taken an assignment of the first lease in reliance on the promise of the plaintiffs to give the lessee the right of first refusal for a new lease; that he had paid Schnaidt about \$28,000, and had expended large sums of money in developing and improving said property; that the plaintiffs knew that he desired and intended to make a new lease at the expiration of the old lease; that before such expiration the plaintiffs entered into a new lease with one Virgil Smith; that within a year thereafter the plaintiffs entered into another lease with one Walter Bonkosky; that at all material times the defendant was ready, willing and able to enter into a new lease on the same terms as those in any of the leases entered into by the plaintiffs with other persons; that the plaintiffs did not give the defendant notice as to the terms of any of said leases, and did not give him the right of first refusal or an opportunity to accept or reject a lease on such terms; that by reason of the failure of the plaintiffs to give this right or oppor-

tunity to the defendant the plaintiffs breached the covenant relating to a new lease; and that by reason of said breach defendant has been damaged in the sum of \$300,000. A second cause of action for declaratory relief is based on a controversy between the parties with respect to their obligations under this first right of refusal clause.

The court found against the plaintiffs on all of the issues raised with respect to the items of damage claimed by them, and found that the defendant had cultivated the property in a good and farmerlike manner. With respect to the share crop lease it was found that the defendant had paid the plaintiffs their full share of the returns from the crops. (At the hearing of the motion for a new trial it was agreed by both parties that checks totaling \$2626.26 covering a balance due under the share crop lease had been sent by defendant to plaintiffs and not cashed by them, and that this amount was still owed to them.) It was further found that defendant remained in possession under the first lease until April 5, 1953, which was the reasonable time required to remove the crops; that the plaintiffs were informed by the defendant and knew at all material times, including February 20, 1953, that the defendant "desired and intended to make a new lease" for said property; that the defendant at all times kept and performed his covenants under this lease; that on February 20, 1953, without the knowledge of the defendant, the plaintiffs entered into a share crop lease with one Virgil Smith covering both properties, to run three years with the right to renew for seven years, and did not offer the property described in the first lease to the defendant on the same terms as those contained in the Smith lease; that on March 23, 1953, the plaintiffs informed the defendant in writing that they had not executed a new lease but that they contemplated doing so, and that they thereby gave the defendant his right of first refusal for a new lease on the condition that the new lease would cover the land described in both prior leases, and be for a term of ten years

at \$100 per acre per year; that said offer of a new lease was not made in good faith, was exorbitant and unreasonable, and was made by the plaintiffs for the purpose of defeating defendant's rights under said first refusal clause; that the defendant was ready, willing and able at all times to enter into a new lease with the plaintiffs upon the same terms as those contained in the Smith lease; that the plaintiffs did not extend to the defendant the right of first refusal of a new lease of the property described in the first original lease; that by reason of the failure of the plaintiffs to give the defendant the right to enter into a new lease on the same terms as those contained in the Smith lease the plaintiffs breached this right of first refusal clause; that as a direct and proximate result thereof the defendant was damaged in the sum of \$30,643.00; that defendant, with plaintiffs' knowledge, paid Schnaidt \$28,000 for the two leases and expended large sums of money and time in farming the property covered by the first lease in reliance on his rights under the right of first refusal clause and plaintiffs' representations that they would give him such right of refusal; that defendant would not have taken this assignment or done these things had the plaintiffs not so represented and had the right of first refusal clause not been a part of said lease; and that by reason thereof the plaintiffs are estopped to deny the validity of said first refusal clause, and estopped to deny defendant's right to a new lease to the property covered by the first lease upon the same terms as those contained in the Smith lease. Judgment was entered ordering that the plaintiffs take nothing and that the defendant recover \$30,643 on his cross-complaint. In denying a motion for a new trial the court ordered the findings and judgment amended to reduce the judgment to \$28,016.73. The plaintiffs have appealed from that judgment.

The appellants' contentions, while not expressly so designated, are in fact attacks upon certain of the findings as not supported by the evidence. It is contended that the evidence clearly shows that they

were damaged in the sum of \$895 by the respondent's failure to remove the reservoir from the land, and further damaged in that the respondent failed to cultivate the property in a good and farmerlike manner. With respect to the right of first refusal of a new lease it is contended that the respondent waived that right, that since he had not faithfully performed the covenants of the lease his option had terminated, and that he had surrendered the premises to the appellants. It is then contended that the evidence is not sufficient to support the amount of damages allowed. In this connection it is argued that a new lease for any term, no matter how short or how long, would have been a sufficient compliance with the lease provision for the right of first refusal of a new lease; that any lease between appellants and a third party could not affect the amount of damage sustained by the respondent; that there was no evidence to show that the respondent was willing to negotiate any particular lease with the appellants; that there was no evidence to show any basis for the calculation of damages except the testimony of people farming other property; that the respondent produced no books and gave no testimony showing what he actually made on this property during the two years he farmed it; that there was no evidence showing what portion of the 160 acres involved in this issue would have been planted to potatoes, cotton or other crops; that there was no evidence upon which the net profits for farming this 160 acres could be computed, and none from which it could be calculated with any degree of certainty what the future net profits would have been; and that the award of damages here could have been based only upon speculation and conjecture.

[1,2] While not without conflict, the evidence amply supports the findings to the effect that the appellants had not been damaged in any of the respects claimed by them, and that the respondent had cultivated the property in a good and farmerlike manner. While more conflicting, the evidence also supports the findings to the effect that the respondent informed the appellants that

he desired a new lease and intended to exercise his right under the said right of first refusal clause; and that the plaintiffs did not extend to him the right of first refusal of a new lease of this property.

[3,4] A closer question is presented as to the sufficiency of the evidence to sustain the finding that respondent was damaged in the sum of \$30,643. The usual rule applicable to the loss of future profits is that there must be evidence disclosing a satisfactory basis for estimating what the probable earnings would have been, and that the award must be predicated on something more than mere possibilities. *Natural Soda Products Co. v. City of Los Angeles*, 23 Cal.2d 193, 143 P.2d 12; *Caspary v. Moore*, 21 Cal.App.2d 694, 70 P.2d 224. On the other hand, where prospective profits can be related naturally and directly to the breach of a contract the guilty party may not wholly escape on account of the difficulties of devising a perfect measure of the damages caused by his own wrong. *Hoag v. Jenan*, 86 Cal.App.2d 556, 195 P.2d 451; *Unruh v. Smith*, 123 Cal.App.2d 431, 267 P.2d 52. There was evidence here of what other lands in this area had produced in various years, with the cost of production, some of which were under varying terms of rental. There was evidence of profits and losses in different years in connection with similar land planted to potatoes and to cotton, one being more profitable than the other in some years, but the evidence was not very satisfactory as to what proportions of the land here in question had been or should be planted to either of those crops. There was evidence that the year 1952 was a good year for these crops and that the years 1951 and 1953 were unprofitable years. The respondent had farmed over 1100 acres in 1951 and 1952, including his 160 acres, but his records could not be segregated to show the actual results on this land for those years. The court apparently took into consideration the evidence relating to production on other lands during the years 1953 to 1955, as he stated he would not consider

the possible extension of the Smith lease beyond its first three-year period.

Assuming that the evidence as to prospective profits might be held sufficient under some circumstances, a different situation here appears in that these parties had never agreed on any of the terms of such a new lease. How long it should run and the amount and form of the rental to be paid were vital factors in estimating and determining what the probable profit would have been. This element of uncertainty was overlooked, apparently on the theory that under the clause in question the respondent was entitled to a new lease upon any terms on which the appellants should become willing to lease the property to someone else. There is no evidence supporting that theory in the right of first refusal clause or elsewhere. This right of first refusal of a new lease did not provide for an extension or renewal of the existing lease, thus disclosing the terms of a new lease, and it did not provide that such lease should be on the terms on which the lessors were willing to lease it to someone else. None of the terms of such a new lease were in any way indicated or suggested, and neither the parties nor anyone else knew or could know what the terms of "a new lease" were supposed to be. Damages for the loss of future profits must be shown with reasonable certainty. Under the clause in question this could not be shown with any certainty because such future profits would so largely depend upon the rental to be paid and the length of the new lease. This first refusal clause left all of the terms of a new lease to the future agreement of the parties, and there is no evidence or suggestion that such an agreement was ever reached.

[5,6] A court may not fix all the terms of a new lease without ascertainable standards in the option agreement, and this option clause was not sufficient to establish a contract right. *Ablett v. Clauson*, 43 Cal. 2d 280, 272 P.2d 753, 757; *Bonk v. Boyajian*, 128 Cal.App.2d 153, 274 P.2d 948; *Belcher v. Williams*, 151 Cal.App.2d 615, 311 P.2d 861; *A.B.C. Distributing Co. v. Distillers, etc., Corp.*, 154 Cal.App.2d 175,

316 P.2d 71. In the *Ablett* case, where the agreement set forth none of the terms of a new lease except its duration, it was held that "* * * the terms of the option are too uncertain to make it enforceable as a contract right." After quoting the general rule as follows, "* * * if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement.", it is there stated that this rule is well established in this state.

The clause of the lease here in question, being too uncertain to be "enforceable as a contract right" and being one which could "give rise to no legal obligation", it would seem to follow that an alleged breach of that clause could not, in itself, give rise to an obligation based upon the claim that an enforceable contract existed. Not only was this element of uncertainty and absence of terms entirely overlooked, but the consideration of the results on other lands over a three-year period was improper since a one-year lease would have been a sufficient compliance if the agreement had otherwise been valid. The evidence relating to that one year, 1953, would not have supported a judgment for anything like the amount awarded.

[7] Assuming that an estoppel might be shown, the evidence here was not sufficient to support this judgment on the ground of estoppel. The court's finding of an estoppel related only to respondent's right to a new lease on the same terms as the Smith lease, and was based upon his reliance on the said right of first refusal clause and the appellants' representation that they would give him such right of first refusal. Aside from other considerations there was no evidence of any representation giving him a right to a lease on the terms of the Smith lease or on any other stated terms at the time he took the assignment, or subsequently, and no evidence of any agreement of that nature other than the refusal clause in the lease itself. Estoppel was not pleaded, the case was tried on the issue

as to whether or not the refusal clause had been breached, and no claim with respect to an estoppel is made in the briefs on this appeal. On the record before us, the evidence is not sufficient to support the judgment as entered.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.



158 Cal.App.2d 258

John P. SONLEITNER, doing business under the firm name and style of Sunlight Stations Company, Petitioner and Defendant,

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Civ. 22927.

District Court of Appeal, Second District,
Division 2, California.

March 6, 1958.

Prohibition proceeding to restrain Superior Court of Los Angeles County from taking further proceedings in action there pending. The District Court of Appeal, Fox, P. J., held that where there was no provision for jury trial in statute prescribing procedure for purpose of collecting motor vehicle fuel license taxes, jury trial was not mandatory and judge was empowered to try any factual issues.

Alternative writ discharged.

1. Jury ⇐10

The constitutional guarantee to jury trial extends only to those cases wherein right to jury trial existed at common law. West's Ann.Const. art. 1, § 7.

2. Jury ⇐19(17)

Defendant in action to collect taxes was not entitled to jury trial on ground that action was one of debt, because

"taxes" are not debts. West's Ann. Const. art. 1, § 7.

See publication Words and Phrases, for other judicial constructions and definitions of "Taxes".

3. Jury ⇐13(1)

Mere fact that a proceeding is denominated an action at law does not per se give rise to right of jury trial, court is not bound by form of action but rather by nature of rights involved, and test is whether gist of action is legal in a common-law context. West's Ann.Const. art. 1, § 7.

4. Jury ⇐19(17)

A jury trial is not a matter of right in an action to collect taxes since a judicial proceeding to collect taxes was not even a recognized form of action at common law. West's Ann.Const. art. 1, § 7.

5. Jury ⇐19(17)

Where there was no provision for jury trial in statute prescribing procedure for collecting motor vehicle fuel license taxes, jury trial was not mandatory and judge was empowered to try any factual issues. West's Ann.Rev. & Tax.Code, §§ 7301 et seq., 7706, 7727, 7729; West's Ann.Code Civ.Proc. § 592; West's Ann. Const. art. 1, § 7.

6. Taxation ⇐840

A penalty which is created by statute for failure to pay a tax assessment becomes part of the tax.

Edward H. Blixt, Los Angeles, for petitioner.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann, James C. Maupin, Deputy Attys. Gen., for the people, the real party in interest.

FOX, Presiding Justice.

Petitioner seeks a peremptory writ of prohibition to prevent respondent court from proceeding without a jury in the case of People v. Sonleitner (L. A. Superior Court No. 105648). The complaint in that case alleges that during the period from November 1, 1951, to July 31, 1955,

petitioner made taxable distributions of motor vehicle fuel within the state without possessing a distributor's license, and that the Board of Equalization ascertained as best it could the amount of the unlicensed distribution and determined the tax due, adding interest and a penalty of 100 percent of the amount of the tax, as prescribed by sections 7706 and 7727 of the Revenue and Taxation Code. The complaint further alleges that the determination of the Board became final and was not paid, and the total amount (about \$130,000), together with additional penalties and interest, is presently due and owing. Petitioner raised several questions of fact by his answer, which included a general denial and four affirmative defenses.

Thereafter, the State filed a memorandum to set the matter for a nonjury trial. Defendant objected. The State then made a motion for trial without a jury; the court granted that motion and set the cause for trial.

[1] The purpose of the instant proceeding is the collection of motor vehicle fuel license taxes under Part 2 of the Revenue and Taxation Code. The right to trial by jury is guaranteed in section 7 of Article I of the California Constitution.

However, this guarantee extends only to those cases wherein the right to a jury trial existed at common law. *People v. One 1941 Chevrolet Coupe*, 37 Cal.2d 283, 286-287, 231 P.2d 832; *Phyle v. Duffy*, 34 Cal.2d 144, 148, 208 P.2d 668. "As thus presented, the question is an historical one. Although the common law forms of action are abolished and law and equity are united in one forum, the problem of right to a jury trial must still be approached in the context of 1850 common law pleading." *Ripling v. Superior Court*, 112 Cal.App.2d 399, 402, 247 P.2d 117, 119. It appears that the right to trial by jury has never been extended to cases involving the collection of taxes. In *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222, 234, the court stated that "the right of trial by jury, has no application to proceedings for the collection of taxes." Although no other California case has specifically dealt with this issue (cf. *People v. Skinner*, 18 Cal.2d 349, 354-355, 115 P.2d 488, 149 A.L.R. 299), it is well settled in other jurisdictions that there is no right under the general constitutional provisions to a jury trial in statutory or summary proceedings for the collection of taxes.¹ The reasoning behind the

1. *Wickwire v. Reinecke*, 275 U.S. 101, 105-106, 48 S.Ct. 43, 72 L.Ed. 184; *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 18 How. 272, 59 U.S. 272, 281-284, 15 L.Ed. 372; *State v. Overby*, 265 Ala. 39, 89 So.2d 525, 528; *Campbell v. State*, 242 Ala. 215, 5 So. 2d 466, 472; *State v. Bley*, 162 Ala. 239, 50 So. 263, 264; *Drew County Timber Co. v. Board of Equalization of Cleveland County*, 124 Ark. 569, 187 S.W. 942; *Hicks v. Stewart Oil Co.*, 182 Ga. 654, 186 S.E. 802, 803-804; *Harper v. Commissioners of Town of Elberton*, 23 Ga. 566, 568; *Hoffman v. Dept. of Finance*, 374 Ill. 494, 30 N.E.2d 34, 36; *Mix v. People*, 86 Ill. 312, 313; *Johnston v. State*, 212 Ind. 375, 8 N.E.2d 590, 10 N.E.2d 40, 41; *Davis v. City of Clinton*, 55 Iowa 549, 8 N.W. 423, 424; *Thomas Forman Co. v. Owsley County Board of Supervisors*, 267 Ky. 224, 101 S.W.2d 939, 941; *City of Covington v. Shinkle*, 175 Ky. 530, 194 S.W. 766, 767; *Stearns Coal & Lumber Co. v. Commonwealth*, 167 Ky. 51, 179 S.W. 1080, 1082; *Harris*

v. Wood, 6 T.B.Mon. 641, 22 Ky. 641, 643; *City of New Orleans v. Cassidy*, 27 La. Ann. 704; *Board of Comm'rs of Mille Laes County v. Morrison*, 22 Minn. 178, 181; *Spitcaufsky v. Hatten*, 353 Mo. 94, 182 S.W.2d 86, 95, 160 A.L.R. 990; *State ex rel. Ferguson v. Moss*, 69 Mo. 495, 503; *Boody v. Watson*, 64 N.H. 162, 9 A. 794, 798; *Cocheco Mfg. Co. v. Stratford*, 51 N.H. 455, 458-459; *City of New Rochelle v. Echo Bay Waterfront Corp.*, 268 App.Div. 182, 49 N.Y.S.2d 673, 681, affirmed 294 N.Y. 678, 60 N.E.2d 833, certiorari denied 326 U.S. 720, 66 S.Ct. 24, 90 L.Ed. 426; *Unemployment Compensation Comm'n v. J. M. Willis Barber & Beauty Shop*, 219 N.C. 709, 15 S.E. 2d 4, 7; *Cowles v. Brittain*, 9 N.C. 204, 207; *Chickasha Cotton Oil Co. v. Grady County*, 177 Okl. 240, 58 P.2d 590, 595; *Crandal v. James*, 6 R.I. 144, 148; *Cruikshanks v. City Council*, 1 McCord, S.C., 360; *In re Hackett*, 53 Vt. 354, 359-360; *Dexter Horton Bldg. Co. v. King County*, 10 Wash.2d 186, 116 P.2d 507, 511.

denial of a jury trial in such proceedings is clear. To construe the constitutional jury trial guarantee as entitling a person to have a trial by jury on every demand made upon him for taxes would cause interference and delay in tax collection. Since tax collection proceedings traditionally have been summary in nature, such a construction of so important a constitutional provision could not have been intended. (See 3 Cooley, *Taxation* 2616-17 (4th ed.).) In other words, "to pursue every delinquent liable to pay taxes through the forms of process and a jury trial would materially impede, if not wholly obstruct, the collection of the revenue; and it is not believed that such a mode was contemplated by the Constitution." *Cowles v. Brittain*, 9 N.C. 204, 207; see, also, *Cooley*, op. cit. supra at 2619.

[2] The only case upon which petitioner relies is *Grossblatt v. Wright*, 108 Cal.App. 2d 475, 239 P.2d 19. In that case a private person commenced an action against his landlord to recover treble damages, attorney's fees and costs under the United States Housing and Rent Act of 1947, 50 U.S.C.A. Appendix, § 1881 et seq. because the latter demanded and accepted rent in amounts above the maximum prescribed rates. The court held that the action, though founded upon a statute which did not exist at common law, was essentially an action of debt, and the defendant was therefore entitled to a jury trial. The court observed (108 Cal.App.2d at page 486, 239 P.2d at page 26): "A jury trial was a matter of right in the common-law action of debt, and consequently it exists in all civil actions under modern practice which formerly would have fallen within this form of action." It is thus clear that the very basis upon which the *Grossblatt* case was decided makes it distinguishable from the case at bar. The cause of action in the *Grossblatt* case was the equivalent of a common law action of debt. But the cause of action here involved is *not* equivalent to an action of debt because taxes are not debts. *People v. Hochwender*, 20 Cal.2d 181, 183, 124 P.2d 823; *Southern Service Co. v. County*

of Los Angeles, 15 Cal.2d 1, 11, 97 P.2d 963; *Perry v. Washburn*, 20 Cal. 318, 350; *Courtney v. Byram*, 54 Cal.App.2d 769, 771, 129 P.2d 721; *Spurrier v. Neumiller*, 37 Cal.App. 683, 690, 174 P. 338. In *People v. Central Pacific R. R. Co.*, 105 Cal. 576, 588-689, 38 P. 905, 908, the court stated: "The collection of taxes is not, however, the mere collection of a debt, but is a sovereign act of the state, to be exercised as may be prescribed by the legislature. Whether the tax is collected by an action in court, or by summary sale by the tax collector, is immaterial. The state, through its legislature, can avail itself of the judicial power as the means by which it will collect the tax; and in such proceedings it may prescribe such procedure as may best avail for that purpose, irrespective of the mode of procedure provided for the determination of controversies between individuals, just as it may avail itself of the executive branch of the government of authorizing the sheriff to sell the property upon which the taxes are delinquent, without requiring him to pursue the same course as is required in sales upon judgments between individuals. Although the tax is an obligation from the citizen to the state, it is not of the same character of obligation as exists between citizens, and for the purposes of its collection the state is not limited to the same mode or to the same procedure which it prescribes for individuals in the collection of obligations between themselves." (See, also, *People v. Skinner*, supra.) Since an action to collect taxes is not of the same nature as the common law action of debt, the *Grossblatt* case is not applicable to the case at bar.

[3,4] Petitioner points out that Revenue and Taxation Code section 7729 authorizes the attorney general to prosecute "an action at law" to collect the license tax, penalty and interest determined against an unlicensed distributor. He argues from this that the present suit is an action at law and he is therefore entitled to a jury trial. However, the mere fact that a proceeding is denominated an action at law does not per se give rise to the right of

trial by jury; the court is not bound by the form of the action but rather by the nature of the rights involved—the test is whether the gist of the action is legal in a common law context. *People v. One 1941 Chevrolet Coupe*, supra, 37 Cal.2d at page 299, 231 P.2d 832; *Ripling v. Superior Court*, supra, 112 Cal.App.2d at page 402, 247 P.2d 117; *Grossblatt v. Wright*, supra, 108 Cal.App.2d at pages 483-484, 239 P.2d 19. At common law in this country and in England taxes were not collected by regular judicial proceedings. *Kelly v. Pittsburgh*, 104 U.S. 78, 80, 26 L.Ed. 658; *People v. Skinner*, supra, 18 Cal.2d at page 358, 115 P.2d 488. Since a judicial proceeding to collect taxes was not even a recognized form of action at common law, it follows that the designation by the legislature of such a proceeding as an “action at law” does not carry with it the right to a trial by jury. A jury trial is thus not a matter of right in an action to collect taxes. The legislature was free to prescribe such procedure as would best avail for the purpose of collecting motor vehicle fuel license taxes through a judicial action (see *People v. Skinner*, supra, 18 Cal.2d at page 358, 115 P.2d 488; *People v. Central Pac. R. R. Co.*, supra, 105 Cal. at page 589, 38 P. 905), and it has done so. But no provision for a jury trial has been made. Under such circumstances Code of Civil Procedure section 592 governs. The pertinent portions of that section provide: “In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury * * *. In other cases, issues of fact must be tried by the Court, subject to its power to order any such issue to be tried by a jury * * *.” The cause of action here involved clearly falls into the second category, and the case must be tried by the court.

[5] The fact that petitioner’s answer raises several collateral factual issues does not alter this result. The gist of the instant action is the collection of taxes based upon

a final determination of a state taxing agency, and under Code of Civil Procedure section 592, a judge is expressly empowered to try any factual issues in cases where a jury trial is not mandatory.

[6] Furthermore, petitioner cannot bolster his claim by asserting that this is partially an action to collect a penalty. It is well settled in this state that a penalty which is created by statute for failure to pay a tax assessment becomes part of the tax. *Weston Inv. Co. v. State of California*, 31 Cal.2d 390, 393, 189 P.2d 262; *Carpenter v. Peoples Mut. Life Ins. Co.*, 10 Cal.2d 299, 303-304, 74 P.2d 508; *County of Los Angeles v. Ballerino*, 99 Cal. 593, 596, 32 P. 581, 34 P. 329; *Camden Fire Ins. Ass’n v. Johnson*, 42 Cal.App.2d 528, 531, 109 P.2d 447.

The alternative writ is discharged.

ASHBURN, J., and KINCAID, J. pro tem., concur.



158 Cal.App.2d 489

John G. OPPENHEIMER, Plaintiff and Appellant,
v.

V. W. SMITH, E. J. Hilton, Union Pacific Railroad Company, a corporation, Defendants and Respondents.
Civ. 22469.

District Court of Appeal, Second District,
Division 3, California.
March 18, 1958.

Rehearing Denied April 14, 1958.
Hearing Denied May 14, 1958.

Action for damages for alleged breach of contract of employment. The Superior Court, Los Angeles County, Clarence L. Kincaid, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal held that where issues decided in a previous action commenced by

plaintiff in municipal court against the same defendants were identical with ones presented in plaintiff's subsequent action in the superior court, and judgment in the municipal court action was a final judgment on the merits, subsequent action in superior court was barred.

Judgment affirmed.

1. Judgment ⇐540

In determining the validity of a plea of res judicata three questions are pertinent, namely, was the issue decided in the prior adjudication identical with the one presented in action in question, was there a final judgment on the merits, and was the party against whom plea is asserted a party or in privity with party to prior adjudication.

2. Judgment ⇐715(1)

Where issues decided in a previous action commenced by plaintiff in municipal court against the same defendants were identical with ones presented in plaintiff's subsequent action in the superior court, and judgment in the municipal court action was a final judgment on the merits, subsequent action in superior court was barred.

3. Judgment ⇐576(1)

Where issues decided in a prior municipal court action were identical with ones presented in subsequent action commenced by plaintiff against the same defendants, and municipal court action was a final judgment on the merits, even if judgment in municipal court action was erroneous, it barred plaintiff's subsequent action.

4. Judgment ⇐720

Where question as to whether a municipal court judgment was void because judge who tried case was disqualified was raised on plaintiff's appeal from such judgment to the appellate division, and that court held that judge was qualified, and such judgment became final, such holding was conclusive in subsequent action commenced by plaintiff in the superior court involving the same issues decided in the municipal court action.

John G. Oppenheimer, in pro. per.

E. E. Bennett, Edward C. Renwick, Malcolm Davis, and Jack W. Crumley, Los Angeles, for respondents.

PER CURIAM.

Plaintiff brought this action against V. W. Smith, E. J. Hilton, and Union Pacific Railroad Company for damages for alleged breach of contract. A special defense of res judicata was sustained.

The complaint, filed February 24, 1956, alleged that defendants Smith and Hilton were employees of the railroad; on February 25, 1952 plaintiff was in the employ of the railroad under a written contract; he has duly performed all the terms and conditions of the contract; the contract provided that no employee would be disciplined or dismissed without a fair hearing by his supervising officer; on February 26, 1952 the railroad, through Hilton, purported to give plaintiff a hearing; at the end of the "unfair hearing" Hilton said a decision would be rendered in due course; the statement was "a sham and a farce"; Smith was not present at the hearing and did not hear the evidence; he did not read it before February 28, 1952, if at all; under date of February 27, 1952 the railroad, through Smith, wrote to plaintiff, saying in part: "Having carefully considered the evidence adduced at the hearing held February 26, 1952, I find * * * That you failed to protect assignment * * * Therefore, you are discharged from the company's service"; the transcript of the evidence taken at the hearing bears the date February 28, 1952, the testimony was not taken under oath, the testimony was not signed by any witness who testified, a blank space appears in each instance at the end of all witnesses' testimony and below the words, "I have read the foregoing & it is correct"; as a proximate result of the conduct of defendant, plaintiff was deprived by defendants of his employment and livelihood, to his wage loss and damage in the sum of \$20,000.

The complaint further alleged that in February 1952 plaintiff had pending against

the railroad an action for personal injuries suffered by him within the course and scope of his employment on May 6, 1951 and within the meaning and purview of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.; in April 1952 judgment was entered for plaintiff in that action and against the railroad; the judgment became final; plaintiff was discharged from his employment by reason of that lawsuit and each defendant is guilty of unfair labor relations and practices, breach of the written contract of employment, all to plaintiff's damage in the sum of \$20,000.

Defendants filed separate answers. Each answer alleged as a special defense that on October 7, 1954, in an action then pending in the municipal court of Los Angeles Judicial District between the same parties and for the same cause of action as set forth in the complaint in the present action, judgment was duly entered and made ordering and adjudging that the plaintiff take nothing by his action; on April 19, 1955 the judgment of the municipal court was affirmed by the appellate department of the superior court, and it became final.

Pursuant to section 597 of the Code of Civil Procedure, the court proceeded to the trial of the special defenses before the trial of any other issue. The court found the allegations of the special defenses were true and "the judgment thereby pleaded is valid, it litigated the same thing, with the same parties who were sued in the same names and in the same capacities and the plaintiff had actual notice of the pendency of the action." Judgment was entered that plaintiff take nothing in the present action. He appeals.

It is contended the findings are not supported by the evidence. The record of the municipal court action alleged in the special defenses was introduced in evidence at the trial. It appears therefrom that the complaint in the present action is in all essentials a duplicate of the complaint in the municipal court action. Plaintiff there is the plaintiff here. The defendants there are the defendants here. Each defendant answered. The court in the municipal

court action made findings which recite that the action came on for trial before the court, sitting without a jury, the plaintiff appearing in person and acting as his own attorney, and the defendants by their attorney, that "evidence both oral and documentary was offered by the plaintiff," and that the court considered all the evidence submitted. The court found that plaintiff did not prove that defendants, or any of them, disciplined or dismissed an employee without a fair hearing by his supervising officer; plaintiff did not prove that defendants, or any of them, deprived plaintiff of his employment and livelihood, his job, any of his property rights, or any of his contractual rights; plaintiff did not prove that defendants, or any of them, breached a written contract of employment. Judgment in that action was that plaintiff take nothing. Plaintiff made a motion to vacate the judgment on the ground it was void, which was denied. A motion for a new trial was denied. Plaintiff appealed to the appellate department of the superior court. The judgment was affirmed and became final.

[1,2] "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" *Bernhard v. Bank of America*, 19 Cal.2d 807, 813, 122 P.2d 892, 895." *Freeze v. Salot*, 122 Cal.App.2d 561, 566, 266 P.2d 140, 143. The plea of res judicata was good. The issues decided in the municipal court action were identical with the ones presented in this action; the judgment in the municipal court action was a final judgment on the merits; and plaintiff, the party against whom the plea is asserted; was a party to the adjudication of the municipal court.

[3, 4] It is argued that the municipal court action was not on the merits. The record clearly shows the contrary. Even if the judgment in that action was erroneous,

as plaintiff urges, it bars the present action. *Citizens Nat. T. & S. Bank of Los Angeles v. Hawkins*, 87 Cal.App.2d 535, 544, 197 P.2d 385. Plaintiff argues the municipal court judgment was void because the judge who tried the case was disqualified. He raised the same point on his appeal to the appellate department and that court held the judge was qualified. That holding is conclusive in this action.

We have examined the numerous cases cited by plaintiff. None of them is in point.

The judgment is affirmed.



158 Cal.App.2d 373

Grace W. STANLEY, Plaintiff, Cross-Defendant, and Appellant,

v.

Edward L. SHIERRY and Gertrude A. Shierry, Defendants, Cross-Complainants and Respondents.

Civ. 17709.

District Court of Appeal, First District,
Division 2, California.

March 13, 1958.

Rehearing Denied April 11, 1958.

Hearing Denied May 7, 1958.

Action to quiet title. The Superior Court, Contra Costa County, Wakefield Taylor, J., rendered judgment for the defendants, and the plaintiff appealed. The District Court of Appeal, Brazil, J. pro tem., held that where deed stated that lot was delineated and designated on a certain map and that portion of the lot conveyed had the boulevard as the north boundary line and center of the creek as the south boundary line, parol evidence was admissible to identify the south boundary line as the center of the actual creek and not as center of the creek lines as shown on the map.

Affirmed.

1. Deeds ⚡8

Grantor cannot convey what already belongs to someone else merely by including it within the legal description.

2. Evidence ⚡451

An unambiguous document is to be interpreted according to its plain language, and parol evidence may be referred to only to explain an ambiguity which appears on face of instrument; in such a case parol evidence is admitted to dispel doubt, not by showing that the parties meant something other than what they said but by showing what they meant by what they said.

3. Evidence ⚡460(6)

Where deed stated that lot was delineated and designated on a certain map and that portion of the lot conveyed had the boulevard as the north boundary line and center of the creek as the south boundary line, parol evidence was admissible to identify the south boundary line as the center of the actual creek and not as center of the creek lines as shown on the map.

Angell & Adams, Robert M. Adams, Jr., Philip H. Angell, Jr., San Francisco, for appellant.

Tinning & De Lap, Robert Eshleman, Martinez, for respondent.

BRAZIL, Justice pro tem.

The plaintiff appeals from a judgment which denied a decree requiring defendants to remove a portion of a building from land she claimed to own, from a refusal to quiet her title to the disputed area, and from a decree which quieted defendants' title to the self same property.

Lots 14 and 29 in Block 6, Map No. 1, Lafayette Homesites, have a common boundary line roughly half way between Golden Gate Way on the north and Moraga Boulevard on the south. Each lot is 50 feet wide and between 130 and 140 feet long, lot 14 being a few feet longer than lot 29.

Both lots were owned by the Moraga Land Company before 1927, and each side

traces its claim of right to the disputed portion of lot 14 from this common source. The deed from the land company to Margaret Thompson, the defendants' predecessor in interest, to a portion of that lot is first in time being dated July 27, 1926, and the deed from the same grantor to Annie Eagles, plaintiff's predecessor in interest, to lot 29 and a portion of lot 14 follows on April 21, 1927. The disputed portion covers a substantial area approximately in the middle of lot 14. The confusion is brought about by the difference in the language used in the two deeds in conveying separate parts of the lot.

In 1955 the respondents (defendants) constructed a building on lot 14, the rear of which building is 65 feet from Golden Gate Way, the lot's northern boundary. Appellant (plaintiff) claims an encroachment of 49.02 feet at the east boundary and 19.15 feet at the west boundary, covering an area of about 1,500 square feet. She sought removal of the building and a decree of quiet title. The respondents asked and got a decree quieting their title to the land in dispute.

For the sake of clarity, before going any further, the exact wording of the granting clauses of the deeds by which the predecessors in interest of the respective parties acquired title from the Moraga Land Company is set forth.

The 1926 deed to Mrs. Thompson conveys "That portion of Lots 14 * * * in Block 6, as said lots are delineated and so designated on that certain map [Map No. 1 Lafayette Homesites, etc.] which have the boulevard as the North Boundary line and the center of the creek as the South Boundary line. Subject to an easement for public travel over the roads shown on map above referred to excepting * * * as said lots are delineated on map above referred to, which strip of land shown on said map and thereon designated as Alpha Lane has been closed."

The 1927 deed to Mrs. Eagles conveyed lot 29 and a portion of lot 14 in the following manner: "Commencing at a point on the

Northern line of Moraga Boulevard as per map hereinafter referred to, where said line is intersected by the dividing line between Lots 28 and 29 in Block 6, as per map hereinafter referred to," and then follows a metes and bounds description with an east boundary of 230 feet, a north boundary of 58 feet, a west boundary of 205 feet and a south boundary of 52.48 feet (east and west lines are not at right angles to north and south lines), "Being all of Lot 29 and a portion of Lot 14 in Block 6 as said lots and block are delineated and so designated on that certain map [Map No. 1 Lafayette Homesites, etc.]."

Lot 14 is 139.17 feet long on the east side and 135.81 feet on the west side; lot 29 is 130 feet long on the east and 135.64 feet on the west. If there were no prior transfer by the land company, the second deed would definitely convey to Mrs. Eagles the major portion of lot 14, i. e., to within less than 40 feet of the north boundary on the east and less than 77 feet from the same boundary on the west side.

The recorded map to which both deeds refer shows the location and dimensions of lots 14 and 29 within Block 6, Moraga Boulevard on the south and Golden Gate Way on the north, and in between in lot 14, much closer to its north line than the south one, two parallel lines, with courses and distances and the legend "Walnut Creek" contained between those lines.

The metes and bounds description of the second deed when plotted on the recorded map obviously extend the east and west lines of the portion of lot 14 so conveyed right up to the center of these surveyed lines called Walnut Creek. The map was recorded October 5, 1914.

[1] The two deeds being recorded at about the same time as they were dated, there is no problem of rights of bona fide purchasers involved. The second deed, being so clear in its description, appellant would own all the land within the outside lines so described, unless a portion thereof at the time of its execution and delivery in 1927, did not then belong to the grantor—

that it was then not within its power to make such a transfer. It is obvious that the grant deed conveyed only what the grantor owned at the time of its execution; that the grantor could not convey what already belonged to someone else merely by including it within the legal description.

It therefore follows that this case is determined by finding out what portion of lot 14 the respondents got by reason of the 1926 deed to Mrs. Thompson.

Viewing the evidence in the light most favorable to the respondents, we find that in 1926 there was only one creek running through lot 14, the course of which channel has not changed from then up to the present time. There was no live or running creek at the place designated on the 1914 map as "Walnut Creek"; at most, there was only an ill defined place there where runoff water came from the highway to join the actual creek. The actual creek crosses the lot at a point many feet south of the lines on the map labeled Walnut Creek. Respondents claim, and the court so found, that they own the northern portion of the lot to the center of the actual running creek as it existed on the ground ever since 1926; and appellant asserts respondents own only that portion of the lot that lies north of the center of the creek as it is shown on the recorded map.

[2] The appellant says the trial court was in error in receiving evidence of the location of a running creek on the ground in 1926, for, the deed to Mrs. Thompson being clear and unambiguous in its reference to a recorded map with its location of creek banks being clearly shown, there was no room for interpretation. An unambiguous document is to be interpreted according to its plain language, and parol evidence may be referred to only to explain an ambiguity which appears on the face of the instrument. *Barnhart Aircraft, Inc. v. Preston*, 212 Cal. 19, at page 22, 297 P. 20, at page 21. In such a case parol evidence is admitted to dispel doubt, not by showing that the parties meant something other than what they said

but by showing what they meant by what they said.

There was much evidence presented on the conduct of the parties and persons interested in the properties after the original deeds, but no detailed discussion on the subject is needed for the rights of the parties are determined by what was actually done by the execution and delivery of the first deed. If that deed conveyed the northern part of lot 14 to the center of the actual creek, then the Moraga Land Company did not have any land left to convey lying north of that line when it made the second deed nine months later. It then did not convey the area lying between the center of the actual creek and the center of the creek lines as shown on the map.

[3] A consideration of the first deed, without reference to extraneous matters, shows that the court was justified in receiving evidence to explain what was meant by "the center of the creek." The outside lines of the lots and of the block can only be ascertained by reference to the map, but the deed divides the lot as shown on the map in a manner that could not well have been put in percentage form or in feet. The south line of the part transferred is a creek which is a natural monument. This deed does not refer to the center line of "the creek as shown on the map," nor even to "Walnut Creek" or to "the creek as surveyed in 1914"; its reference as a monument for fixing the lot's south boundary is simply: "and the center of the creek." That this description does not necessarily mean the creek lines as shown on the map is borne out by the indefinite language which follows the designation of the lot and block numbers as shown on the map, and that is "which have the boulevard as the north boundary." The map lists the north boundary as "Golden Gate Way," not "the boulevard." If the description was limited in all its detail to the map, this added language about the boulevard would have been surplusage. The very wording of the first deed justifies the inference that the seller used the map for

one part of the description, i. e., the outside lines of lots and block and the only creek that was there, as a natural monument, separating the lot into two portions, the part sold and the part retained. This inference is substantiated by a look at the map and finding out what would have happened if this were not so. The conveyance would otherwise have been only of a small irregular shaped piece of ground having no practical use as a building site because the east side would be less than 40 feet long and the west side less than 77 feet. It would also have left an area of land between the live creek and the part conveyed of little or no use to anyone for it would have no street access except across a creek.

The court was correct in receiving parol evidence to identify the interior lot line, and its finding as to the location of the actual creek on the ground is supported by the evidence. There was then no conflict in the description and no need to look to the rules of interpretation as embodied in Section 2077 of the Code of Civil Procedure.

The case of *Devlin v. Powell*, 67 Cal.App. 165, 227 P. 231, 232 is factually quite similar to this one. There the plaintiff relied on a deed executed in 1894 describing the property as "Block one bounded by 'A' Street and the American River and Twenty-fourth and Twenty-fifth Streets, Block two bounded by 'A' Street and American Street and Twenty-third and Twenty-fourth Streets, Block Twenty-nine bounded by American Street and American River and Twenty-third and Twenty-fourth Streets." If plaintiff's deed limited him to the line of the river as it is shown on the city map (the American River channel had shifted in the intervening years), he had no color of title north of the lines shown on the map. In affirming the trial court's holding that plaintiff's land extended to the actual river bank as it existed when the deed was executed,

the court said: "The Hooker deed was executed and delivered on the 23d day of April, A.D. 1894, speaks as of that date, refers to natural objects as of that date, and the interpretation to be given thereto and the intent and meaning of the conveyance must be based upon the circumstances and conditions as they existed upon that date, unless there is something in the instrument manifesting a contrary intent."

The trial court being justified in finding that the disputed area was acquired by respondents by a deed prior in time to that by which appellant acquired any part of the lot, and the description thereof being made certain by parol evidence showing the location of a natural monument (the creek) referred to in that deed, there is no good reason for going on to discuss other points contained in the briefs. It is sufficient to say that, if conduct of the parties after the two original deeds would assist in determining the rights of the parties, then the evidence in the record is ample to support a finding that everyone interested in these properties conducted themselves with regard to it in a manner quite consistent with the decision of the trial court.

The judgment is not a determination that there is any inconsistency between the deed and the map, nor that there is any deviation from the map. It merely holds that the deed uses the map for a description and location of the outside boundaries of lots and block, and a natural monument as the inside or dividing line between the two portions of one lot separately conveyed. The terms and particulars of the first deed (the one that needs interpretation) is thus not varied in any way.

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

158 Cal.App.2d 316

**Evelyn PHILLIPS, Plaintiff and
Respondent,**

v.

Richard BARRON, Defendant and Appellant.

Civ. 17529.

District Court of Appeal, First District,
Division 2, California.

March 11, 1958.

Hearing Denied May 7, 1958.

Action arising out of collision which occurred when defendant attempted to make a U-turn on a four lane divided highway from lane for northbound traffic to southbound traffic and was struck by southbound automobile driven by plaintiff. From an order of the Superior Court, Alameda County, Cecil Mosbacher, J., granting plaintiff a new trial following rendition of verdict for the defendant, the defendant appealed. The District Court of Appeal, Dooling, J., held that evidence would have been sufficient to support a verdict for plaintiff and court did not err in granting plaintiff a new trial.

Order affirmed.

**1. Appeal and Error ☞1015(1)
New Trial ☞72**

Trial court is entitled to reweigh evidence in determining whether to grant a new trial on ground of insufficiency of evidence, and if evidence is legally sufficient to support a verdict in favor of party moving for new trial, appellate court must affirm order of trial court granting new trial on that ground.

**2. Automobiles ☞244(1)
New Trial ☞70**

In action arising out of collision which occurred when defendant attempted to make a U-turn on a four lane divided highway from lane for northbound traffic to southbound traffic and was struck by southbound automobile driven by plaintiff, evidence would have been sufficient to support a verdict for plaintiff and court did not err in granting plaintiff a new trial following rendition of verdict for defendant.

3. Appeal and Error ☞1015(1)

In action arising out of automobile collision which occurred when defendant attempted to make U-turn from northbound lane of divided highway to southbound lane and he was struck by plaintiff's southbound automobile which then ran over outer curb of highway, entered lot, struck boat trailer and continued into another lot where it collided with house trailer, question whether original collision was proximate cause of subsequent course of plaintiff's automobile or whether in exercise of ordinary care plaintiff could have controlled her automobile better and avoided some or all of subsequent damage was for trial court in passing on plaintiff's motion for new trial.

4. New Trial ☞157

Under rule providing that party seeking new trial shall within ten days after filing notice of intention to move therefor, serve and file memorandum of points and authorities and that except for good cause shown, failure of moving party to serve and file prescribed memorandum shall be ground for denial of motion without a hearing on merits, failure to file memorandum is only made ground for denial and it is not mandatory on Superior court to deny motion where memorandum is not filed. Superior Court Rules, rules 3(b), 36(c) (2).

5. Appeal and Error ☞169

A party will not be allowed to make a new argument for the first time on appeal when the record made in trial court furnishes no support for it.

Edward A. Friend, San Francisco, for appellant.

Hardin, Fletcher, Cook & Hayes, William J. Hayes, Oakland, for respondent.
Cyril Viadro, San Francisco, of counsel.

DOOLING, Justice.

Defendant appeals from an order granting a new trial on the ground of insufficiency of the evidence. The action was one

for personal injuries received by plaintiff in a collision between the automobile driven by her and the automobile driven by defendant.

[1] The rule is firmly settled by an unbroken line of decisions of our Supreme Court that the trial court is entitled to reweigh the evidence in determining whether to grant a new trial on the ground of insufficiency of the evidence and if the evidence is legally sufficient to support a verdict in favor of the party moving for the new trial an appellate court must affirm the order of the trial court granting the new trial on that ground. *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 219, 293 P.2d 48; *Richardson v. Ham*, 44 Cal.2d 772, 775, 285 P.2d 269. Appellant asks us to reconsider and set aside this rule. It is futile to ask an intermediate court to overrule a principle settled by the decisions of our Supreme Court, which we are bound in law to follow. In this connection we may point out that as recently as September 17, 1957, the Supreme Court again reaffirmed this particular rule in *People v. Sheran*, 49 Cal.2d 101, 315 P.2d 5.

[2] Looking therefore only to the evidence most favorable to the plaintiff we find the following: The collision occurred on September 14, 1954, on East 14th Street in San Leandro at its intersection with 152nd Avenue. In this area East 14th Street is a four lane highway with two northbound and two southbound lanes separated by a dividing strip approximately seventeen feet wide. The plaintiff was southbound on East 14th Street in the inner lane driving her car at about 25 or 30 miles per hour. Defendant who had been driving northerly had turned left into the dividing strip at the intersection of 152nd Avenue intending to make a U-turn. The plaintiff testified that when she was 30 or 40 feet from this intersection she saw the defendant's automobile apparently stopped in the divider strip. The defendant then started his car forward into the southbound lane. When plaintiff observed this she put her foot on the brake and swerved her car to the right. The defendant's car

continued to move and the two came into a glancing collision. Plaintiff "blacked out" temporarily and partially lost control of her car which ran over the outer curb, entered a lot, struck an 18-foot boat on a boat trailer, and continued into the next lot where it collided violently with a house trailer. The witness Waiters corroborated plaintiff in the following particulars: He testified that he first saw defendant's automobile stopped in the dividing strip; that it started forward into the southbound lane and continued moving until the collision when its front end had about reached the dividing line between the two southbound lanes; that plaintiff swerved her car to the right but nevertheless the two cars came into contact. There was conflicting testimony in many particulars but under the rule above referred to we must disregard it.

The above recital is sufficient to demonstrate that the evidence is ample to support a verdict for the plaintiff and with that established we must affirm the order.

[3] Appellant devotes much time to the argument that he was not legally responsible for the subsequent course of the respondent's car after the impact. It is sufficient to point out that whether the original collision was a proximate cause of the subsequent course of respondent's car, or whether in the exercise of ordinary care respondent could have controlled her automobile better and avoided some or all of the subsequent damage, also presented a question for the trial court in granting the motion for new trial.

[4] The respondent in moving for a new trial failed to furnish points and authorities as required by Rule 3(b), Rules for Superior Courts. Appellant called this fact to the trial court's attention but the trial court proceeded to hear the motion, over appellant's objection. Rule 3(b) provides: "A party seeking a new trial * * * shall, within ten (10) days after filing notice of intention to move therefor, serve and file a memorandum of points and authorities * * *. Except for good

cause shown, the failure of the moving party to serve and file the prescribed memorandum *shall* be grounds for denial of the motion without a hearing on the merits." (Emphasis ours.)

Rule 36(c) (2) of the same rules provides that the word "shall" is mandatory. From this appellant argues that it is mandatory on the Superior Court to deny the motion where the memorandum is not filed. If this had been the purpose of the Judicial Council in formulating Rule 3b they could have readily said so in more direct and less ambiguous language. To say that failure to perform Act A "shall be grounds for" doing Act B is far different from saying that the court shall do Act B if Act A is not performed. We think it would distort the language of this rule to construe it to mean, as appellant contends: "if appellant fails to file the prescribed memorandum the motion shall be denied." The failure is only made "grounds for" a denial, i. e., a basis or reason on which the trial court may act. It was so construed in *Dorsa v. MacNeil*, 112 Cal.App.2d 807, 811, 247 P.2d 577. It is true that in the *Dorsa* case no objection on this ground was made in the trial court. Appellant here did make the objection but the following also appears in the transcript:

"The Court: And I might further state * * * he sets forth all the statutory grounds * * * the statutes as far as that goes are some authorities and would constitute, at least the reference to one code section, the one setting forth the grounds—I think that the merits of a case are what are to be considered and not some technical ground.

"Mr. Friend: I agree with the Court, simply in proper discharge of my duties to my client I cite every statute I think is applicable."

[5] Appellant now argues that he was prejudiced by the lack of points and authorities in that he was not prepared to argue the sufficiency of the evidence. He made no such contention in the trial court,

which had the power to continue the hearing if he had made a proper showing, and should not be allowed to make that argument for the first time on appeal when the record made in the trial court furnishes no support for it.

The order is affirmed.

KAUFMAN, P. J., and DRAPER, J.,
concur.



158 Cal.App.2d 460

**Ruby B. REINFELD, Individually and as
Special Administratrix of the Estate of
Harry Leo Reinfeld, Plaintiff and Re-
spondent,**

v.

**The SAN FRANCISCO CITY AND COUNTY
EMPLOYEES RETIREMENT SYSTEM
et al., Defendants and Appellants.**

No. 17765.

**District Court of Appeal, First District,
Division 2, California.**

March 18, 1958.

Rehearing Denied April 17, 1958.

Hearing Denied May 14, 1958.

Action by widow of city employee to recover amount paid into city pension fund by her husband. From adverse judgment of the Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., the defendants appealed. The District Court of Appeal, Brazil, J. pro tem., held that under city charter listing incompetence as one of the grounds for discharge of permanent civil service employee, city civil service employee, who became mentally incompetent shortly before retirement date, was not automatically separated from civil service system, and his widow, following retirement and death of employee, could not recover all that he had paid into retirement fund on theory that his mental incapacity terminated his employment with city and that he was entitled to refund of all that he had paid in.

Judgment reversed.

1. Municipal Corporations Ⓒ220(9)

Under city charter listing incompetence as one of grounds for discharge of permanent civil service employee, city civil service employee, who became mentally incompetent shortly before retirement date, was not automatically separated from civil service system, and his widow, following retirement and death of employee, could not recover all that he had paid into retirement fund on theory that his mental incapacity terminated his employment with city and that he was entitled to refund of all that he had paid in. West's Ann.Gov.Code, §§ 1028, 1770; West's Ann.Labor Code, § 2920.

2. Municipal Corporations Ⓒ220(9)

Pension provisions of a city charter are an integral portion of contract of employment with city.

3. Municipal Corporations Ⓒ79

Provisions of Labor Code, setting forth events terminating employment do not take precedence over city charter provisions in matters involving a pension or retirement system for municipal employees. West's Ann.Gov.Code, §§ 1028, 1770; West's Ann. Labor Code, § 2920.

Dion R. Holm, City Atty., City and County of San Francisco, Norman Sanford Wolff, Deputy City Atty., San Francisco, for appellant.

James C. Purcell, Michael Riordan, San Francisco, for respondent.

BRAZIL, Justice pro tem.

[1] For forty years or so, Harry Reinfield was a Civil Service employee of the City and County of San Francisco, serving in the capacity of an engineer. As such employee he was a member of long standing in the city's Retirement System and he had made regular contributions to the Retirement Fund in a total sum, with interest, of \$9,554.73.

In November of 1953 the Retirement Board notified him that as he would be 65 years old come next January he would be retired on February 1, 1954, by virtue of the

mandatory retirement provisions of the City Charter. In December of 1953 Mr. Reinfield, with his wife, went to the office of the System and there signed a "compulsory service retirement form" and an "election with regard to option" wherein he chose the maximum monthly allowance from among the four options available to him before actual retirement. From early October 1953 to the 1st of February 1954, he was not actually working because of his illness, which was mental of nature. All during this time he drew sick-leave pay. He received two monthly retirement checks totaling \$846.89 and his widow got \$415.07 as the pro-rated amount for April and the further sum of \$500 death benefit allowance. Mr. Reinfield died April 29, 1954.

During February of the following year, the widow as Special Administratrix of his estate served notice of rescission on the Retirement Board with an offer to return all moneys theretofore received from the Board as a result of the retirement and demanded payment of all accumulated contributions and interest of her husband to the fund. She asserted that her husband was incompetent for several months before his retirement and she asked for a hearing of the matter before the Board to determine this fact. The Board took no action.

She then filed an action for declaratory relief, the basis of which lies primarily on the claim that Mr. Reinfield was mentally incompetent from and after October 1, 1953, until he died. As all agreed that it was up to the Retirement Board to conduct the inquiry (Ware v. Retirement Board, 65 Cal. App.2d 781, 151 P.2d 549), if one were required, to determine whether or not the employee was legally incompetent, the fact of mental incompetency became the subject of a limited stipulation. The parties stipulated for the purposes of deciding the legal issues in the action for declaratory relief that the employee was mentally incompetent from October 1, 1953, to February 1, 1954. Then if the court found the issue of incompetency to be material to a determination of the rights and obligations of the parties, the matter would go back to the

Board for a determination of the employee's mental condition.

The court by its judgment found in plaintiff's favor that mental capacity of decedent during the time covered by the stipulation was material and relevant; that in the event the Retirement Board, upon a hearing, found as a fact that Mr. Reinfeld was mentally incompetent, then and in that event, plaintiff as special administratrix of his estate was entitled to all accumulated contributions plus interest, less whatever amount had been paid over to the employee or his widow as a result of retirement.

[2] The employee having long before become a member of the retirement system, he remained such a member until the happening of an event which would end that membership. Section 226 of Part I, Article 3 of the San Francisco Municipal Code provides for cessation of membership on death, retirement, insufficient employment time, discharge or resignation. Section 154 of the Charter, along with other matters with which we are not here concerned, provides that no permanent employee shall be discharged except for cause and then only after a hearing. One of the causes for removal or discharge therein listed is: Incompetence. Upon separation of an employee for any cause other than retirement, the employee or his estate would be entitled to return of all he had put into the fund. Upon retirement, the employee could no longer exercise any of the options (Charter section 165.2(B)), nor could he thereafter elect to recover his contributions. If he were legally incapacitated before retirement, his guardian could, of course, do for him whatever he otherwise could have done for himself. It is also provided in the Charter that if no election of option were made by the employee before the retirement, then his pension check would be for the maximum amount. The fact that decedent signed a couple of forms in which he elected to take the maximum amount during the time when according to the stipulation he was mentally incompetent is of no consequence, for what he did receive is just what he would have gotten if he had not

signed either the "compulsory service retirement form" or the "election with regard to option." The pension provisions of the City Charter are an integral portion of the contract of employment (*Dryden v. Board of Pension Com'rs*, 6 Cal.2d 575 at page 579, 59 P.2d 104). Here the provisions for maximum benefits if no election were made by the employee were in the Charter long before the employee became incompetent.

The respondent's complaint in substance alleges that Mr. Reinfeld was incompetent from October 1, 1953; that by reason thereof his employment with the city terminated; that his signing of the two indicated forms, being signed during a period of incompetency, were void acts; and that a rescission is, under the circumstances, in order. There is no claim made that the respondent should be able to exercise one of the four options.

The appeal is from that portion of the judgment which holds (A) the issue of competency or incompetency of Harry Leo Reinfeld from October 1, 1953, until his death was a material issue in this case; (B) the aforesaid Retirement Board shall further hear and determine the issue as to whether decedent was incompetent on the 1st day of October, 1953, and in the event it so finds, a further determination shall be made by said Board as to whether said incompetency established factually the legal incapacity of the decedent to act and carry out his duties as an engineer and as an employee of defendant municipal corporation; (C) if decedent is duly found to have been incompetent from October 1, 1953, until his death, then plaintiff is entitled to the return of contributions plus interest.

Respondent contends "on this appeal that the Labor Code, Section 2920, is binding on defendant, Municipal Corporation." That section reads: "Events terminating employment. Every employment is terminated by any of the following: (a) Expiration of its appointed term (b) Extinction of its subject (c) Death of the employee (d) The employee's legal incapacity to act as such." It is this last subdivision which respondent

claims, if legal incapacity to act is established, automatically ended the employment and as a consequence required return of all contributions.

An extended discussion of the situation is made unnecessary by the recent case of *Pearson v. County of Los Angeles*, 49 Cal. 2d 523, 319 P.2d 624, decided by the Supreme Court after the decision by the trial court in this case. In the *Pearson* case the County contended that a deputy sheriff was automatically separated from the retirement system upon being convicted of a felony, which if true would have cost the convicted deputy his retirement pay. Government Code, 1028 provides in part "Any person who has been convicted of a felony in this State * * * is disqualified from holding office or being employed as a peace officer of the State, county * * *," and section 1770 of the same code provides in part "An office becomes vacant on the happening of any of the following events before expiration of the term: * * * (h) His conviction of a felony * * *." From page 533 of 49 Cal.2d, page 630 of 319 P.2d of that case: "Plaintiff argues, *inter alia*, that section 1770 is not applicable here because it, unlike section 1028, refers solely to 'officers' and not to 'employees,' and plaintiff claims that he was merely a county employee and not an officer.

"This latter argument need not be resolved, for we agreed with plaintiff's further contention that even if (for purposes of this decision) he is deemed to be an officer within the purview of section 1770, still he was not automatically discharged upon his conviction of a felony, for application of the subject statute was precluded by section 7½ of article XI of the California Constitution and certain pertinent sections of the Los Angeles County Charter." The pertinent provisions of that charter did not encompass automatic removal from office upon conviction of a felony.

And so in this case, the San Francisco Charter provisions do not encompass automatic severance from the retirement system upon employee's "legal incapacity to act."

While legal incapacity to act and incompetence are not synonymous, incompetence does include within its meaning mental as well as physical inability to do the job. Section 154 of the Charter, in its provision for removal of an employee for incompetence after a hearing, includes within its terms an employee who is mentally incapacitated.

[3] The provisions of Labor Code, 2920 do not take precedence over the Charter provisions in matters involving a pension or retirement system for municipal employees. "* * * [A] civil service system is strictly a municipal affair." *Savage v. Sox*, 118 Cal.App.2d 479 at page 487, 258 P.2d 80, at page 85. If this were not so, many a civil service employee who became mentally ill either temporarily or shortly before retirement date would find himself deprived of all the benefits of the retirement system without a hearing. It is doubtful if this employee or those interested in his welfare would at the time of his incapacity and without the benefit of hindsight, which justified respondent's position in this case, ever have claimed he was automatically out of the system and not entitled to retirement pay so long as he might live. The only way it was ascertained that Mr. Reinfeld could not have lived very long after he first became ill was by the autopsy which revealed a brain lesion.

Respondent also maintains that if the employee was not automatically separated from the system by his incapacity, he should nevertheless have been given an opportunity to resign; that the State through its courts should protect persons who are legally incapacitated. Under the charter the right to exercise one of the four options or the right to resign would have to be asserted before actual retirement. The respondent has not shown how or in what manner the Retirement System or the courts, without a guardianship proceeding, could have effected the employee's resignation in time. Surely no guardian or anyone else interested in the employee's welfare would ever in the use of reasonable judgment, and without the knowledge later acquired, have caused

a resignation to be made. At that time the expectancy of life of a man about 65 would far exceed the two years it would take to use up all he had contributed to the fund.

The judgment is reversed with instructions to enter judgment declaring that the issue of mental competency or incompetency is not a material issue to the case, that plaintiff is not entitled to return of contributions or interest, and that there is nothing further to be heard by the Retirement Board.

Judgment reversed.

DOOLING, Acting P. J., and DRAPER, J., concur.

Heraing denied; CARTER, J., dissenting.



158 Cal.App.2d 379

Frank BAKER, Plaintiff and Respondent,
v.

E. R. WAITE, L. R. Davenport, Leland J.
Cuneo and C. J. Garibotti,
Defendants,

Leland J. Cuneo and C. J. Garibotti,
Appellants.
Civ. 9231.

District Court of Appeal, Third District,
California.

March 13, 1958.

Action to impose liens for unpaid wages. The Superior Court, Siskiyou County, James M. Allen, J., rendered judgment for plaintiff, and defendants appealed. The Third District Court of Appeal, Van Dyke, P. J., held that where tailings of early mining operations have been left upon mining claim and have been abandoned by those who placed them there, they belong to owner of claim as part thereof, and work of extracting values therefrom when undertaken later, constitutes such "mining" as affords grounds for allowance of miner's lien upon land.

Affirmed.

1. Mines and Minerals ⇨113

Where mining and milling constituted but a single coordinated enterprise which, taken as a whole, involved mining operation, it would be immaterial to workers' right to lien for unpaid wages that some had worked at mills and others had worked at mine. West's Ann.Civ.Code, § 3060.

2. Mines and Minerals ⇨117

In action to impose liens for unpaid wages, evidence would sustain finding that work had been done on mining property described in complaint. West's Ann.Civ.Code, § 3060.

3. Mines and Minerals ⇨117

In action to impose liens for unpaid wages, evidence would not sustain defendants' contention that work had not been done upon and for benefit of millsite on which part of coordinated mining operation was conducted. West's Ann.Civ.Code, § 3060.

4. Master and Servant ⇨82(1)

Statutes providing for liens for laborers are to be liberally construed to attain purpose for which they were enacted.

5. Mines and Minerals ⇨112(2)

Where tailings of early mining operations have been left upon mining claim and have been abandoned by those who placed them there, they belong to owner of claim as part thereof and work of extracting values therefrom when undertaken later, constitutes such "mining" as affords grounds for allowance of miner's lien upon land. West's Ann.Civ.Code, § 3060.

See publication Words and Phrases, for other judicial constructions and definitions of "Mining".

Tebbe & Correia, Yreka, for appellants.
Margaret E. Hoyt, Mt. Shasta, Samuel R. Friedman, Yreka, for respondent.

VAN DYKE, Presiding Justice.

By this action plaintiff, respondent herein, on behalf of himself and certain assignors, sought to impose upon real property owned by defendants Cuneo and Garibotti,

appellants herein, liens for unpaid wages arising from employment of respondent and his assignors by defendants Waite and Davenport who were lessees of the real property. The complaint alleged, and the court found, that appellants were the owners of the real property involved; that respondent and his assignors have performed labor as miners upon the real property; that the lessees were operating the property as a mine; that the work and services rendered were for the working, preservation, construction, improvement and development of the real property as a mine, and for the benefit of said property in the entirety. Judgment was rendered in favor of respondent and therefrom Cuneo and Garibotti, the owners of the real property, have appealed.

Appellants assert that the findings of fact are not supported by the evidence and that the conclusions of law are not justified by the findings. A discussion of these assignments of error requires a summary statement of the evidence.

It appears that the two parcels of real property involved are separated by a considerable distance, estimated by witnesses to be from 12 to 20 miles. One parcel, known as the millsite, contained a mill on which the ore taken from the mining property was processed mainly by concentration. The mining property was mined for chromite. Speaking generally, the area has long been known as one of the areas of the state producing chromite commercially and chromite had been mined therefrom at various times. The earlier operators had extracted chromite by methods which included both tunneling and open cut operations and had dumped tailings on the property and left them to lie there. A considerable part of the mining done by respondent and his assignors consisted in re-working the old tailings although a part of the work was done in the old cuts and tunnels. This operation, too, appeared to have been a culling and concentrating process, the accumulated products selected for transportation and milling being then trucked to the mill where the processing was continued. Some

of the work done was the repair and reconstruction of a campsite on the mining property to house and care for the miners, and other work involved the building of access roads. It fairly appears from the record that the lessees embarked on a program of reactivating the mine, the program including the use of the mill, the whole operation of mining and milling being a coordinated one.

[1] In their attack upon the findings of fact as being unsupported by evidence appellants assert that some of the miners never worked on the millsite and that others never worked at the mine. There was a conflict as to the men having worked entirely on one or the other parcel of the real property, but in any event that would be immaterial since this was a single coordinated enterprise and, taken as a whole, involved a mining operation. It would make no difference that one miner worked at one point and another miner worked at another.

[2] Cuneo, one of the appellant owners, testified that no work was done on the mining property as described in the complaint, but it is admitted that the property described in the complaint is owned by appellants. Respondent testified the work was done on the property described in the complaint, that the owners were on the property while the work was being done and stated to respondent that the location where the work was done was within the boundaries of the described property. The trial court could accept this testimony and therefrom infer that the respondent and his assignors were working on the described property belonging to appellants and that appellants, being present, would have protested if ore was being extracted from land not owned by them or not within the Waite-Davenport lease. They shared in the proceeds and were presumptively honest. Some support may be found for the finding attacked and the descriptions of the area involved in official publications of the Department of Natural Resources, Division of Mines, concerning chromite deposits of Siskiyou County (Bulletin 134, Part I, Chapter 2, p. 118), from

which we quote: "The Seiad Creek or Mountain View deposits are located between the forks of Seiad Creek in sec. 20, T. 47 N., R. 11 W." Portions of this section 20 are described in the complaint as Parcel II. Respondent testified that the land involved was located between the forks of Seiad Creek. The record substantially supports the challenged finding.

[3] Appellants challenge the finding that the work done was upon and for the benefit of Parcel I as described in the complaint and referred to in the record as the millsite. They assert that only a small portion of that parcel was under lease to the lessees Waite and Davenport, and that there is no evidence that the work done was performed upon the leased portion. Therefore, say appellants, the finding in respect of Parcel I is in error because it does not limit the lien to the land under lease to Waite and Davenport. The land described in the complaint as Parcel I consists of a single body of land on which the mill is placed. Witnesses referred to the parcel as the millsite and the entire parcel is admittedly owned by appellants. A description of Parcel I given in the complaint is: "Mineral Lots 37 & 47, Section 16, Township 45 North, Range 10 West, M.D.M." Appellants introduced in evidence a lease to Waite and Davenport, in which the land leased is described as a "certain mining claim known as the 'California Placer Mining Claim', being Tract A and B in Lot 47, Survey No. 132 and embracing a portion of Section 16, Township 45 North, Range 10 West, M.D.M." Appellants in their brief say that "there is no evidence that work was performed upon any other portion of this tract of land" than the land described in the lease. However, the testimony is that the miners performed work at the millsite in the operation and upkeep of the mill itself and the handling of the ore trucked to the mill. There is no way of determining the limits of the area used in the mining operation, and the appellants, beyond offering the lease in evidence, made no effort to inform the court as to just what the limits were in respect of which the les-

sees had a right to use the property on which the mill was located. Under the circumstances, the court was justified in finding that the property used under the lease was that described in the complaint. Some latitude must be allowed men working as miners and seeking to impress property with a lien for their unpaid wages in matters of niceties of land description. In the absence, therefore, of more definite proof by the owners, limiting the area as to which the lessees were exercising rights of occupation, the trial court was justified in finding the facts as it did.

[4, 5] Respondents assert that work done in reworking the old tailings was not work for which a lien can be allowed because such work would not constitute mining. They say the dump consisting of material removed from its original place in the land by the early operations became personal property of those who displaced it, and that reprocessing this and obtaining therefrom mineral left there by the early miners was not labor for which a lien could be allowed under the cited code section, Civ.Code, § 3060. It is well settled that statutes providing for liens by laborers are to be liberally construed to attain the purpose for which they were enacted. *McClung v. Paradise Gold Min. Co.*, 164 Cal. 517, 129 P. 774. It appears from the testimony that the dump being worked on was of early origin; that the dumps had been abandoned by those whose mining had created them and the court could infer that these tailings had lost their aspects of personal property and had become a part of the soil. *Rickets on Mining*, page 150, note 84, states that tailings which are dumped on non-mineral land and abandoned become, upon abandonment, a part of the realty so as to mineralize the land on which they are placed and make it subject to mining location by the first comer. We think it must be held that where, as in this case, tailings of early mining operations have been left upon the mining claim and have been abandoned by those who placed them there they belong to the owner of the claim as a part thereof and that the work

of extracting values therefrom undertaken later must be held to be mining such as affords ground for the allowance of a miner's lien upon the land. "In a broad or enlarged sense, the term 'mine' denotes the vein, lode, or deposit of mineral, and is also used to denote the place where, or the parcel of land on which, such mineral vein or deposit is found." 58 C.J.S. Mines and Minerals § 1, p. 14. In addition to the foregoing there was testimony that a part of the work done on the dump was necessary to clear the old cuts and tunnels for working. We think it was substantially shown that all of the labor for which liens were allowed was work done in a mining claim and/or upon real property worked as a mine by the subtractive process as required by the statute.

The judgment is affirmed.

PEEK, J., and WARNE, Justice pro tem., concur.



158 Cal.App.2d 268

Hazel M. RIVETT and Rowena B. Tilton,
Plaintiffs and Appellants,

v.

Earl C. NELSON, Jr., et al., Defendants.

Earl C. Nelson, Jr., Earl C. Nelson, Inc.,
Swett and Crawford, Inc., and A. W. Mc-
Cready, Jr., Respondents.

Civ. 22402.

District Court of Appeal, Second District,
Division 3, California.

March 6, 1958.

Action to recover damages arising from a purchase of machines for vending policies of automobile travel insurance. Judgment for defendant on opening statement of counsel for plaintiff in the Superior Court of Los Angeles County, C. A. Paul-

sen, J., and the plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that directed verdict on the opening statement was proper as to certain defendants and improper as to other defendants.

Judgment affirmed in part and reversed in part.

1. Trial ⇐109

In deciding a motion for nonsuit based upon an opening statement, every fact which counsel has stated as among matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted as facts which would be proved if the case were tried, and if those facts entitled plaintiff to some relief, and there is no admission that matters set up by way of defense are true, it is error to order a nonsuit.

2. Fraud ⇐16

In action for fraud in sale of vending machines of automobile travel insurance, silence of president of defendant corporation when alleged fraudulent statements were made was tantamount to positive assertion that statements of owners of the corporation were true.

3. Trial ⇐109

In action for fraud in the sale of machines for vending policies of automobile travel insurance where it was not asserted in opening statement by counsel against insurance brokerage firm that it received any of the proceeds from the sale of the machines or that they made any false statements to plaintiff or had any knowledge of any misrepresentations made by other defendants directed verdict on the opening statement in favor of such defendants was proper.

4. Joint Ventures ⇐1.3

A "joint venture" is an undertaking by two or more persons jointly to carry out a single business enterprise for profit.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Venture".

5. Joint Ventures ⇨1.2

In a joint adventure, there must be a community of interest in the enterprise, a sharing of profits and losses, and some joint participation in the conduct of the business.

6. Joint Ventures ⇨1.15

The existence of a joint venture is ordinarily shown by evidence of an express agreement or by evidence of the acts and conduct of the members thereof.

7. Joint Ventures ⇨7

Joint venture may be created by estoppel, and one who consents to being represented by another as a joint adventurer may be estopped to deny that he is a joint adventurer as to third persons who enter into a transaction in reliance upon an ostensible agency and who have dealt with the ostensible agent as an agent of the purported joint venture not as principal.

8. Principal and Agent ⇨14(1), 25(1)

An ostensible agency is created by the representation of the principal and not by those of the purported agent.

9. Trial ⇨109

In action for fraud in sale of vending machines for automobile travel insurance, where facts disclosed that plaintiffs did not deal with owners of corporations or the president thereof in reliance upon participation by an insurance brokerage firm in a supposed joint venture and plaintiffs' negotiations were exclusively with the corporate owners and their contract was with the corporation, directed verdict on opening statement of counsel as to insurance brokerage firm was proper.

10. Trial ⇨109

In action for fraud in sale of machines for vending policies for automobile travel insurance, where it was an essential question of whether belief was engendered in the minds of plaintiffs that a firm of underwriting managers intentionally or by want of ordinary care caused plaintiffs to believe that a codefendant was speaking for the firm in representing to prospective purchaser that policies would be available for sale through the machines, directed verdict on

opening statement of counsel for the firm of underwriting managers was error. West's Ann.Civ.Code, §§ 2300, 2315, 2317, 2334.

11. Appeal and Error ⇨925(3)

On appeal from judgment for defendants based on a directed verdict on opening statement for counsel for plaintiffs, the appellate court must assume that all evidence that was favorable to the plaintiffs and encompassed within the opening statement would have been produced.

12. Fraud ⇨22(1)

In action for fraud in the sale of vending machines for automobile travel insurance plaintiffs were not barred from recovery, on the ground they exhibited a want of ordinary care, in failing to make an investigation as to truth of representations.

Albert J. Forn, Los Angeles, for appellants.

John K. Ford, Los Angeles, for respondents Nelson.

Belcher, Kearney & Fargo, Los Angeles, for respondent Swett & Crawford.

Donald Murchison, Beverly Hills, for respondent A. W. McCready, Jr.

SHINN, Presiding Justice.

Hazel M. Rivett and Rowena B. Tilton brought the present action to recover damages arising from their purchase of 20 machines for vending policies of automobile travel insurance from defendant Continental Service Corporation, which was the alter-ego of defendants Sol H. Oppenheim and Herbert Oppenheim. The other defendants in the action are Swett & Crawford, Inc., a firm of underwriting managers and agents, Earl C. Nelson, Inc., an insurance brokerage firm, Earl C. Nelson, Jr., and A. W. McCready, Jr., the president of Continental Service Corporation. At the trial, which was to a jury, plaintiffs recovered judgment against the Oppenheims and against Continental Service Corporation. However, upon the making of an opening statement by plaintiffs' counsel,

each of the remaining defendants moved for a nonsuit. Their motions were granted; plaintiffs appeal from the ensuing judgments of nonsuit.

The complaint stated six causes of action against defendants. The first cause of action alleged that defendants "acted in concert and as co-adventurers in pursuit of a common scheme or plan; and each defendant was empowered by the others to act, and did act, as the agent of the others; and each and all of the things alleged to have been done by defendants, or by any of them, were done in their capacity as co-adventurers and as agents for each other."

The second cause of action re-alleged the foregoing and alleged further that on or about August 10, 1953, defendants represented to plaintiffs that they would sell and deliver to each plaintiff ten coin-operated vending machines designed to sell accident insurance policies to the public; that defendants had obtained leases on twenty locations for the machines and would assign and deliver ten of said leases to Mrs. Rivett and ten to Mrs. Tilton; that the Insurance Corporation of Ireland, Ltd., had contracted with defendants to issue accident insurance policies to be sold to the public through the machines; that said corporation had been approved by the Insurance Commissioner to do business in California; that the policies would be written by Earl C. Nelson, Inc., a licensed insurance broker; and that defendants would put the machines in the lease locations and in operating order within a week or ten days after the purchase thereof by plaintiffs. It was also alleged that the said representations were made in order to induce plaintiffs to purchase ten vending machines; that in reliance upon the representations each plaintiff executed a written contract for the purchase of ten machines for a price of \$2,500 plus tax; that \$2,587 was paid to defendants by Mrs. Rivett and \$2,575 by Mrs. Tilton. It was further alleged that the representations were false and were known by defendants to be false; defendants had none of the machines in their possession and could not and did not intend to

deliver them to plaintiffs; defendants had not obtained lease locations for the machines; the Insurance Corporation of Ireland, Ltd., had not contracted with defendants to issue the policies and had not been approved by the Insurance Commissioner to do business in California; and defendant Earl C. Nelson, Inc. was unable to write the policies and had no intention of doing so.

In their third cause of action, plaintiffs alleged the making of other false representations by defendants, to-wit, that each machine would sell a minimum of one accident policy per day and would average a minimum profit of \$90 per year. The fourth cause of action alleged that on or about October 15, 1953, upon discovery of the falsity of defendants' representations, plaintiffs rescinded their contracts and demanded restoration of the purchase price of the machines, but that defendants have failed and refused to comply with their demand. The fifth cause of action alleged that defendants breached the written contracts of purchase by failing to perform any of their promises and undertakings thereunder. In the sixth cause of action, plaintiffs alleged that defendants breached a written warranty dated August 15, 1953. The answers denied the material allegations of the complaint.

The following is the substance of the opening statement made by plaintiffs' counsel. On being questioned by defendants' attorneys, he conceded that it was a full and complete statement of all the facts he expected to prove upon the trial.

Mrs. Rivett and Mrs. Tilton are widows. In the summer of 1953 they were approached by Sol and Herbert Oppenheim, who are father and son. The Oppenheims disclosed to plaintiffs "a wonderful project which is going to make money for them." Plaintiffs were each to purchase ten coin-operated vending machines which would be used to sell policies of automobile travel insurance. The policies dispensed by the machines would be in the amount of \$5,000 and would remain in force for one week at a cost of \$1 to the policyholder; each

policyholder could purchase a second \$5,000 policy for an additional \$1. The ten machines would cost \$2,500. The Oppenheims showed plaintiffs a printed profit breakdown sheet which indicated that ten machines would gross \$350 per week, less \$35 to the owner of the lease locations and \$227.50 as the cost of the policies, leaving a weekly net profit of \$87.50 on ten machines. The Oppenheims told plaintiffs that Earl C. Nelson, Inc. would prepare the policies, which were to be issued by the Insurance Corporation of Ireland, Ltd. The Oppenheims promised to furnish lease locations for the machines. On or about August 28, 1953, Mrs. Rivett and Mrs. Tilton each purchased ten machines from the Continental Service Corporation, which was controlled by the Oppenheims.

A. W. McCready, Jr., was the president of Continental Service Corporation. He was present during conversations between the Oppenheims and plaintiffs in which the Oppenheims made some of the representations alleged in the complaint to be fraudulent; McCready knew the representations were false yet remained silent. August 15, 1953, McCready wrote a letter to each of the plaintiffs in which he said: "We guarantee that at the end of one year's period from the placement of the ten (10) machines that you have purchased, that these machines will have sold a minimum of 3,650 insurance policies. If they do not do so, we will return the \$2,500 you have expended for these machines. Very truly yours, Continental Service Corporation, A. W. McCready, Jr., President." August 27th, McCready wrote another letter to each of the plaintiffs in which he said: "May we take this opportunity to commend you on your fine judgment of a business opportunity and assure you that the returns will more than justify your expectations * * *. You have placed your feet upon the road that will inevitably lead to financial security."

Swett & Crawford prepared sample policy contracts and its employes negotiated with the Insurance Commissioner in an unsuccessful effort to obtain permission for

the Insurance Corporation of Ireland, Ltd. to do business in California. On the side of one of the vending machines which the Oppenheims exhibited to plaintiffs appeared a list of thirteen addresses and telephone numbers in various cities in California and Oregon; the addresses were of offices maintained by Swett & Crawford in those cities. The addresses and phone numbers were given to the Oppenheims by Swett & Crawford. July 28, 1953, a Swett & Crawford employe, one Mr. Vogler, wrote a letter to Earl C. Nelson, Jr. in which he stated: "This will serve to confirm our several discussions regarding the captioned. We can assure your office, the owners and purveyors of the dispensers used for the sale of Travel Accident insurance of a policy in a reputable insurance market. We look to you for the payment of premiums earned under policies dispensed through these machines. Needless to say we are extremely interested with the plans of distributing the popular travel accident policy. If we can be of any service to you, Continental Service Corporation or their distributors, please do not hesitate to call upon us." Swett & Crawford and Nelson allowed the Oppenheims to show the letter to plaintiffs.

Earl C. Nelson, Inc. maintained offices in the same Los Angeles office building as Swett & Crawford. It had the same telephone number as Swett & Crawford and its telephones operated through the same switchboard. In September or October 1953, an attorney for Continental Service Corporation told Mrs. Rivett that Continental "couldn't go any further with this project because Earl Nelson had failed to get the insurance policy which he had promised to do." Mrs. Rivett then went to see Mr. Nelson. On the floor in one corner of Nelson's office was one of the vending machines; Nelson had some sample policies on his desk. In the words of plaintiffs' counsel, Nelson said "he was working with Swett and Crawford and with the Oppenheims on this project and he assured her he was still going to get this policy." Nelson told her "he could get it. And he told

her this was a good project, that he only wished he had the time, he would buy twenty of those machines himself and make the same profit that had been guaranteed to Mrs. Rivett. And he told her that she should be patient that this policy would be forthcoming and everything would turn out all right. And then Mrs. Rivett told Mr. Nelson that she hadn't even gotten the machines yet and Mr. Nelson told her: 'Well, you will be getting them, don't worry about it.' So that Mr. Nelson was speaking for the Continental Service Corporation, Oppenheims, as well as for Swett and Crawford."

At the conclusion of the foregoing opening statement, plaintiffs' attorney told the jury: "Well, that about sums up what we will present here in court but I want to repeat, I think I have already mentioned Mrs. Tilton and Mrs. Rivett relied on each of these names and on the statements each of these people made, whether it was in writing, through letters or whether it was oral as the Oppenheims presented it to them and if it were not for these names, Mrs. Tilton and Mrs. Rivett will both testify to this effect, if it were not for these names and the good reputation of these firms here, Mrs. Tilton and Mrs. Rivett wouldn't have parted with their money because just the Oppenheims alone wouldn't have been sufficient to induce them."

[1] In deciding a motion for nonsuit based upon an opening statement, every fact which counsel has stated as among the matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted by the court as facts which would be proved if the case were tried. *Moffitt v. Ford Motor Co.*, 117 Cal.App. 247, 251, 3 P.2d 605. If those facts entitle the plaintiff to some relief, and there is no admission that matters set up by way of defense are true, it is error to order the nonsuit. (16 Cal.Jur.2d 207.) In our opinion, the nonsuits as to Earl C. Nelson, Inc. and Mr. Nelson were proper, but we are of the view that the court erred in ordering nonsuits as to Mr. McCready and Swett & Crawford.

[2] With respect to McCready, plaintiffs alleged in their second and third causes of action that he was guilty of fraud, and the facts which counsel stated he expected to prove and the reasonable inferences would have supported a verdict in favor of plaintiff upon those counts. McCready was the president of Continental Service Corporation. He was appointed to that position by the Oppenheims, presumably in furtherance of their promotional scheme. Since plaintiffs purchased the vending machines from Continental, it was a reasonable assumption that the corporation was to deliver the machines and to arrange for the assignment of the lease locations to plaintiffs. If such was the case, it was also a reasonable assumption that McCready knew that Continental was not in a position to deliver the machines or to obtain the lease locations or that he was not justified by the information he possessed in causing or permitting plaintiffs to believe and rely upon the representations. McCready was present during conversations between plaintiffs and the Oppenheims; he heard the representations made by the Oppenheims at those times as an inducement to plaintiffs to purchase the machines. Counsel did not disclose in his opening statement what representations were made to plaintiffs in McCready's presence, but we must presume that upon the trial Mrs. Rivett or Mrs. Tilton would have testified to the details of the conversations and that they related to the representations alleged.

If false and fraudulent statements were made to plaintiffs while McCready was present, it was a permissible, although not necessary inference from McCready's familiarity with the Oppenheims' promotional scheme that he knew or should have known the statements to be false and that the Oppenheims were endeavoring to deceive Mrs. Rivett and Mrs. Tilton. Silence, under the circumstances, was tantamount to a positive assertion that the statements of the Oppenheims were true. We cannot say as a matter of law that the jury could not reasonably have concluded that McCready

was a knowing participant in the fraud committed by the Oppenheims.

[3] However, the facts outlined in the opening statement were wholly insufficient to establish a cause of action against Mr. Nelson or Earl C. Nelson, Inc. It was not asserted by counsel that they received any of the proceeds from the sale of the machines, that they made any false statements to plaintiffs, or that they authorized or had knowledge of any misrepresentations made by the Oppenheims.

Plaintiffs' entire argument is that the facts were sufficient to establish a joint venture for the sale and promotion of the machines and the sale of accident insurance policies through the machines, that plaintiffs entered into the transaction with Continental Service in reliance upon the existence of a joint venture, and that the Nelsons should be estopped to deny that a joint venture existed. The argument is without merit.

[4-7] A joint venture is an undertaking by two or more persons jointly to carry out a single business enterprise for profit. *Nelson v. Abraham*, 29 Cal.2d 745, 177 P.2d 931. There must be a community of interest in the enterprise; a sharing of profits and losses; and some joint participation in the conduct of the business. (28 Cal.Jur.2d 478-480.) The existence of a joint venture is ordinarily shown by evidence of an express agreement or by evidence of the acts and conduct of the members thereof. A joint venture may also be created by estoppel. One who consents to being represented by another as a joint adventurer may be estopped to deny that he is a joint adventurer as to third persons who enter into a transaction in reliance upon an ostensible agency (*Hansen v. Burford*, 212 Cal. 100, 297 P. 908; *Foster v. Fisher*, 44 Cal.App.2d 33, 111 P.2d 935), and who have dealt with the ostensible agent as an agent of the purported joint venture, not as a principal. *Luft v. Arakelian*, 33 Cal.App. 463, 466, 165 P. 712.

[8,9] However, the facts which plaintiffs expected to prove point irresistibly to

the conclusion that they did not deal with the Oppenheims, with McCready and with the corporation in reliance upon the Nelsons' participation in a supposed joint venture. Plaintiffs' negotiations were exclusively with the former and their contract was with the corporation. Although the Oppenheims told plaintiffs that they were working on the project with Nelson, that statement would not establish them as the agents of the Nelsons, either actual or ostensible, for the reason that an ostensible agency is created by the representations of the principal, not by those of the purported agent. *Boren v. State Personnel Board*, 37 Cal.2d 634, 643, 234 P.2d 981, and cases cited.

No facts were stated in the opening statement to the effect that the Nelson defendants did or said anything which would render them responsible for the representations made by the Oppenheims. No error was committed in granting the motions for nonsuit of Earl C. Nelson and Earl C. Nelson, Inc.

[10] Our conclusion is different with respect to the corporation Swett & Crawford. The ultimate question for the trial court with respect to the responsibility of that defendant was whether the evidence which plaintiffs intended to introduce would have warranted a jury in concluding that Swett & Crawford intentionally or by want of ordinary care caused plaintiffs to believe that the Oppenheims were speaking for Swett & Crawford, as well as for themselves, in representing to prospective purchasers that policies of insurance would be available for sale through the machines.

If the jury could properly have given an affirmative answer to this question, based upon the evidence plaintiffs proposed to introduce, as related in the opening statement, it was error to grant a nonsuit as to Swett & Crawford. If the jury would have believed that the purpose of Vogler's letter was to encourage and aid in the sale of the machines by the Oppenheims and that the statements in the letter were to be used by the Oppenheims in their representations to prospective purchasers, a reasonable con-

clusion would have been that Swett & Crawford constituted the Oppenheims its agents for the purpose of making that representation. Even if the Oppenheims were not expressly authorized to make the representation on behalf of Swett & Crawford there would have been equal responsibility if plaintiffs could reasonably have believed that such was the purpose of Swett & Crawford. In other words, it would be immaterial whether the agency was actual or ostensible, and we do not doubt that the circumstances, sought to be proved, were such as to have warranted the plaintiffs in believing that the representation was made by Oppenheims on behalf of Swett & Crawford as well as on their own behalf. The law of ostensible agency is stated in Sections 2300, 2315, 2317 and 2334 of the Civil Code. It was purely a factual question whether such a belief assertedly engendered in the minds of plaintiffs was intentional upon the part of Swett & Crawford or merely the result of want of ordinary care. On this point we need only refer to *House Grain Co. v. Finerman & Sons*, 116 Cal. App.2d 485, 491, 253 P.2d 1034, for a pertinent application of the code sections.

[11] The facts sought to be proved would not have established a partnership or a true joint venture, but that was not the question. Plaintiffs proposed to prove that Swett & Crawford and the Oppenheims were engaged in a common enterprise. The Oppenheims were selling the machines; Swett & Crawford was to furnish the policies without which the machines would have been worthless and could not have been sold. The scheme was indivisible. The machines could not have been sold without positive assurance that policies would be provided. It was only through the sale of policies that purchasers of the machines could have recouped their investments and made any profit. We do not doubt that a jury would have concluded that the principal inducement to the plaintiffs in making their investments was that policies would be furnished by Swett & Crawford for sale through the machines. We must assume that all the evidence that

was favorable to the plaintiffs and encompassed within the opening statement of counsel would have been produced. This would include testimony by the plaintiffs that they relied upon the representation that Swett & Crawford would provide the policies and that but for this belief and reliance they would not have purchased the machines.

[12] Although the complaint accused Swett & Crawford of fraud counsel did not in the opening statement make that accusation. But fraud was not an element of the responsibility of Swett & Crawford, which was to be determined solely under the theory of ostensible agency. If plaintiffs were misled by the assertions made in Vogler's letter into a belief that the Oppenheims were speaking as the agents of Swett & Crawford, good faith on the part of the latter would not relieve it of responsibility. If there was negligence in the issuance of Vogler's letter any claim on the part of Swett & Crawford that the letter only expressed an opinion or belief would be untenable if plaintiffs understood the statement to be of a fact, that is to say, if they understood that Swett & Crawford knew policies would be available. Swett & Crawford had superior knowledge; plaintiffs were two widows seeking a safe investment of money that had come to them upon the death of their husbands. They had no knowledge of the facts with respect to the availability of policies and could have been expected to have none. They had to rely upon the representations that were made to them and the fact that they made the investments would be persuasive evidence that they did rely upon the representations. We cannot give serious consideration to the contention of Swett & Crawford that plaintiffs exhibited a want of ordinary care in failing to make an investigation as to the truth of the representations that were made to them. They were not required to make an investigation as to the truth of the statement that Insurance Corporation of Ireland, Ltd., had contracted with Swett & Crawford to provide the accident policies nor were they required to make an investi-

gation in order to ascertain whether the insurance corporation was licensed to do business in California. (23 Cal.Jur.2d p. 84.) We conclude that the court was clearly in error in granting the motion of Swett & Crawford for judgment of nonsuit.

The judgment is affirmed in so far as it is in favor of Earl C. Nelson and Earl C. Nelson, Inc., and is reversed in so far as it is in favor of A. W. McCreedy, Jr. and Swett & Crawford; the respective parties to bear their own costs of appeal.

PARKER WOOD and VALLÉE, JJ.,
concur.



158 Cal.App.2d 367

In the Matter of the ESTATE of Clyde Eldon WEAVER, also known as C. E. Weaver, Deceased.

Dorothy M. Talbot, Administratrix of the Estate of Clyde Eldon Weaver, also known as C. E. Weaver, Deceased, Petitioner and Respondent,

Louis E. Wetzol, Assignee of the Heirs of Clyde Eldon Weaver, Contestant and Appellant.
Civ. 9187.

District Court of Appeal, Third District,
California.

March 12, 1958.

Rehearing Denied April 9, 1958.

Hearing Denied May 7, 1958.

Estate proceedings. The administratrix petitioned for confirmation of sale of realty. The Superior Court, Sacramento County, Malcolm C. Glenn, J., entered order confirming the sale, and the contestant appealed. The District Court of Appeal, Peek, J., held that where the only possible reason for sale of estate realty was to pay expenses of administration, and where that necessity had been removed by tender of a cashier's check by counsel and a bona fide offer to pay whatever additional expenses the court might find, then any reason for the

sale had been completely removed, and hence it was error for the probate court to confirm the sale.

Order reversed, and cause remanded with instructions.

1. Executors and Administrators ⇨336, 343

An averment by representative of estate as to necessity of a sale is not alone sufficient; and it is not a matter for him alone to determine but is a conclusion which the court must draw from the facts. West's Ann.Prob.Code, §§ 754, 785.

2. Executors and Administrators ⇨343

Under statutes relating to sale of property of estate, estate representative has burden of proving that sale is necessary to satisfy obligations of estate or that sale is necessary for best interests of estate. West's Ann.Prob.Code, §§ 754, 785.

3. Executors and Administrators ⇨358(4)

An order confirming sale of real property of estate should be affirmed on appeal if there is any substantial evidence to support it. West's Ann.Prob.Code, §§ 754, 785.

4. Executors and Administrators ⇨343

The determination of the sufficiency of the evidence to show that sale of estate property is necessary to satisfy obligations of estate or that sale is for best interests of estate rests in the sound discretion of the probate court. West's Ann.Prob.Code, §§ 754, 785.

5. Executors and Administrators ⇨321

Where the only possible reason for sale of estate realty was to pay expenses of administration, and where that necessity had been removed by tender of a cashier's check by counsel and a bona fide offer to pay whatever additional expenses the court might find, then any reason for the sale has been completely removed, and hence it was error for the probate court to confirm the sale. West's Ann.Prob.Code, §§ 754, 785.

MacBride & Gray, Hugh A. Evans,
Sacramento, for appellant.

Irving D. Gibson, Sacramento, for respondent.

PEEK, Justice.

This is an appeal from an order confirming sale of real property by the administratrix of the above-entitled estate.

The appellant, who is the assignee and transferee of the heirs of the deceased, objected to the sale on the ground that it was unnecessary since he was ready, willing and able to pay the expenses of administration. However the court confirmed the sale, and this appeal followed.

The overly long and contentious history of this case begins with the death in 1938 of James Wesley Weaver, leaving as his sole heir his son, Clyde Eldon Weaver. The latter died the following year, and prior to probate of his father's estate. The sole asset in each estate consists of a small acreage in Sacramento County. At the time of Clyde Eldon's death he was a resident of Winslow, Arizona. His heirs are his wife, Mildred, and three children—Virginia, Norma and James Eldon, all adults. In June of 1948 James Eldon, on behalf of himself and the remaining heirs of James Wesley and Clyde Eldon, for valuable consideration, executed and delivered to Louis E. Wetzal, also a resident of Winslow and the appellant herein, a quitclaim deed to the real property in question. Thereafter, on September 3, 1949, all of the heirs joined in the execution of a warranty deed covering the same property and delivered it to appellant who recorded the same on May 7, 1951. On January 7, 1949, Dorothy M. Talbot, a stranger, neither an heir nor a creditor of the decedent, filed a petition for letters of administration in the estate of Clyde Eldon, being case number 30600 in the Sacramento County Superior Court. Although her petition was filed in January of 1949, letters were not issued until June 17, 1954. It would appear that a like petition was contemporaneously filed in the estate of James Wesley since it bears number 30599. On February 25, 1954, and prior to the issuance of letters of administration, a request for special notice

was filed by appellant through his attorneys. On April 12, 1956, the administratrix petitioned for confirmation of sale of real property giving notice to appellant as requested. Thereafter on April 24 appellant filed his opposition thereto. It appears that in the probate of the estate of James Wesley an identical situation developed. In that proceeding the late Grover W. Bedeau, then Judge of the Superior Court of Sacramento County, upon the hearing of the petition denied confirmation thereof, and in his order noted that Wetzal, through his attorneys, had agreed in open court to pay all " * * * proper expenses of administration of said estate [number 30599] and the Estate of Clyde Eldon Weaver, Action No. 30600 [the present proceeding], as determined by the Court not heretofore paid, and after examining the return and hearing the evidence the Court finds that said sale is not necessary to pay the expenses of said administration." Disregarding the conclusion of the court in the James Wesley estate, the administratrix and her attorney again sought to sell the property for the same reason that it " * * * is and was necessary in order to secure funds with which to pay the expenses of administration * * * " Opposition to confirmation of the proposed sale was again filed by appellant and upon the same grounds as in the previous proceeding. Thereafter a hearing was held on May 8, 1956, at which appellant's attorneys offered in evidence the entire file of the James Wesley estate and affidavits by each of the heirs of the deceased identical to those offered in that proceeding which in substance alleged that the affiants as the surviving spouse and children respectively of the deceased were his sole heirs and as such had executed a warranty deed to the real property in favor of appellant; that said deeds which were also introduced in evidence were then a matter of record; and that the affiants waived any right, title or interest in and to said real property. During the course of the hearing the court reviewed the history of the litigation and stated that at one time, when inquiry was

made of the administratrix and her counsel as to why they were so persistent in their attempts to sell the property, attorney Gibson answered that, "Well, among other things he wanted a bigger fee."

At the conclusion of that hearing the court stated that the sale would not be confirmed and directed counsel for appellant and for the administratrix to join with the court and determine the cost of administration, and that appellant through his attorney would then deposit with the administratrix the amount as found by all of the parties. For the purpose of computing the cost, the hearing was continued to May 15, 1956. At the continued hearing counsel for appellant appeared, but there was no appearance for the administratrix, and the matter was again continued to June 8, 1956. Again there was no appearance by counsel for the administratrix and the court continued the matter for a third time to June 29, 1956. At the fourth and final hearing, counsel for the administratrix did appear. A cashier's check in the sum of \$250 was tendered to him on account of the costs of administration, but he refused to accept the same.

At the hearing the court expressed a desire to personally view the premises in order to determine the true value of the property and stated that its previous "order" would be reversed and that the sale would be confirmed following inspection of the property.

Thereafter findings were made and entered by the court, the pertinent portions of which are as follows: that "a sale of said real property is and was necessary in order to secure funds with which to pay the expenses of administration of the estate of said decedent"; and that "* * * there is no personal property and no funds from which to pay or defray the expenses of administration of said estate, and therefore good reason existed for said sale when it was made by said administratrix and now exists." Lastly the court, in finding IX, stated:

"All of the foregoing recitals are true, but subject to this explanation: (a) The

property consists of some acreage some miles from the City of Sacramento, the title to which stood in the father of the decedent herein. After the father's death the title passed to the above-named decedent, his son. It became necessary to administer first the father's estate and then the son's. The administratrix is a stranger, being neither a creditor nor an heir of decedent. (b) There was a persistent effort on the part of the administratrix and her attorney in the father's estate to sell the property, although certain interested parties have been trying to save the property for the assignee of the family of decedent. Said administratrix and her attorney finally did accept an amount of money agreed upon as necessary to pay the expenses of administration of the father's estate. The same procedure has been taking place in the son's estate; however, the administratrix and her attorney finally succeeded in advertising the property for sale and bringing the present return of sale before this Court for confirmation before any money with which to pay the expenses of administration was actually paid over to the administratrix or her attorney, and, while there was at all times a genuine offer by a party interested in the property, to pay all legitimate expenses of administration the administratrix and her attorney cannot be held to have agreed thereto. (c) As a last resort, and to enable the Court to determine whether the amount bid herein represented the value of the property, the Court suggested that another appraiser be appointed to permit the Court to determine if the amount so bid was disproportionate to the value thereof as now appraised. None such appeared.

"For the foregoing reasons, the Court has been forced to confirm the sale.

"(d) The Court has not passed upon the necessary expenses of sale as claimed by the administratrix, except the usual ones of advertising, Clerk's costs, etc. Other items will be disposed of later when brought before the Court."

Appellant's contention on appeal is essentially that the record is insufficient to support the conclusion of the trial court that the sale by the administratrix was necessary. Probate Code, section 754, provides in part that,

"* * * When a sale of property of the estate is necessary for any such purpose [to pay debts, legacies, family allowance or expenses], or when it is for the advantage, benefit, and best interests of the estate and those interested therein that any property of the estate be sold, the executor or administrator may sell the same, either at public auction or private sale, * * *"

It is further provided in Probate Code, section 785, that:

"Upon the hearing the court must examine into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and must examine the return and witnesses in relation to the sale; * * *"

It follows from the applicable code sections that in order to sell real property of an estate it first must be shown that such sale is necessary to satisfy obligations of the estate or is for the best interests of the estate and those interested therein, and second that upon a hearing for such purpose the court must examine into the necessity therefor or the advantage thereof.

Under the circumstances disclosed by the record, the only alleged purpose to be achieved by selling the property was to pay the costs of administration. But, as Judge Bedeau noted in the proceeding in James Wesley's estate, a sale was unnecessary by reason of the offer of appellant through his attorneys to pay such expenses. Certainly the record herein shows no greater reason for the sale than did the record in the companion case. Nor does the "explanation" set forth by the court in its findings support the conclusion that for the reasons stated it was "forced to confirm the sale."

We must assume that pursuant to Judge Bedeau's order the appellant paid the

expenses in James Wesley's estate and also pursuant to that order had every reason to assume that if and when the expenses in Clyde Eldon's estate were determined, he would be given the opportunity to do likewise.

[1,2] It has long been the rule that an averment by the representative of the estate to the necessity of a sale is not alone sufficient. *Haynes v. Meeks*, 20 Cal. 288. It is not a matter for him alone to determine but is a conclusion which the court must draw from the facts. *Pryor v. Downey*, 50 Cal. 388. Furthermore, unless the representative can bring himself within the mandatory provisions of the applicable section, the duty so cast upon him has not been sustained. Thus where the petition alleged that a sale was necessary in order to liquidate an estate for distribution, the court held that it was not a ground for sale under section 754, and that although the probate court found that it was to the advantage of the estate to sell the property, the reviewing court held that such finding was not supported by the evidence when the only reason shown was to distribute the estate in cash. *In re Estate of Canfield*, 107 Cal.App.2d 682, 238 P.2d 67. Hence it would appear that where, as here, the record shows that a cashier's check was tendered by appellant's counsel and refused by counsel for the administratrix, which check was in substantially the amount of the ordinary expenses of probate, except the extraordinary fees requested by the administratrix and her attorney, the quoted findings of the court herein are likewise without support in the evidence.

[3-5] While it is the rule that an order confirming the sale of real property should be affirmed on appeal if there is any substantial evidence to support it (*In re Estate of Da Roza*, 82 Cal.App.2d 550, 186 P.2d 725), and that the determination of the sufficiency thereof lies in the sound discretion of the probate court (*In re Estate of Kay*, 30 Cal.2d 215, 181 P.2d 1), nevertheless, where, as in the present case, the only possible reason for the sale is to pay

the expenses of administration, and where that necessity has been removed by tender of a cashier's check by counsel and a bona fide offer to pay whatever additional expense the court may find, then any reason for the sale has been completely removed, and hence it was error to confirm the sale. *In re Estate of Rawitzer*, 175 Cal. 585, 166 P. 581.

The order is reversed, and the cause is remanded with instructions to the probate court to enter a new and different order in accordance with the views herein expressed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



158 Cal.App.2d 511

Kira MISHKIN, Plaintiff and Appellant,
v.

Romano Bruno SANVIDOTTI and Mrs. Romano Bruno Sanvidotti, Defendants and Respondents.
Civ. 17348.

District Court of Appeal, First District,
Division 1, California.
March 19, 1958.

Pedestrian brought action against motorist for injuries sustained by pedestrian when she ran into side of automobile or was hit by automobile while she was attempting to cross street at place other than crosswalk. The Superior Court, San Mateo County, Murray Draper, J., entered judgment in favor of the motorist, and the pedestrian appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained the verdict, and that evidence was insufficient to justify giving of pedestrian's requested instruction that where pedestrian, though not previously within unmarked crosswalk, is struck by vehicle while it is passing through it, if

pedestrian is not more than one or two feet outside of limits of crosswalk, same rules are applicable as if accident occurred within crosswalk.

Judgment affirmed.

1. Automobiles ⇨244(59)

In action by pedestrian against motorist for injuries sustained by pedestrian when she ran into side of automobile or was hit by automobile while she was attempting to cross street at place other than crosswalk, evidence sustained implied finding that after motorist saw pedestrian's perilous position, he had no reasonable opportunity to avoid the accident.

2. Automobiles ⇨245(6)

In action by pedestrian against motorist for injuries sustained by pedestrian when she ran into side of automobile or was hit by automobile while she was attempting to cross street at place other than crosswalk, it was jury's function to weigh evidence and to determine what effect, if any, should be given to inaccurate estimates by witnesses of distance.

3. Automobiles ⇨244(6)

In action by pedestrian against motorist for injuries sustained by pedestrian when she ran into side of automobile or was hit by automobile while she was attempting to cross street at place other than crosswalk, evidence was sufficient to sustain verdict for motorist.

4. Automobiles ⇨246(50)

Where there is testimony that pedestrian, who was struck by automobile, was injured within short distance of unmarked crosswalk, instruction that where pedestrian, though not previously within unmarked crosswalk, is struck by vehicle while it is passing through it, if pedestrian is not more than one or two feet outside limits of crosswalk, same rules are applicable as if accident occurred within crosswalk, is proper.

5. Automobiles ⇨242(1)

In action by pedestrian against motorist for injuries sustained by pedestrian

when she ran into side of automobile or was hit by automobile while she was attempting to cross street at place other than crosswalk, burden was on pedestrian to introduce evidence which would justify giving of instruction that where pedestrian, though not previously within unmarked crosswalk, is struck by vehicle while it is passing through it, if pedestrian is not more than one or two feet outside limits of crosswalk, same rules are applicable as if accident had occurred within crosswalk.

6. Automobiles ⚡246(50)

In action by pedestrian against motorist for injuries sustained by pedestrian when she ran into side of automobile or was hit by automobile while she was attempting to cross street at place other than crosswalk, evidence was insufficient to justify giving of requested instruction of pedestrian that where pedestrian, though not previously within unmarked crosswalk, is struck by vehicle while it is passing through it, if pedestrian is not more than one or two feet outside of limits of crosswalk, same rules are applicable as if accident had occurred within crosswalk. West's Ann.Vehicle Code, §§ 560, 562.

Dennis L. Woodman, Redwood City, for appellant.

Ropers & Majeski, Redwood City, for respondents.

PETERS, Presiding Justice.

Plaintiff, a pedestrian, was hit by, or ran into, a car driven by the defendant Romano Sanvidotti. The jury brought in a defendant's verdict. The plaintiff appeals from the judgment entered on that verdict. She challenges the sufficiency of the evidence, and contends that the trial court committed reversible error when it refused to give a proffered instruction. Both contentions lack merit.

The case is a typical fact case in which the evidence, as to causation, was sharply conflicting. Plaintiff, on January 21, 1951, the date of the accident, was employed at

the Casa Mateo Inn, which is located in San Mateo on the east side of Bayshore Highway, and south of the intersection of Bayshore and Indian Avenue. Indian Avenue runs into Bayshore but does not cross it. Bayshore, at the time of the accident, had two marked northbound and two marked southbound lanes. Plaintiff left her place of employment on the day in question, in the company of Anna Droz, another Inn employee. It was their custom to take a northbound bus to their homes in San Francisco. This bus ran infrequently, and, if they missed it, they would cross the highway and walk over to nearby Poplar Street and catch a bus there.

On this particular day they apparently missed the bus on Bayshore. Plaintiff testified that, after waiting a substantial period, she decided to cross the highway from east to west in order to catch the Poplar Street bus. It was now raining, and, while crossing Bayshore, plaintiff carried a newspaper in her right hand and held it over her head. She testified that she crossed the northbound lanes, looking to her left. When she reached the double dividing line she stopped because a southbound car, with its lights on, was approaching from the north. That car stopped to allow her to pass. It was in the fast lane. Plaintiff said that she then crossed the two southbound lanes, keeping a lookout to her right for southbound traffic. She testified that while crossing the southbound lanes she noticed a broken bottle on the shoulder of the highway, and was somewhat fearful of falling down. She did not run, but walked across the two southbound lanes. She had completely crossed those two lanes and had reached the west shoulder of the highway and was just taking a step off the shoulder when she was hit in the back by the car driven by Romano Sanvidotti.

This story was contradicted, in its most important details, by Romano and his witnesses. Romano testified that on the day in question, accompanied by his wife and their three children and by his mother-in-law, he left his home in San Bruno and

was driving south on Bayshore, in his right, or the slow lane, at about 40 miles per hour. At about Millbrae it started to rain. He did not have his headlights on, nor did any other vehicle on the highway, because it was light and the visibility was good. He was looking straight ahead. He first saw the plaintiff when she was seven or eight feet to his left in the fast southbound lane, and when his car was six to eight feet from the point of contact. She was running fast, was shielding her head with some object, and was looking straight ahead and down. She ran into the side of his car. He did not sound his horn, put on his brakes, or swerve because he did not have time to do so, the impact occurring a split second after he first saw the plaintiff.

Mrs. Sanvidotti, in general, corroborated her husband in all essential particulars. Another witness, who was following Romano at a distance of about a hundred feet, testified that as plaintiff approached the center line of the highway he saw her running with a newspaper over her head. She ran across the southbound lanes and at no time looked to her right, looking at all times to the south, or in the wrong direction to observe oncoming traffic coming from the north. She ran into the side of Romano's left front fender, and this occurred in the slow lane of traffic. This witness did not have his headlights on and no other car that he observed had its lights lit.

A police officer, who investigated the accident shortly after it occurred, found the plaintiff lying on Bayshore about 75 feet south of the south curbline of Indian Avenue, with her head lying about on the center line of Bayshore. It was daylight, it was raining, and visibility was pretty good. The physical evidence indicated that plaintiff was hit with the left front of Romano's car.

No witness testified as to the precise point of impact. The investigating officer testified that Mrs. Droz had fixed the point of impact 75 feet south of the intersection of Bayshore with Indian Avenue. The other

witnesses, in very general terms, fixed the point of impact substantially south of that intersection.

Appellant's attack on the sufficiency of the evidence is based on the contention that Romano's evidence, which obviously supports an implied finding that she was contributively negligent, is so inherently impossible that it cannot support the verdict. This contention is predicated on the argument that because Romano testified that when he first saw appellant she was about the same distance from him that he traveled before he hit her, which would be a physical impossibility, all of his evidence should be disbelieved. Appellant contends, with some logic, that it is impossible for a woman, even if she is running, to cover the same distance in the same interval of time as an automobile traveling at least 40 miles per hour. But this inconsistency is not fatal. Obviously, Romano was inaccurate in one or both of his estimates. Either appellant was closer to the point of impact than Romano estimated, or Romano was farther away. But this inconsistency was apparent. It was apparent that the distances testified to were mere estimates. There is other substantial evidence in the record. The evidence of the witness who was following Romano's car, and of Romano, shows that appellant was running across a busy highway, shielding herself in the rain and not looking in the direction from which traffic could be anticipated. All of the testimony, with the exception of that of appellant, is to the effect that none of the cars on Bayshore had its lights on. No one, except appellant, testified about a car in the fast lane with its lights on stopping for her to pass. All of the other witnesses agree that appellant was running across the highway. All of the witnesses, except appellant agree that she ran into the left front side of Romano's car while he was traveling in the slow lane. Appellant's story that she was on the shoulder of the highway when hit is contradicted by the other witnesses and by the physical facts.

[1] On this evidence the jury could have found either that Romano was not negli-

gent, or that, if he was, appellant was contributively negligent. The jury was fully and correctly instructed on these issues, and also fully instructed on the doctrine of last clear chance. The evidence supports the implied finding that, after Romano saw appellant in her perilous position, he had no reasonable opportunity to avoid the accident.

[2, 3] Attacks on estimates of distance, or time intervals, are common. Inaccuracies in these respects are frequent. It has frequently been held that such obvious inaccuracies do not render the entire testimony of a witness inherently improbable. The jury can add and subtract. They saw and heard the witnesses. It is their function to weigh the evidence, and to determine what effect, if any, should be given to such inaccurate estimates. *Cucuk v. Payne*, 140 Cal.App.2d 881, 296 P.2d 7. The evidence is substantial and convincing in support of the verdict.

The appellant requested the court to give, and it refused, the following instruction: "Where the pedestrian, though not previously within the crosswalk, is struck by the vehicle while it is passing through it, if the pedestrian is not more than one or two feet outside of the limits of the unmarked crosswalk the same rules are applicable as if the accident had occurred within the crosswalk."

[4, 5] Where there is testimony that the plaintiff was injured within a short distance of an unmarked crosswalk such an instruction is proper. *Karr v. Sherer*, 132 Cal. App.2d 835, 283 P.2d 376. But here appellant's counsel did not produce the indispensable evidence required before such an instruction is proper. The burden was, of course, on appellant. There was not one word of testimony that the accident happened within one or two feet of any unmarked crosswalk, or as to where the limits of such crosswalk were located, if one existed. The trial court instructed on Vehicle Code, sections 560 and 562 relating to the duties of automobile drivers towards pedestrians, and the rights and duties of

pedestrians crossing at intersections, or other than intersections. The subject of proximate cause was adequately covered in the instructions.

[6] Thus, the jury was adequately instructed on the issues involved. The refusal of the proposed instruction was proper under the evidence.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



158 Cal.App.2d 477

Grace H. PEER, Petitioner,

v.

The SUPERIOR COURT of the State of California In and for the COUNTY OF LOS ANGELES, Respondent.

Civ. 22789.

District Court of Appeal, Second District,
Division 2, California.

March 18, 1958.

Proceedings on petition for writ of review of an order of the Superior Court imposing upon petitioner a charge for a portion of the sanitarium care of her husband. The District Court of Appeal, Richards, J. pro tem., held that, by procuring interlocutory decree of divorce after dismissal of first proceeding, which resulted in her husband's commitment as a mentally disordered person, and filing of petition in subsequent proceeding, which also resulted in his commitment, wife absolved herself from liability for his maintenance, even though divorce decree did not become final until after second commitment.

So much of order as imposed charge upon petitioner for care of patient in sanitarium annulled.

1. Divorce ☞315

An interlocutory decree of divorce does not dissolve marriage or terminate relationship of husband and wife, but such decree does terminate obligation of support, in absence of provision therefor.

2. Divorce ☞200

In absence of property settlement agreement, any award of support to husband as against whom divorce decree was granted would have been in excess of jurisdiction of court and void.

3. Mental Health ☞74

Any liability of wife created by statute at time husband was first found mentally disordered terminated with dismissal of proceeding. West's Ann.Welfare & Inst. Code, §§ 5077, 6650; West's Ann.Civ.Code, §§ 155, 176.

4. Mental Health ☞74

By procuring interlocutory decree of divorce after dismissal of first proceeding resulting in husband's commitment as a mentally disordered person and filing of petition in subsequent proceeding which also resulted in his commitment, wife absolved herself from liability for his maintenance, even though divorce decree did not become final until after second commitment. West's Ann.Welfare & Inst.Code, §§ 5077, 6650; West's Ann.Civ.Code, §§ 155, 176.

Clyde A. Jones, Long Beach, for petitioner.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Asst. County Counsel, Los Angeles, and Richard L. Riemer, Deputy County Counsel, La Mirada, for respondent.

RICHARDS, Justice pro tem.

Petitioner seeks review and annulment of an order of the superior court imposing upon her a charge for a portion of the sanitarium care of her husband, George T. Peer, pursuant to the provisions of section 5077 of the Welfare and Institutions Code in connection with proceedings under said

code, committing him to a sanitarium as a mentally disordered person.

On September 19, 1955, pursuant to a petition filed under section 5047 of said code alleging petitioner's husband to be mentally ill, he was found under section 5076 to be mentally disordered and was committed to a sanitarium for care. He was returned to the court for re-evaluation on September 24, 1956, at which time the matter was dismissed by the court at the request of petitioner so that she could care for him under the supervision of her own physician. The reports of the counselor in mental health made to the court pursuant to section 5029 of said code, and a part of the record before us, show that on March 26, 1957, petitioner filed an action for divorce against Mr. Peer; that an interlocutory decree of divorce was granted to petitioner by default on May 31, 1957, and that there was no property settlement agreement of record in connection with the divorce proceeding. Thereafter a new petition under section 5047 was filed on July 15, 1957, and on August 8, 1957, Mr. Peer was again found to be mentally disordered and was committed to the care of the counselor in mental health to be placed in a sanitarium. Thereafter on August 15, 1957, a further hearing was had to determine the petitioner's liability for the cost of her husband's care, at which hearing petitioner was neither present nor represented by counsel, and following which hearing the court made its order under section 5077, determining that the cost for the care of the patient was \$120 per month, to be defrayed out of his estate at \$69.70 a month, and that the balance of \$50.30 a month be a charge upon the petitioner.

Welfare and Institutions Code, section 5076, provides in essence that if the court finds a person to be "mentally disordered and bordering on mental illness" it may "commit him to be placed in a suitable home, sanitarium, or rest haven home, subject to the supervision of the counselor in mental health and the further order of the court." The pertinent provision of section 5077 provides that "[t]he reasonable cost

of maintenance of a person committed under the provisions of Section 5076, in a sum to be fixed by the court at the time of the commitment, shall be defrayed out of the estate of the patient so committed or shall be a charge upon his relatives *liable for his maintenance.*" (Emphasis added.)

[1,2] The record here shows that prior to the filing of the petition on July 15, 1957, the petitioner had obtained an interlocutory decree of divorce. It is established that, whereas an interlocutory decree of divorce does not dissolve the marriage or terminate the relationship of husband and wife (In re Estate of Abila, 32 Cal.2d 559, 560, 197 P.2d 10; Deyoe v. Superior Court, 140 Cal. 476, 74 P. 28; Pereira v. Pereira, 156 Cal. 1, 10, 103 P. 488, 23 L.R.A.,N.S., 880; In re Estate of Dargie, 162 Cal. 51, 53, 121 P. 320), such decree does terminate the obligation of support in the absence of a provision therefor. In re Estate of Abila, supra, 32 Cal.2d at page 560, 197 P.2d 10; London G. & A. Co. v. Industrial Acc. Comm., 181 Cal. 460, 184 P. 864; McClure v. McClure, 4 Cal.2d 356, 359-360, 49 P.2d 584, 100 A.L.R. 1257. In the absence of a property settlement agreement, and the record herein discloses there was none, any award of support in the divorce proceeding to the husband as against whom the decree was granted would have been in excess of the jurisdiction of the court and void. Goldberg v. Goldberg, 144 Cal.App.2d 402, 404, 301 P.2d 5; McLaughlin v. Superior Court, 128 Cal.App.2d 62, 65, 274 P.2d 745. Therefore, it cannot be presumed that there was any provision in the interlocutory decree imposing an obligation on petitioner to support her husband and the record discloses no other evidence that the petitioner had assumed any liability for his support.

[3,4] Respondent contends that the petitioner's liability for maintenance of her husband commenced upon his prior commitment as a mentally disordered person and that such liability was not terminated by the divorce proceeding and relies upon Plath v. Industrial Acc. Comm., 109 Cal.

App. 349, 293 P. 89, in support of this contention. In Plath v. Industrial Acc. Comm. it appears that the wife deserted her husband and was thereafter adjudged insane and committed to a state hospital. Her husband was later killed in an industrial accident. It was contended on behalf of the wife that at the time of her husband's death he was legally liable for her maintenance as an insane person under the provisions of Political Code, section 2176, and that she was therefore conclusively presumed to be a dependent under section 14 of the Workmen's Compensation Act. Agreeing with the commission that under Civil Code, section 175, the husband was relieved of liability for his wife's support by reason of her desertion, the court held that Political Code, section 2176 did not impose a new liability upon the husband when his wife became insane and that said section imposed a liability "only in those cases in which liability existed in favor of the wife at the time she became insane" (109 Cal. App. at page 352, 293 P. at page 90). Welfare and Institutions Code, section 6650, is based on former Political Code, section 2176, above referred to and provides that "The * * * wife * * * of a mentally ill person * * * shall cause him to be properly and suitably cared for and maintained * * * The * * * wife * * * of a mentally ill person * * * shall be liable for his care, support, and maintenance in a state institution of which he is an inmate * * *" It is our conclusion that any liability of the petitioner created by said section 6650 at the time Mr. Peer was first found to be mentally disordered terminated with the dismissal of the previous proceeding on September 24, 1956, and that subsequent to that date any liability for his maintenance under Civil Code, sections 155 and 176, was, as we have previously stated, in the absence of an agreement to support her husband, terminated by the interlocutory decree of divorce on May 31, 1957.

It thus appears that the petitioner was not "liable for his maintenance" when the subsequent petition of mental illness was

filed July 15, 1957, or on August 8, 1957, when Mr. Peer was found to be mentally disordered or on August 15, 1957, when the challenged order was made under section 5077 imposing upon petitioner a charge for a portion of the sanitarium care of the patient.

So much of the order of August 15, 1957, as imposes a charge upon petitioner for the care of the patient in a sanitarium is annulled.

FOX, P. J., and ASHBURN, J., concur.



In the Matter of the ESTATE of Elsie M. ALLIE, Deceased.

Myrtle MARQUARDT and Stella Kranz,
Appellants,

v.

Mitchell S. CASH, Respondent.*

No. 17825.

District Court of Appeal, First District,
Division 1, California.

March 17, 1958.

Rehearing Denied April 16, 1958.

As Amended April 30, 1958.

Hearing Granted May 14, 1958.

Proceeding to determine whether heirs of husband or heir of wife were entitled to proceeds of National Service Life Insurance Policy on life of husband. The Superior Court, County of San Mateo, Murray Draper, J., rendered judgment for wife's heir, and husband's heirs appealed. The District Court of Appeal, Fred B. Wood, J., held that where husband's National Service Life Policy named wife as beneficiary, assets acquired by husband and wife during marriage were used for premium payments, and before proceeds of policy were paid to wife upon death of husband, wife died intestate, proceeds of policy were payable one-half to heir of wife and one-half to heirs of husband.

Reversed with directions.

* Opinion vacated 329 P.2d 903.

1. Husband and Wife ⇨249, 274(1)

Where a husband takes out a policy on his life in favor of his wife, and premium payments are made with community funds, proceeds of policy take on and retain community character given them by premium payments, whether viewed as coming to surviving spouse by devolution or by gift, and if wife dies before payment, proceeds are payable one-half to husband's heirs and one-half to wife's heirs.

2. Husband and Wife ⇨274(1)

Where husband's National Service Life Policy named wife as beneficiary, assets acquired by husband and wife during marriage were used for premium payments, and before proceeds of policy were paid to wife upon death of husband, wife died intestate, proceeds were payable one-half to heir of wife and one-half to heirs of husband. West's Ann.Prob.Code, §§ 225, 228; National Service Life Insurance Act of 1940, § 602 as amended 38 U.S.C.A. § 802; 38 U.S.C.A. § 454a.

Emmet B. Hayes, San Francisco, for appellants.

Cooper, White & Cooper, Sheldon G. Cooper, John E. Schaeffer, San Francisco, for respondent.

FRED B. WOOD, Justice.

March 18, 1956, Joseph Allie died intestate and without issue. Thereupon, \$5,000 became payable to his widow, Elsie Allie, as beneficiary under a National Service Life Insurance Policy which the United States government had issued upon his life in May of 1951.

April 25, 1956, Elsie died intestate and without issue. The proceeds of the life insurance policy had not yet been paid to her. They were later paid into her estate pursuant to a clause of the policy which declared that "if a beneficiary survives the Insured and is entitled to the proceeds of this policy in one sum, and dies before receiving payment, the proceeds of this policy will be payable to the estate of such beneficiary."

Question: Upon the death of Elsie did the proceeds of this policy go to her sole heir (her brother, Mitchell Cash) pursuant to section 225 of the Probate Code, or in equal shares to her sole heir and to the heirs of Joseph (his sisters Myrtle Marquardt and Stella Kranz) pursuant to section 228 of the Probate Code? *

But for the possible effect of certain federal statutes the answer would be that these proceeds went in equal shares to Elsie's heir and to Joseph's heirs pursuant to the provisions of section 228.

According to section 225 the separate property of a person who dies intestate, leaving neither issue nor spouse, goes to his parent or parents if either be living and if not then to his brothers and sisters and the descendants of deceased brothers and sisters.

This is modified by section 228 as to so much of the estate as was "[1] community property of the decedent and a previously deceased spouse, and [2] belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest * * *

If both of these conditions are met and there is no lineal descendant of the deceased spouse, "one-half of such community property goes to" the heirs of the decedent "and the other half goes to" the heirs of the deceased spouse.

Here, it appears that community funds were used in paying the premiums upon this policy, inferred from the following facts recited in the Settled Statement: "The deceased and her husband were married on September 4, 1926. There is no evidence other than that the assets of the estate were acquired during the marriage by the earnings of the parties. The premiums on the insurance policies were paid

during the marriage. There is no evidence that the payments thereon were made from funds other than community property of the parties." See *In re Estate of Adams*, 132 Cal.App.2d 190, 204-205, 282 P.2d 190. This satisfies the first condition of section 228.

As to the second condition of that section, it might be said that the half of the proceeds which represented the spouse's community interest came to decedent from him "by gift," in view of his having designated her as beneficiary. Her half belonged or went to her "by virtue" of its community character or "by gift" from him to her (in view of his designation of her as beneficiary), it would not matter which.

[1] We observe that it was at one time held that when a husband took out a policy on his own life in favor of his wife, premium payments made with community funds were in the nature of inchoate gifts from him to her. The matured upon his death and gave the proceeds the character of separate property of hers if she survived him. *In re Estate of Miller*, 23 Cal.App.2d 16, 18, 71 P.2d 1117, and *In re Estate of Lissner*, 27 Cal.App.2d 570, 577, 81 P.2d 448. Later cases disapproved of the *Miller* and *Lissner* cases and disallowed that doctrine, with the result that the proceeds in such a case take on and retain the community character given them by the premium payments, whether viewed as coming to the surviving spouse by devolution or by gift. See *In re Estate of Rattray*, 13 Cal.2d 702, 713-716, 91 P.2d 1042, an inter vivos transaction; *In re Estate of Perkins*, 21 Cal.2d 561, 571, 134 P.2d 231.

Accordingly, under California law, if unaffected by any federal statute, the proceeds of the National Service Life Insurance Policy went one-half to Elsie's

* The trial court held that the proceeds of this policy and the proceeds of a certain other policy went to Elsie's sole heir but that the remainder of her estate went in equal shares to her heir and to Joseph's heirs.

Joseph's heirs appealed from the whole of the decree but have since narrowed the scope of their appeal to the portion of the decree which deals with the proceeds of the National Service Life Insurance Policy, as indicated in the question above stated.

heir and one-half to Joseph's heirs as prescribed in section 228 of the Probate Code.

[2] We find nothing in the policy itself that indicates a different disposition in this case. The provision for payment to the estate of the beneficiary if the beneficiary survives and is entitled to payment in one sum but dies before payment, is not in conflict with our section 228 when, as here, the surviving spouse is the beneficiary. After the money thus reaches the estate of the beneficiary, the federal government has no further concern with it, insofar as anything expressed in the contract of insurance is concerned. Nor do we find anything in the federal statute (38 U.S.C.A. § 802) that indicates an intent to regulate the disposition of the money after it thus comes into the hands of the personal representative of the beneficiary in such a case as this. Peculiarly apt are the words of the court in *Re Estate of Perryman*, 133 Cal.App.2d 1, 3, 283 P.2d 298, 299, concerning the federal Civil Service Retirement Act: "Nothing in the act indicates any intent of Congress to restrict distribution of the fund by the administrator to whom it is paid. Lacking such provision, there is * * * no reason against distribution under the state law of succession."

We are not concerned with the case in which "no beneficiary survives the Insured." In such a case, the policy declares that the proceeds are payable "to the Insured's estate." Nor are we concerned with the case in which "a beneficiary not entitled to the proceeds of this policy in one sum survives the Insured and dies before receiving any installments." In such a case, according to the policy, settlement will be "made as if the beneficiary had died before the Insured." The latter was the situation in *Singleton v. Cheek*, 284 U.S. 493, 497, 52 S.Ct. 257, 76 L.Ed. 419, based upon 38 U.S.C.A. § 802, as it formerly read. Nor are we concerned with the case in which some-

one other than the spouse of the insured is made the beneficiary, facts which were present in *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424, resulting in a conflict between the federal law (38 U.S.C.A. § 802) and the California inheritance law. The federal statute prevailed over the local law.

Attention has been directed to section 454a of Title 38 of the U.S.Code Annotated, which provides in part: "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." Just how this statute conflicts with section 228 of our Probate Code and thus supersedes any of the provisions of the latter, respondent has not explained to our satisfaction. No taxes, no creditors' claims, no attachments, levies or other seizures and no assignments are here involved. We perceive in such a statute no intent upon the part of Congress to set aside the California law of descent and succession.

It would take words more explicit than any we find in section 802 or in section 454a to evince a congressional intent to override the provisions of section 228 of our Probate Code in the situation presented by the facts of this case. See *Clark v. Allen*, 331 U.S. 503, 517, 67 S.Ct. 1431, 91 L.Ed. 1633.

The portion of the judgment appealed from (that which declares the proceeds of the National Service Life Insurance Policy distributable solely to Mitchell S. Cash) is reversed with directions to conduct further proceedings not inconsistent with the views herein expressed.

PETERS, P. J., and BRAY, J., concur.

158 Cal.App.2d 294

**UNITED AIR LINES, Inc., and Hartford
Accident & Indemnity Co., a corpora-
tion, Petitioners,**

v.

**INDUSTRIAL ACCIDENT COMMISSION of
the State of California and Martin E.
Lohdell, Respondents.**

Civ. 17851.

District Court of Appeal, First District,
Division 1, California.

March 10, 1958.

Hearing Denied May 7, 1958.

Proceeding by employer and its insurance carrier to review a decision of the Industrial Accident Commission. The District Court of Appeal, Peters, P. J., held, inter alia, that where petition filed four days before expiration of five years from date of injury was entitled "Petition to Reopen to Amend * * * to Provide * * * Future Medical Treatment", and decision of Industrial Accident Commission made after five years had elapsed was an "Order Amending Decision After Reconsideration to Provide Future Medical Treatment" and body of decision ordered that decision after reconsideration should be "amended to provide for future medical treatment" which order rescinded provisions of a previous order declaring that future medical treatment was not necessary and substituted a provision for further medical treatment, commission's decision after reconsideration was beyond its jurisdiction and hence was void.

Order annulled in accordance with opinion.

1. Statutes $\S$ 223.2(34)

Sections 5803 and 5804 of the Labor Code, under which jurisdiction of Industrial Accident Commission in certain matters terminates five years after date of injury, do not stand alone and must be considered with section 5410, under which the Commission has jurisdiction after five years from date of injury on claims for new and further disability if claim is filed before the expiration of the five years.

West's Ann.Labor Code, §§ 5410, 5803, 5804.

2. Workmen's Compensation $\S$ 2016

If an application for new and further disability is filed before expiration of five years from date of injury, Industrial Accident Commission may act on it thereafter, and a petition seeking amendment of prior order must be acted on within the five years the Commission loses jurisdiction. West's Ann.Labor Code, §§ 5803, 5804.

3. Workmen's Compensation $\S$ 2016

Before the expiration of five years from date of injury Industrial Accident Commission can act under section 5803 of the Labor Code to alter or amend, or can act under section 5410 whereunder Commission has jurisdiction after five years from date of injury on claims for new and further disability if claim is filed before expiration of the five years, but after expiration of the five-year period there is no power to act under section 5803 and Commission can act only under section 5410. West's Ann.Labor Code, §§ 5410, 5803.

4. Workmen's Compensation $\S$ 2016

An order for new and further disability in workmen's compensation case is not an order amending a previous order on subject of permanent disability, but is a completely new order, as regards limitation of time within which award of compensation may be rescinded, altered or amended. West's Ann.Labor Code, §§ 5410, 5803, 5804.

5. Workmen's Compensation $\S$ 2016

Where petition filed four days before expiration of five years from date of injury was entitled "Petition to Reopen to Amend * * * to Provide * * * Future Medical Treatment", and decision of Industrial Accident Commission made after five years had elapsed was an "Order Amending Decision After Reconsideration to Provide Future Medical Treatment" and body of the decision ordered that decision after reconsideration should be "amended to provide for future medical treatment", which order rescinded pro-

visions of a previous order declaring that future medical treatment was not necessary and substituted a provision for further medical treatment, Commission's decision after reconsideration was beyond its jurisdiction and hence was void. West's Ann.Labor Code, §§ 5410, 5803, 5804.

R. P. Wisecarver, San Francisco, for petitioner.

Everett A. Corten, Daniel C. Murphy, Emily B. Johnson, San Francisco, for respondent Industrial Accident Commission.

Charles P. Scully, Lowell A. Airola, San Francisco, for respondent, Martin Lobdell.

PETERS, Presiding Justice.

On June 14, 1957, the Commission rendered its "Decision after Reconsideration" by which it held that it had jurisdiction to render the order more than five years from the date of injury, and reaffirmed an order of May 24, 1955, providing for future medical treatment to the injured employee. The United Air Lines, Inc. and its carrier seek annulment of the order.

The case involves the proper interpretation of sections 5803, 5804 and 5410 of the Labor Code. Under sections 5803 and 5804 the jurisdiction of the Commission in certain matters terminates five years after the date of injury. Under section 5410 the Commission has jurisdiction after five years from the date of injury on claims for new and further disability if the claim is filed before the expiration of the five years. The question here presented is into which of these categories does the present proceeding fall?

On March 6, 1950, Lobdell was seriously injured in the course and scope of his employment with United Air Lines. He was given medical care and compensation for temporary disability. Various hearings and proceedings were had before the Commission prior to October 30, 1953.

On that date a Decision after Reconsideration was rendered awarding the employee a 21 per cent permanent disability rating and expressly finding that the applicant was "not in need of any further medical treatment to cure or relieve him from the effects of his injury."

On March 2, 1955, 4 days less than 5 years from the date of injury, the employee filed a "Petition to Reopen to Amend Decision after Reconsideration to Provide the Applicant with Future Medical Treatment," praying for an amendment to the Decision after Reconsideration "to provide the applicant with future medical treatment."

On May 24, 1955, after the five years had expired, the Commission issued its "Order Amending Decision after Reconsideration to Provide Future Medical Treatment," ordering that the Decision After Reconsideration be "amended to provide for future medical treatment, as may be required." Present petitioners duly filed a "Petition for Reconsideration" which was granted, and nearly two years later, on June 14, 1957, the Commission issued its "Decision after Reconsideration" ordering that the order of May 24, 1955, "Amending Decision after Reconsideration" "be, and the same is, affirmed and adopted as the Decision after Reconsideration." It is this last order, and the one of May 24, 1955, that petitioners seek to have annulled in this proceeding.

The issue presented is clear. The "Petition to Reopen to Amend Decision after Reconsideration to Provide the Applicant with Future Medical Treatment" was filed within five years from the date of injury. It was acted on after that period had elapsed. Did the Commission have jurisdiction to so act?

Petitioners rely on sections 5803 and 5804 of the Labor Code to support their contention that the orders of May 24, 1955, and of June 14, 1957, were beyond the jurisdiction of the Commission to make. These two sections provide:

Section 5803. "The commission has *continuing jurisdiction* over all its orders, decisions, and awards made and entered under the provisions of this division. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the commission may *rescind, alter, or amend* any such order, decision, or award, *good cause appearing therefor*.

"Such power includes the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that *the disability of the person in whose favor such award was made has either recurred, increased, diminished, or terminated*." (Emphasis added.)

Section 5804 provides, in part: "No award of compensation shall be *rescinded, altered, or amended* after five years from the date of the injury. * * *" (Emphasis added.)

These sections, standing alone, are fairly clear. The Commission has "continuing jurisdiction" for five years from the date of injury to "rescind, alter, or amend" its prior orders, but no award "shall be rescinded, altered, or amended after five years from the date of the injury."

[1] But the sections do not stand alone. They must be considered with section 5410 of the Labor Code. It provides: "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of *compensation* within five years after the date of the injury upon the ground that the original injury has *caused new and further disability*. The jurisdiction of the commission in such cases shall be a continuing jurisdiction at all times within such period." (Emphasis added.)

[2] The proper interpretation of these sections has been presented to the courts on several occasions, and, as the decisions disclose, the problem is not a simple one. It is clear that if an application for a new and further disability is filed before the five years have expired, the Commis-

sion may act on it thereafter. It is equally clear that a petition seeking the amendment of a prior order must be acted on within the five years or the Commission loses jurisdiction. The Commission argues that, although the petition filed just before the expiration of the five-year period was entitled a "Petition to Reopen to *Amend* Decision after Reconsideration," and the order of May 24, 1955, made after the five years had elapsed was entitled "Order *Amending* Decision after Reconsideration," such last named order for future medical treatment contains, by necessary implication, a finding that the applicant has suffered a new and further disability for which such future treatment is necessary. The medical reports filed with the various applications show, so it is claimed, that in fact the applicant's physical condition has changed for the worse—the claimed new and further disability—and therefore it was proper to award the future medical benefits contained in the order although the five-year period had elapsed. Thus, so the Commission claims, the rule of Consolidated Steel Corporation v. Industrial Accident Commission, 6 Cal.2d 368, 57 P.2d 919, is applicable. That case holds that the Commission can make an award under section 5410 for a new and further disability after five years from the date of injury if the application is filed before the five years have elapsed.

[3] It is quite clear that before the five-year period has expired the Commission can act under section 5803 to alter or amend, or can act under section 5410, but that after the expiration of the five-year period there is no power to act under section 5803, and the Commission can act only under section 5410. Westvaco Chlorine Products Corporation v. Industrial Accident Commission, 136 Cal.App.2d 60, 288 P.2d 300.

[4,5] In the present case, the petition filed four days before the five years had elapsed was entitled a "Petition to Reopen to Amend * * * to Provide * * * Future Medical Treatment." The dec-

sion of May 24, 1955, made after the five years had elapsed was an "Order Amending Decision after Reconsideration to Provide Future Medical Treatment" and the body of the decision ordered that the Decision after Reconsideration should be "amended to provide for future medical treatment." The order rescinded the provision of the order of October 30, 1953, declaring that further medical treatment was not necessary and substituted a provision for further medical treatment. Not a word was said about any new or further disability. So far as the English language is capable of conveying thought, the applicant prayed for and the Commission granted an amendment of its 1953 order. As was pointed out in the Westvaco case, supra, 136 Cal.App.2d at page 65, 288 P.2d at page 303: "* * * an order for new and further disability is not an order amending a previous order on the subject of permanent disability. It is a completely new order." In the instant case the applicant on March 2, 1955, did not purport to be instituting a new and independent proceeding for an award based on a new and further disability. The employer and its carrier were never presented with that issue. The applicant frankly and clearly asked for a modification of the original award. He pleaded his case under section 5803, and relief was granted to him under that section.

This conclusion is supported and is consistent with the holdings in *Sprague v. Industrial Accident Commission*, 46 Cal.2d 414, 296 P.2d 548, and *Sutton v. Industrial Accident Commission*, 46 Cal.2d 791, 298 P.2d 857. The *Sprague* case held, among other things, that an application for medical treatment made within the five-year period did not amount to a claim for new and further disability. In the *Sutton* case the Supreme Court held that section 5410 applied only to applications based on a new and further disability and where such is not involved the applications are governed by sections 5803 and 5804. See also *State of California v. Industrial Accident*

Commission, 155 Cal.App.2d 551, 318 P.2d 194.

The order amending the Decision after Reconsideration to provide further medical treatment of May 24, 1955, and the Decision after Reconsideration dated June 14, 1957, being beyond the jurisdiction of the Commission to make, are annulled.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.



S. H. RIDDLE, on behalf of himself and all others similarly situated, Plaintiffs and Respondents,
v.

YOSEMITE CREEK COMPANY, a corporation, Kadota Creek Company, a corporation, Richard C. Leuschner, Richard D. Leuschner, Jr., Elizabeth F. Leuschner, et al., Defendants and Appellants.*

Civ. 9149.

District Court of Appeal, Third District, California.

March 12, 1958.

Hearing Granted May 7, 1958.

Action by grower of produce to recover against purchasing corporation for unpaid for produce wherein other defendants were sought to be held liable under the alter ego doctrine. Judgment for plaintiffs in the Superior Court, Stanislaus County, David F. Bush, J., and the defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that the facts justified the application of the alter ego doctrine and that the action was a proper class action.

Judgment affirmed.

I. Corporations ☞

To cast aside the legal fiction of distinct corporate existence as distinguished

* Opinion vacated 335 P.2d 107.

from those who own its capital stock, it is not enough that corporation is so organized and controlled and its affairs so managed as to make it merely an instrumentality of its stockholders, but it must further appear that they are business conduits and alter ego of one another and that to recognize their separate entities would aid the consummation of a wrong.

2. Corporations ⇐1

Conditions under which corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders varies according to the circumstances, and one of the factors to be considered is whether there is an attempt to provide adequate capitalization for the corporation.

3. Corporations ⇐1

In suit by creditor to recover from corporation for unpaid for produce delivered to it and to recover from other defendants on alter ego theory, evidence authorized finding that a corporation was used as a device whereby purchasing corporation's business could be operated behind protection of dummy corporate identity so as to justify holding the dummy corporation and individuals liable for corporate debts.

4. Parties ⇐12

In action by grower for payment for produce delivered to corporate purchaser wherein other defendants were sought to be held liable on alter ego doctrine, and plaintiff alleged that he sued on behalf of himself and all others similarly situated, and part of relief demanded was that the assets be made subject to demands of creditors of purchasing corporation and that individuals be enjoined from disposing thereof and it was alleged that parties interested were too numerous to make it practical that they all be joined as plaintiffs, maintenance of class action was justified.

5. Parties ⇐88(1)

Where as to joinder of certain plaintiffs in class action no objection was made, claim that such parties were not proper parties was waived.

Sutter & Carter, Modesto, for appellants.

Mellis & Stockton, Modesto, for respondents.

VAN DYKE, Presiding Justice.

This action was brought by plaintiff-respondent Riddle, claiming to act for himself and others similarly situated, against two corporations and various individual defendants. During the course of the trial a number of individuals were permitted to join as plaintiffs and they appear herein as respondents. They, along with Riddle, were creditors of Yosemite Creek Company, a corporation, hereinafter called Yosemite. They sought to hold the individual defendants responsible for the corporate debts of Yosemite and they likewise sought to hold Kadota Creek Company, a corporation, hereinafter called Kadota, responsible for the same debts. A number of individual defendants who were originally parties to the action were dismissed upon their motion without opposition from plaintiffs. Judgment was rendered in favor of plaintiffs against both Yosemite and Kadota and against three individuals, appellants herein, namely, Richard D. Leuschner, Richard D. Leuschner, Jr., and Elizabeth F. Leuschner. They are the sole appellants herein. The two corporations also appealed, but their appeals were heretofore dismissed.

[1] The judgment applies the doctrine that under certain circumstances in a particular case the obligations of a corporation may be fastened upon certain individuals. Our own courts have frequently applied the doctrine and have stated the conditions under which its application is appropriate. In *Erkenbrecher v. Grant*, 187 Cal. 7, 11, 200 P. 641, 642, the court said:

"* * * In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it 'merely an instrumentality, conduit or adjunct' of its stockholders, but it must

further appear that they are the 'business conduits and alter ego of one another,' and that to recognize their separate entities would aid the consummation of a wrong. Divested of the essentials which we have enumerated, the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization."

In *Minifie v. Rowley*, 187 Cal. 481, 487, 202 P. 673, 676, it was said:

"Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice."

In *Gordon v. Aztec Brewing Company*, 33 Cal.2d 514, 522, 203 P.2d 522, 527, it is said:

"* * * [W]here the recognition of the fiction of separate corporate existence would foster an injustice or further a fraud the courts will refuse to recognize it. *Stark v. Coker*, 20 Cal.2d 839, 846, 129 P.2d 390; *Puccetti v. Girola*, 20 Cal.2d 574, 578, 128 P.2d 13; *Shea v. Leonis*, 14 Cal.2d 666, 669, 96 P.2d 332. It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice. *Wenban Estate*,

Inc., v. Hewlett, 193 Cal. 675, 698, 227 P. 723 * * *

[2] In *Stark v. Coker*, 20 Cal.2d 839, 129 P.2d 390, John B. Coker and his wife Regina were held liable on a promissory note executed by a corporation. The court stated, 20 Cal.2d at page 846, 129 P.2d at page 394:

"* * * The conditions under which the corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders, necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court. Only general rules may be laid down for guidance."

In *Automotriz Del Golfo De California, etc. v. Resnick*, 47 Cal.2d 792, 796, 306 P.2d 1, 4, the court said:

"Another factor to be considered in determining whether individuals dealing through a corporation should be held personally responsible for the corporate obligations is whether there was an attempt to provide adequate capitalization for the corporation. In *Balantine on Corporations* (rev. ed. 1946), at pages 302-303, it is stated: 'If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unincumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or

trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege.'

"The rule * * * was followed in *Shea v. Leonis*, 14 Cal.2d 666, 96 P.2d 332, 334, where a lessee attempted to escape liability for rent due under a lease by assigning his interest in the lease to a corporation which was without other assets. The court held that the owners of the corporate stock were liable * * *, pointing out that it is proper to disregard corporate existence 'where, as in the instant case, the device adopted is * * * an attempt to avoid liability for benefits enjoyed by means of taking the obligation in the name of a specially organized corporation which has no other assets.' In *Carlesimo v. Schwebel*, 87 Cal.App. 2d 482, 197 P.2d 167, 174, it was recognized that 'the proper rule is that inadequate financing, where such appears, is a factor, and an important factor, in determining whether to remove the insulation to stockholders normally created by the corporate method of operation.'"

Yosemite was organized as a California corporation in June of 1949. On July 15th following it issued 510 shares of stock to Elizabeth F. Leuschner. On August 20, 1951, she transferred 255 shares to Richard D. Leuschner, Jr., and 255 shares to Elizabeth E. Leuschner, retaining one share. The transferees were respectively her stepson and stepdaughter. Apparently, she obtained from some source an additional share which she kept. The stock book of the corporation shows that it was not accurately kept so as to indicate with exactness to whom shares were issued and to whom issued shares were assigned. It does appear that altogether 534 shares of stock were issued and that, during the critical years with which we are here concerned, the stock ownership was as follows: Richard D. Leuschner, Jr., owned 268 shares; Elizabeth F. Leuschner owned one share; Elizabeth E. Leuschner, daughter of Rich-

ard, Sr., owned 257 shares, and the remaining shares were owned by various employees, some of whom testified that they purchased them through wage deductions at about \$100 per share. During the same critical years, the officers of Yosemite were as follows: Richard D. Leuschner, Sr., president and a director; his wife, Elizabeth F., secretary and a director; Richard D. Leuschner, Jr., vice president, treasurer and a director. It does not appear that Elizabeth E. was an officer. She was not made a party to this action.

Kadota was organized about the same time as Yosemite. During the critical period there were 510 outstanding shares of Kadota and of these Richard D. Leuschner, Jr., owned 170 and the remaining 340 shares were owned by Elizabeth E. The corporation was officered as follows: Richard D. Leuschner, Sr., was assistant secretary and a director; Elizabeth F. Leuschner, his wife, was a director; Richard D. Leuschner, Jr., was president and a director, and the other officers and directors were Elizabeth E. Leuschner and her husband.

Richard D. Leuschner, Sr., although shown to be the dominating figure in carrying on the business of both corporations did not appear as a stockholder of either.

Yosemite operated as a processor of fruits and vegetables under a license from the Bureau of Market Enforcement of the Department of Agriculture of the state. From 1945 until the latter part of 1952 Yosemite operated at Kadota, California, having a lease of the Bear Creek Company processing plant, which plant had been mortgaged by its owner to the Reconstruction Finance Corporation. In the latter part of 1952, the Reconstruction Finance Corporation foreclosed its mortgage and Yosemite then moved its base of operations to Modesto where it operated until the spring of 1953, when its remaining assets were transferred to Kadota. During 1952 and 1953 Yosemite contracted to buy the produce of growers under written contracts executed in its name. To a certain

extent it failed to make payment to the growers. Plaintiff, as an unpaid grower-creditor, brought this action to recover from Yosemite. He sought to hold the other defendants on the alter ego theory. He claimed in addition that he sued for other creditors of Yosemite who, like himself, were growers who had sold their produce to Yosemite and had not been fully paid.

When Yosemite transferred its assets to Kadota the principal consideration moving to it was Kadota's agreement that it would process the produce purchased by Yosemite, sell the finished products and pay over to Yosemite the gross receipts, less its costs of processing and less 40% of the net profit resulting after the further deduction of Yosemite's expenses. It appears that Kadota kept its agreement with Yosemite but that to enable it to do this certain members of the Leuschner family loaned various sums of money to it, aggregating approximately \$100,000. It appears further that as produce was brought in by the growers Kadota paid the greater portion of the moneys due them, with the ultimate result that they received on an average about 80% of the contract price for produce they delivered.

Yosemite and Kadota during their entire existence appear to have failed in many instances to conform to standard corporate procedure. Few meetings of shareholders were held. Few regular meetings of directors were held. They entered into transactions with shareholders and officers and resolutions approving these do not appear to have been regularly passed. Stockholders and directors alike dealt directly with both corporations without the execution of written documents precisely describing the transactions. When such documents were executed they were sometimes executed by the member of the family involved acting both as an individual and in his capacity as an officer of the corporation. Such transactions included borrowing of corporate funds for personal use, loaning of personal funds to a corporation at interest, purchase of corporate equipment followed by leasing the equipment back to

the corporation for rental, personal guarantee of corporate obligations, payment of corporate obligations out of personal funds.

When Kadota was organized in mid 1949 it engaged in farming operations through 1950 after which it ceased business operations and remained inactive until the early part of 1953 when it was reactivated to enter into the agreements heretofore related with Yosemite.

The business conducted by the corporations was extensive. The gross sales price of the products, first of Yosemite, and thereafter under the agreement of Kadota, amounted to nearly two million dollars a year. The price paid growers for the raw products grossed around eight to nine hundred thousand dollars a year.

Leuschner, Sr., testified that, though he was under contract to receive a salary and some commissions in exchange for his management of the corporation's affairs, he was never paid except to the extent of a few hundred dollars and that over the years he loaned to the corporations far more than they ever paid him, which loans were never repaid. The only other person who is asserted, through testimony, to have been active in managing the two corporations was Richard, Jr., and he apparently had little to do therewith until the last year or two, during which time Kadota was processing the products purchased by Yosemite from the growers. During that period he was asserted to be a buyer of processing materials and of processing equipment and general overseer of packing and processing operations. There is no testimonial assertion, however, that he supplanted the overriding management of his father. There is testimonial assertion that Mrs. Leuschner, Sr., was never any other than a dummy stockholder and officer. Leuschner, Sr., testified that, speaking generally, she did what she was told in the way of executing documents and was unfamiliar with the affairs of either corporation. These matters, however, left the trial court to speculate as to what the real interest of the family members was as existing among themselves. The dominance in the

corporation affairs and the unpaid but extensive managerial activities of Leuschner, Sr., during the time when the stock of these corporations was held by members of his family warranted the trial court in not only disbelieving the testimonial assertions as to the status of Mrs. Leuschner in the corporate affairs and the limited activities of Leuschner, Jr., during the last year or two of corporate activities, but also in determining that there were unexplained interests and relationships among the family group justifying the court's concluding that the three members of the family held liable for Yosemite's debts constituted a unified and equally interested family group who would all have benefited from a successful conduct of the corporate affairs and who ought to be held as being the persons to be jointly and severally held liable for the debts of Yosemite if other conditions existed justifying disregard of the corporation.

Leuschner, Sr., testified that in the latter part of 1952 it had become impossible for Yosemite to conduct its business openly in its own name because it was continually hindered and harassed by the Reconstruction Finance Corporation, hereinafter called RFC, which held chattel mortgages on most of the equipment Yosemite was using and claimed chattel mortgage liens against other equipment. RFC, said Leuschner, Sr., was continuously litigating its claims against Yosemite, issuing attachments in the actions it brought and so impeding operations that it was concluded Yosemite could no longer continue in its own name to operate its business. For that reason it was decided to reactivate the dormant Kadota, which, though it had no assets, owed no debts. Yosemite had contracted with numerous growers for produce not yet matured which would be delivered. Leuschner, Sr., said it was believed that by turning over Yosemite's equipment to Kadota, that corporation could conduct the processing activities necessary to take care of the crops contracted for and could finance its operation through advances from brokers and others who would buy

the processed crops, and through money furnished by members of the family. (Apparently no thought was given to capitalizing Kadota, or Yosemite, in the usual way of stock issuance for money received.) In the meantime Kadota would be free from harassing claims of RFC, and of other creditors of Yosemite. Leuschner, Sr., testified also that these plans would have been brought to fruition and would have been successful, and that profits would have been made and all debts would have been paid, had not the prices of finished products fallen disastrously.

From the foregoing the trial court could hold that the existence of Kadota as a corporation was seized upon as a device whereby Yosemite's business could be operated behind the protection of Kadota's corporate identity. We think it apparent that its participation in the whole of the activities here involved was only that of a closely held and controlled corporation compelled to engage in activities for the benefit of Yosemite and ultimately of the family group which owned both corporations.

It appears that Kadota's lack of capital and the insufficiency of its borrowing capacity against its products was recognized by the group as making it necessary that they supply further capital to it. This, however, they did not do by purchasing its stock or in any way furnishing capital assets, but by lending money to it, in this way being in a position to compete with other creditors if, in the outcome, Kadota should be unable to pay its debts. These loans were made and it was testified that they were made from the resources of the individuals making them. Richard Leuschner, Jr., his sister, and Mrs. Leuschner among them loaned approximately \$100,000 to enable Kadota to continue processing the produce being purchased by and delivered to Yosemite. We think the record discloses that Kadota was no more than a "dummy" corporation used by the Leuschner family to enable them to continue to carry on the business of Yosemite. The history of the entire venture, as given by Leuschner, Sr., and also by his son, is

that of a business which was desperately using every avenue of credit to keep going. Both the Leuschner men testified that the entire venture would have been a success had not the creditors of Yosemite, notably the RFC, continually harassed Yosemite and thus caused damaging delays and had not prices fallen disastrously so that buyers of the finished products refused to receive the produce they had contracted to buy except at reduced prices reflecting the falling market. When the harassment by Yosemite's creditors took the form of attaching vital units of equipment without which the processing could not go on the Leuschners were compelled, according to the testimony, to relieve the situation by making advances to Kadota from their private resources, taking back the corporation's notes. They sometimes redeemed items of equipment from the demands of Yosemite's creditors by paying such demands and taking title to equipment so released in the name of the person who furnished the funds. Then the equipment would be leased to Kadota.

Appellants argue that a gross injustice has been done the individuals held for the debts of Yosemite and that the true picture is one where, in order to save the growers from loss those individuals advanced large sums of money, aggregating about \$100,000, all of which was lost in the final outcome. They point to the lack of any finding by the trial court that in all that they did appellants were guilty of actual fraud, but as has been heretofore stated a finding of actual fraud is never necessary in a case such as this. The test is whether or not the individuals ought in justice to be held or, conversely, whether or not releasing them from the asserted liability would work an injustice on those who dealt with the corporations. As to the advances they made the trial court could conclude that they were not motivated by a personal desire to save the growers from loss, but were made in the hope of profits to come and in order to induce the growers to continue to deliver. In this connection the trial court could consider that it was wrong for the

family group to invite delivery of produce to the corporation, which was in itself insolvent, and was being aided and abetted by a second corporation equally insolvent, and that they could not justly continue to do business through the instrumentality of these two corporations without financing them sufficiently to meet their obligations.

[3] When the entire record is considered we have no doubt the trial court's findings and judgment are substantially supported by the record. Many of the factors deemed material in determining that a court should hold individuals for the obligations of a corporation are here present. These corporations were family owned. Corporate records were either not kept or were so poorly kept as to amount to the same thing. There were many dealings between members of the family group and the corporations of such nature as to betoken an attitude and course of conduct on the part of the members of the group of ignoring the corporate entities in their transactions therewith and, finally, there was the doing of a large and risky business without adequately financing the corporations. Upon the record presented the judgment holding the individuals liable for the corporate debts must be affirmed.

[4,5] Appellants contend that in any event they cannot be held for more than the claims of appellant Riddle for the reason this is not a case wherein he could bring a class action. According to the complaint which alleged that Riddle sued on behalf of himself and all others similarly situated the facts justified a class action, for the allegations asserted in part that the corporations had transferred assets to each other, mingled their assets together, and had transferred their assets to the individuals named as co-defendants with the corporations. A part of the relief demanded was that these assets be made subject to the demands of the creditors of Yosemite and that the individuals be enjoined from disposing thereof. Such allegations justified class actions, these allegations being accompanied by allegations that the parties interested were too numerous to make it

practical that all of them be joined as named plaintiffs. The findings and judgment, however, ignored the allegations of fraudulent conveyances and the judgment embraced only money damages in the amount of the debts owing certain named parties, including Riddle. As to these creditors who were thus given money judgments they were specifically joined as plaintiffs during the course of the trial and to their joinder no objection was made. In so far as these individual judgments were concerned, therefore, any claim that they were not proper parties to a class action was waived.

The judgment appealed from is affirmed.

PEEK, J., and WARNE, J. pro tem., concur.

Hearing granted; CARTER, J., not participating.



158 Cal.App.2d 410

Magdalen Rau GARDNER, Plaintiff and Appellant,

v.

Don TREVASKIS, etc. et al., Defendant,
Don Trevaskis, as Executor of the Estate of
H. J. Kleefisch, Deceased, Defendant and Appellant,

Lorraine Wyatt, and Ohio Casualty Insurance Company, as Administrator With the Will Annexed of the Estate of Helen Haskell Shay, Deceased, Strangers to Original Action and Respondents.

Civ. 17657.

District Court of Appeal, First District,
Division 2, California.

March 17, 1958.

Rehearing Denied April 16, 1958.

Hearing Granted May 14, 1958.

Proceeding by subrogee of rights and claims of estate for which decedent had failed to faithfully discharge his duties as executor, to vacate and set aside order allowing claimant to recover from insolvent decedent's trustee savings account, the amount which claimant had previously de-

posited with decedent for investment. The Superior Court, San Mateo County, Louis B. Dematteis, J., entered order vacating and setting aside judgment and requiring refund of certain moneys paid pursuant thereto and claimant appealed. The District Court of Appeal, Kaufman, P. J., held that under the circumstances it would be a miscarriage of justice to deny subrogee's motion to vacate and set aside judgment.

Affirmed.

1. Judgment ⇨382

Motion to set aside judgment is recognized method for one not a party to action to become such, in order to assert his rights. West's Ann.Code Civ.Proc. § 473.

2. Judgment ⇨386(1)

Where notice of motion to set aside judgment was filed before expiration of six months period application for relief was timely, even though actual motions for relief were not made within six months after judgment. West's Ann.Code Civ.Proc. §§ 473, 1005.5.

3. Judgment ⇨375

Apart from statute, court has inherent jurisdiction to vacate a judgment obtained through extrinsic fraud practiced on the court. West's Ann.Code Civ.Proc. § 473.

4. Appeal and Error ⇨935(1)

On appeal from order setting aside judgment, it must be assumed that lower court believed statements of fact made by prevailing parties.

5. Appeal and Error ⇨982(1)

District Court of Appeal can disturb order setting aside and vacating judgment only where trial court has abused its discretion.

6. Judgment ⇨343

In proceedings brought by subrogee of rights and claims of estate for which deceased executor had failed to faithfully discharge his duties to vacate and set aside judgment allowing claimant to recover from insolvent decedent's trustee savings account, the amount which claimant had previously deposited with deceased for investment,

where deceased's trustee savings account balance was not enough to satisfy demands of subrogees and of claimant in full, under circumstances, it would have been a miscarriage of justice to deny motion to set aside judgment.

Barbagelata, Zief & Carmazzi, Henry J. Broderick, San Francisco, for appellant Gardner.

Edward J. Rice, Oakland, for appellant Trevaskis.

Johnson & Harmon, San Francisco, for respondent Wyatt.

Anderson, McPharlin & Connors, Robert C. Haase, Jr., Los Angeles, for respondent Ohio Casualty.

KAUFMAN, Presiding Justice.

Appeal from an order vacating and setting aside judgment and orders to refund certain moneys paid pursuant thereto.

This controversy centers around the claims of the several parties to all or a portion of the sum of \$10,657 on deposit with the American Trust Company, in a savings account No. 8441, in the name of "Henry J. Kleefisch, Trustee."

Henry J. Kleefisch, an attorney-at-law with numerous clients, died testate on March 13, 1955. His estate was insolvent and his accounts, records and affairs were in a state of confusion. The appellant Don Trevaskis qualified as the executor of the Kleefisch estate. Numerous creditors' claims against the estate were filed, including those of the appellant and the respondents.

On September 2, 1955, appellant Gardner filed an action against the American Trust Company and the appellant Trevaskis as Executor of the Kleefisch estate, claiming that a trust existed in her favor as to \$6,676.75 of the funds on deposit in savings account No. 8441. Her complaint contained no allegation tracing her money into the account but stated only that the appellant, in 1943, had given the sum in question to Kleefisch to invest for her benefit, and

that Kleefisch had acknowledged receipt of the same in writing. Appellant Trevaskis admitted nearly all of the allegations in the complaint, offered no evidence at the trial, waived cross-examination and findings. On January 20, 1956, a judgment was rendered in favor of appellant Gardner decreeing a trust in her favor in the amount of \$6,676.75. This sum had been previously deposited into court by the American Trust Company, which was thereupon dismissed from the action.

In October 1954, on filing a \$30,000 bond of respondent Ohio Casualty Company, Kleefisch had qualified as the executor of the estate of his client Helen Haskell Shay, who died in September, 1954. After the death of Kleefisch, E. A. Winstanley was appointed executor of the Shay estate. On filing his claim against the Estate of Kleefisch, Winstanley was told that Kleefisch's business records were missing and that there was no possibility of ascertaining the source of the funds in the savings account. Upon learning of the judgment in favor of appellant Gardner, Winstanley began to investigate the source of the money in savings account No. 8441. It appeared that the account in question was opened in February 1954, with two checks totalling \$46,318.38. These checks were payable to Helen Haskell Shay and represented the final payment on a sale of Illinois Real Estate which Kleefisch had negotiated for Mrs. Shay. The checks were endorsed "Helen Haskell Shay, by H. J. Kleefisch." No other deposits were made to the account except the accrued interest. At some time after the opening of the account and before his death, Kleefisch transferred \$35,993.38 from the savings account No. 8441 to his commercial trustee account at the same bank, in which there was on deposit, at the time of his death, a balance of \$159. Thereafter, on July 19, 1956, Winstanley filed a motion to vacate and set aside the judgment in favor of appellant Gardner and for orders to refund the amount paid and permitting a complaint in intervention, on grounds of surprise and fraud. At the same time respondent Wyatt filed similar motions on

her own behalf and that of other creditors of the Kleefisch estate. Respondent Wyatt's motion is based on a document signed by Kleefisch in December 1953, similar to that on which appellant Gardner bases her claim, as well as certain checks and drafts. Appellant Gardner, on the basis of the affidavit of Trevaskis, moved to quash the service of both respondents' motions and to strike papers relating to the same from the record. After receiving testimony and affidavits, the court denied appellant Gardner's motions and granted respondents' motions to set aside the judgment and permitting complaints in intervention, stating in its minute order: "Under all the facts and circumstances of this case as appears from the file herein, the court feels not only that the motion to set aside the judgment should be granted, but that it would be a miscarriage of justice to fail to do so."

Appellants Gardner and Trevaskis, as the Executor of the Estate of Kleefisch, appeal from the above order. The only issue is the propriety of the order. Respondents are Loretta Wyatt and Ohio Casualty Company which pursuant to a decree of the Los Angeles Superior Court that Kleefisch had failed faithfully to execute his duties as executor of the Estate of Helen Haskell Shay, and an order of the Probate Court approving a compromise of its surety liability on its bond, had paid the sum of \$17,500 and thus become subrogated to the rights and claims of the Shay estate in the Estate of Kleefisch.

Appellants contend that the trial court's action in vacating the judgment is opposed to reason, evidence and the record as well as general principles of law and equity and that the trial court acted in excess of its jurisdiction in violation of Code of Civil Procedure, sections 387 and 473 in permitting "strangers" to intervene.

[1,2] Appellants' contentions are not sound. They argue that respondents are strangers to the case, and thus not "parties" entitled to the benefit of section 473, Code

of Civil Procedure. But motion to set aside the judgment is the recognized method for one not a party to the action to become such, under the circumstances here present, in order to assert his rights (*Elliott v. Superior Court*, 144 Cal. 501, 77 P. 1109; *Greif v. Dullea*, 66 Cal.App.2d 986, 153 P.2d 581; *Kasparian v. Kasparian*, 132 Cal.App. 773, 23 P.2d 802). It is next argued that the applications for relief under Section 473 were not filed in time, because the actual motions for relief were not made within six months after the judgment, although the notices of motion were filed before expiration of the six months period. But the code specifically provides that a motion is deemed to have been made upon the service and filing of the notice of motion (Code Civ.Proc. § 1005.5).

[3] Furthermore, apart from Code of Civil Procedure, section 473, a court has inherent jurisdiction to vacate a judgment obtained through extrinsic fraud practiced on the court. In re Estate of Estrem, 16 Cal.2d 563, 107 P.2d 36; *McGuinness v. Superior Ct.*, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; *Miller v. Miller*, 26 Cal.2d 119, 156 P.2d 931; *Rice v. Rice*, 93 Cal.App. 2d 646, 209 P.2d 662.

[4-6] Appellants argue that the record and evidence do not support the action of the trial court. On appeal it must be assumed that the lower court believed the statements of fact made by the prevailing parties. *Reid v. Koeslag*, 106 Cal.App.2d 729, 236 P.2d 192. We can only disturb the orders made where the trial court has clearly abused its discretion. *Baratti v. Baratti*, 109 Cal.App.2d 917, 242 P.2d 22. From the record before us we can only conclude in agreement with the trial court that under these circumstances it would be a miscarriage of justice to deny respondents' motion.

In view of the foregoing the orders appealed from are hereby affirmed.

DOOLING and DRAPER, JJ., concur.

158 Cal.App.2d 414

John VICK, Plaintiff and Appellant,**v.****S. H. PATTERSON and Norwood Patterson,
Defendants and Respondents.****Civ. 17701.****District Court of Appeal, First District,
Division 2, California.****March 17, 1958.**

Action to recover compensation for services rendered by a member of city and county fire department under contract of part-time employment by defendants as announcer for telecast of professional baseball games. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., denied defendants' motion for judgment notwithstanding verdict in favor of plaintiff, but entered an order granting their motion for new trial, and plaintiff appealed. The District Court of Appeal held that violation of rule of fire department prohibiting participation by members in any other gainful occupation did not preclude recovery of compensation for services rendered by fireman under contract of part-time employment, particularly since no serious moral turpitude was involved and performance of services under contract had been completed.

Order denying judgment notwithstanding verdict affirmed and order granting new trial reversed.

1. Appeal and Error ⇨874(5)

Where plaintiff appealed from order granting a new trial, alleged error in denying alternative motion for judgment notwithstanding verdict for plaintiff was reviewable at instance of defendants. West's Ann.Code Civ.Proc. § 629.

2. Witnesses ⇨344(2)

Evidence that member of city and county fire department had violated rule of department prohibiting members from actively participating in any other gainful occupation would show, at most, specific wrongdoing and hence was not admissible as bearing on credibility of fireman as a wit-

ness in his action to recover compensation for services rendered under contract of part-time employment by defendants.

3. Witnesses ⇨344(1)

Evidence of specific wrongdoing is not a proper basis for attack upon credibility of a witness.

4. Contracts ⇨136

A contract whose object is unlawful, in that it is contrary to express provision of law, contrary to policy of express law, though not expressly prohibited, or otherwise contrary to good morals, is void. West's Ann.Civ.Code, § 1667.

5. Contracts ⇨112, 123(1)

Contract of part-time employment of member of city and county fire department as announcer for telecast of professional baseball games in violation of rule of department prohibiting members from actively participating in any other gainful occupation was not unlawful on ground of improper use of public authority to overreach another or as involving moral turpitude. West's Ann.Civ.Code, § 1667.

6. Contracts ⇨103, 105

Contract to perform an act prohibited by statute or ordinance is not enforceable.

7. Contracts ⇨105

Mere prohibition by statute does not necessarily imply a legislative intent that agreements in contravention thereof are void.

8. Contracts ⇨108(1)

Power to invalidate agreements on ground of public policy should be invoked only where dangerous tendency clearly and unequivocally appears from contract itself.

9. Contracts ⇨108(1)

Courts are reluctant to declare contract void as against public policy and will refuse to do so if by any reasonable construction contract may be upheld.

10. Contracts ⇨123(1)

Rule of city and county fire department prohibiting active participation by members in other gainful occupation could be enforced by disciplinary proceedings against

a member and did not warrant judicial intervention to declare invalid contract of part-time employment of a member of department by parties wholly unconnected with municipal government.

11. Contracts ☞138(2)

Violation of rule of city and county fire department prohibiting active participation by members in any other gainful occupation did not preclude recovery of compensation for services rendered by fireman under contract of part-time employment as announcer for telecast of professional baseball games, particularly where no serious moral turpitude was involved and performance of services under contract had been completed, and hence refusal to enforce contract would not protect the public but would unjustly enrich outside employers of fireman. West's Ann.Civ.Code, § 1667.

12. Contracts ☞138(2)

In determining whether it should refuse to enforce contract on ground of illegality, court may properly consider facts that no serious moral turpitude is involved and that plaintiff's participation in transaction has been completed and hence refusal to enforce contract will not protect the public but will unjustly enrich defendants. West's Ann.Civ.Code, § 1667.

Thomas B. Gallen, Daly City, for appellant.

Dinkelspiel & Dinkelspiel, Harold A. Block, San Francisco, for respondents.

DRAPER, Justice.

In 1954 plaintiff, a San Francisco fireman, was employed by defendants as an announcer of Pacific Coast League baseball games televised from Oakland and San Francisco. This work was part-time only. Plaintiff was required to work only during each game and for a short time before it. No Saturday or Sunday games were televised. After he had worked for two weeks at an agreed salary which was paid, he and defendants entered into an oral contract for

his services for the remainder of the season. Plaintiff performed the agreed duties through August 27, when television of the Oakland games ceased. He then requested payment of the reasonable value of his services which, in his view, defendants had agreed to pay. Defendants maintained that he had agreed to work for nothing. This action followed, and jury verdict was in favor of plaintiff for \$1,200.

[1] Throughout the period he worked for defendants, plaintiff continued in the employ of the San Francisco Fire Department. At trial, defendants sought to introduce Rule 447 of that department, providing: "Members shall devote their time and attention to the best interests of the Department. They shall at no time engage in any activities that may interfere with the efficiency of the fire service, nor shall they actively participate in any other gainful occupation." Objection to this offer was sustained. Upon entry of judgment on the verdict, defendants moved for judgment notwithstanding the verdict and, in the alternative, for new trial. The motion for judgment notwithstanding the verdict was denied, but that for new trial was granted, upon the sole ground of error in sustaining objection to the offer of Rule 447. Plaintiff appeals from the order granting new trial. Defendants assert error in the denial of judgment notwithstanding verdict, as they are permitted to do (Code Civ.Proc. § 629; In re Estate of Green, 25 Cal.2d 535, 545, 154 P.2d 692).

Thus the sole question on this appeal is the relevancy of Rule 447 of the fire department.

[2,3] Defendants first contend that the rule and the fact of its violation by plaintiff were admissible because they go to the issue of his credibility. They argue that if he in fact contracted for compensation for his television work "he was a disloyal employee" of the fire department, and thus not to be believed. If sound, this argument would permit examination into loyalties to private employers, friends, family and an infinite number of relationships not relevant to the issue of credibility. At most, the dis-

puted rule would show specific wrongdoing, which is not a proper basis for attack upon credibility (*Sales v. Bacigalupi*, 47 Cal.App. 2d 82, 87, 117 P.2d 399).

The more difficult question is whether this contract is illegal and thus unenforceable because it is in violation of the department rule. This issue is but scantily briefed.

[4] It is elementary that a contract whose object is unlawful is void (12 Cal. Jur.2d 269). That is unlawful which is (1) contrary to an express provision of law, (2) contrary to the policy of express law, although not expressly prohibited, or (3) otherwise contrary to good morals (Civ. Code, § 1667).

[5] The contract in this case can be held unlawful only under the first or second subdivision of the code section. There is nothing in the relationship of the parties in this case to indicate improper use of public authority to overreach another, as in the case (*Grimes v. Allen*, 93 Cal.App.2d 653, 209 P.2d 651) cited by both parties. Nor is the contract one inherently involving moral turpitude, as in the familiar cases holding unenforceable contracts which promote prostitution or gambling.

[6] Rather, if this contract is unlawful, it must be because it is in violation of the text or the policy of an express provision of law. The rule is settled that the courts will not enforce a contract to perform an act prohibited by statute (*Duntley v. Kagarrise*, 10 Cal.App.2d 394, 52 P.2d 560), or by ordinance (*Dunn v. Stegemann*, 10 Cal. App. 38, 101 P. 25). We find no authority extending this doctrine to the rules of a municipal department governing wholly intra-departmental administrative affairs. Our case, of course, does not involve rules prescribed by a regulatory body, such as the Division of Corporations or the Industrial Accident Commission, governing the conduct of the public in dealings with the regulated subject-matter.

[7-9] Even where a statute, rather than an administrative regulation, is involved, the mere prohibition does not necessarily imply a legislative intent that agreements

in contravention of it are void (12 Am.Jur. 657). "The power to invalidate agreements on the ground of public policy is so far-reaching and so easily abused that it should be called into action only in cases where the dangerous tendency clearly and unequivocally appears from the contract itself. Courts are reluctant, therefore, to declare a contract void as against public policy, and will refuse to do so if by any reasonable construction it may be upheld" (*Maryland C. Co. v. Fidelity & Cas. Co.*, 71 Cal.App. 492, 497, 236 P. 210; see also *Howard v. Adams*, 16 Cal.2d 253, 257, 105 P.2d 971, 130 A.L.R. 1003).

[10] There is little doubt that within the fire department such a rule is effective, and may be enforced by disciplinary proceedings against the employee (see cases collected in 150 A.L.R. 128). It is quite another matter to argue that the rule invalidates contracts between the employee and a third party. Counsel do not suggest the existence of any rule which would prevent appellant from attending the baseball games in question as a spectator. The fact that he was to receive compensation for his presence at the games may well have served to make his presence in the baseball park, and his consequent unavailability for emergency fire duty, more attractive to him. This, however, does not seem enough to warrant judicial declaration that his contract for such employment was void. Although the City and County of San Francisco requires that its employees be residents of San Francisco, it would hardly be contended that an employee's lease of a residence outside the city is void.

[11, 12] Under the particular facts of this case, we see no reason to doubt that the disciplinary powers of the fire department are ample to secure compliance with its rule against outside employment, where the department considers enforcement of the rule to be required. This rule, concerned wholly with personnel administration within the department, presents no pressing need for intervention of the courts to declare invalid a contract made by an employee with one wholly unconnected with the

municipal government. Such intervention here would not protect the public because the employee's participation in the transaction has been completed; no serious moral turpitude is involved; and to sustain the defense of illegality would unjustly enrich the defendants. These elements may properly be considered by us (Norwood v. Judd, 93 Cal.App.2d 276, 289, 209 P.2d 24).

Order denying judgment notwithstanding verdict affirmed. Order granting new trial reversed.

KAUFMAN, P. J., and DOOLING, J., concur.



Loris HUNTER, Plaintiff and Respondent,
v.

MOHAWK PETROLEUM CORPORATION,
a corporation, Defendant and
Appellant.*
Civ. 17565.

District Court of Appeal, First District,
Division 1, California.

March 19, 1958.

Rehearing Denied April 18, 1958.

Hearing Granted May 14, 1958.

Action by invitee against operator of gasoline service station for personal injuries sustained when another invitee used air hose to blow out gasoline pipe line on his truck and first invitee was struck in face with stream of gasoline. The Superior Court, City and County of San Francisco, A. K. Wylie, J., entered judgment for first invitee and operator appealed. The District Court of Appeal, Peters, P. J., held that question whether operator was negligent in failing to realize the danger created by the other invitee and in failing to give warning to first invitee of the possible danger was for trier of facts.

Judgment affirmed.

Bray, J., dissented.

1. Trial ⇨253(4)

In action by invitee against operator of gasoline service station for personal injuries sustained when another invitee blew air through gasoline pipe line of his vehicle and stream of gasoline struck first invitee in face, operator was not entitled to instructions which omitted reference to possibilities that operator knew or should have known that other invitee would use air hose to blow out gas line and failed either to stop him or warn other customers of danger.

2. Negligence ⇨48

A landowner is required to exercise reasonable care to protect invitee from those dangerous conditions or activities known to landowner, and of which he should have known if reasonable care were exercised.

3. Negligence ⇨32(1)

A landowner, even one operating a business, is not an insurer of the safety of his invitees or business guests.

4. Negligence ⇨28

A landowner is not liable for harm resulting from conditions from which danger is not to be anticipated.

5. Negligence ⇨48, 136(16)

In determining whether or not a business invitor is liable to an invitee for personal injuries sustained, the real question in each case is whether the danger is of such character, or such duration, that jury may reasonably conclude that due care would have discovered it and, if so, it is a fact question for jury, but if not, then there is no liability.

6. Negligence ⇨136(16, 24)

In action by invitee against operator of gasoline service station for personal injuries sustained when another invitee was using air hose to blow out gasoline pipe line on his truck and stream of gasoline struck first invitee in face, question whether operator was negligent in failing to realize the danger created by the other invitee and in failing to give warning to first invitee of the possible danger was for trier of facts.

7. Negligence $\Rightarrow$ 32(1), 48

When a landowner invites customers to his place of business he is under a duty of reasonable care to protect those customers, he is responsible not only for those dangers he actually knows exist but also those dangers which, in the exercise of reasonable care, he should know might exist.

Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco, for appellant.

Leon A. Blum, Harold L. Levin, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Loris Hunter, was injured while she, as an invitee, was on the premises operated by the defendant Mohawk Petroleum Corporation. The injury was caused by the negligent act of another invitee. The plaintiff brought this action against Mohawk on the theory that as invitor it owed her a duty which had been violated. The jury brought in a \$5,000 verdict against Mohawk. From the judgment entered on that verdict Mohawk appeals, its principal contention being that there is no evidence to support the judgment.

The accident occurred on the afternoon of July 7, 1953, on premises operated by Mohawk as a gasoline service station. Mrs. Hunter was a regular customer of this station. It was the custom at this station for the attendant in charge to fill the gasoline tanks of customers, but for the customers to serve themselves air and water. Gasoline was dispensed from pumps installed on cement islands located in the central portion of the lot. The air and water facilities, as well as self-help vacuum cleaning equipment and self-help battery charging units, were located along the eastern edge of the lot for the use of customers. Also on the eastern edge of the lot, in close proximity to the air and water outlets, a large blackboard was maintained by Mohawk to post the winning numbers of drawings made by Mohawk from tickets

previously distributed to its customers as an advertising stunt.

The negligent invitee who directly caused the accident was Pete Paris, a regular customer of the station. About 10 a. m. of the day in question he drove into the station and purchased some gasoline. Then he discovered that he could not start the motor of his pick-up truck. He pushed it over to the portion of the lot where the water and air outlets and the battery charger were located. He tried to charge his battery, but burned it in the process. He then purchased a new battery from the station attendant, and installed it himself. The motor of his truck still would not start. Thereupon he started to work on the motor. He continued to work on the car "for six or seven hours," working both on the motor and the mechanism underneath the car. During this period the station attendant paid no attention to what he was doing and did not, in any way, assist or offer to assist him. He finally decided that the gasoline pipeline leading to the gasoline tank might be plugged up, and he decided to blow it out with the air hose. He testified that he then removed the gas cap on the gasoline tank. There is substantial evidence, however, that there was no gas cap, but simply a rag stuffed into the vent pipe to act as a gas cap, and that this was not removed. Paris then disconnected the main gasoline line from underneath the car and attached the air hose to it to blow out the line. He immediately heard Mrs. Hunter screaming. She was standing immediately back of his truck and very close to the gas tank.

Another customer of Mohawk—Jean Rozelle—testified that she was standing over by the blackboard, which placed her back of Paris' truck, checking to see if she had any winning numbers, when Mrs. Hunter approached and stood beside her, also checking the blackboard numbers. Suddenly a stream of gasoline from the tank of Paris' truck hit the witness in the back. Mrs. Hunter got the full impact of the stream of gasoline in her face.

Mrs. Hunter and her husband testified that they arrived at the gasoline station during the afternoon to get gasoline. They had about 100 tickets in the drawing operated by Mohawk. Mrs. Hunter went over to the blackboard to check her tickets with the winning numbers. She noticed Paris bending over the motor of his truck. No one warned her of any danger, and there were no warning signs. Suddenly the stream of gasoline hit her full in the face. The gasoline burned her face, chest, arms and neck. Her eyesight was materially impaired. No charge is made that, if liability exists, the damages are excessive. They are not.

[1] The first contention of appellant is that the trial court should have given the following proffered instruction: "If you find that the sole, proximate cause of the injury to the plaintiff, if any, was the act of Pete Paris in blowing out his gas line, you will return a verdict in favor of defendant Mohawk Petroleum Co."

Appellant also contends that the court erroneously struck out the first sentence of the following instruction: "Even if you should find that Pete Paris was negligent and that his negligence, if any, caused injury to the plaintiff (if any), such a finding will not support a verdict against the Mohawk Petroleum Co. In order to recover against the Mohawk Petroleum Co., the plaintiff must prove by a preponderance of the evidence that the defendant was negligent, and that such negligence, if any, was a proximate cause of injury to the plaintiff, if any."

Appellant's contention is that the jury must have held that it was vicariously responsible for the acts of Paris, and that the above instructions were necessary to clarify the issues. The trouble is that the refused instructions were misleading and incomplete. Certainly, if appellant knew or should have known that Paris was going to use the air hose to blow out the gas line, and failed either to stop him or to warn other customers of the danger, it would be liable. The proposed instructions omitted any reference to these pos-

sibilities. They were incomplete and properly refused. Moreover, the other instructions given clearly stated the nature of appellant's defense. The jury was told, in no uncertain language, that before appellant could be held liable the jury must find that appellant was negligent. It was instructed at length on the duty owed by a landowner to invitees, and on the necessity of foreseeability as an element of responsibility. The jury was told that there was no duty to warn of an obvious danger. These instructions adequately covered the field.

The basic contention of appellant is that the judgment is unsupported by the evidence. It is claimed that there is no evidence to support the implied finding that appellant knew or should have known that the conduct of Paris might injure other invitees.

The rules applicable to the liability of landowners, who use their premises for business purposes for torts committed by one invitee against another are reasonably well settled, but somewhat difficult of application. They are stated as follows in section 348 of the Restatement of Torts:

"A public utility or other possessor of land who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the land for such a purpose for bodily harm caused to them by the accidental, negligent or intentionally harmful actions of third persons or animals if the possessor by the exercise of reasonable care could have

"(a) discovered that such acts were being done or were about to be done, and

"(b) protected the members of the public by

"(i) controlling the conduct of the third persons, or

"(ii) giving a warning adequate to enable them to avoid the harm without relinquishing any of the services which

they are entitled to receive from a public utility."

[2-5] "The key question in determining whether or not liability exists is whether the landowner knows, or in the exercise of reasonable care should know, of the danger to his invitees. If so, a duty of protection arises. Stated another way, the landowner is required to exercise reasonable care to protect the invitee from those dangerous conditions or activities known to the landowner, and of which he should have known if reasonable care were exercised. The landowner, even one operating a business, is not an insurer of the safety of his invitees or business guests. There is no liability for harm resulting from conditions from which danger is not to be anticipated. The real question in each case is whether the danger is of such a character, or of such duration, that the jury may reasonably conclude that due care would have discovered it. If so, it is a fact question for the jury. If not, then, as a matter of law, there is no liability.

There are several cases holding that the landowner did not know and could not reasonably have anticipated a particular injury, and, as a matter of law, was not liable for injury to an invitee. In *Porter v. California Jockey Club, Inc.*, 134 Cal. App.2d 158, 285 P.2d 60, the plaintiff, a patron at a racetrack, was injured by another patron who ran into the plaintiff. A nonsuit was affirmed, the court finding no evidence that indicated that the operator knew or should have known that such an act would take place. See also *Richards v. Stanley*, 43 Cal.2d 60, 271 P.2d 23. Similarly, in *Worcester v. Theatrical etc. Corp.*, 28 Cal.App.2d 116, 82 P.2d 68, a patron in a theatre was kicked by another apparently intoxicated patron who was asleep when the plaintiff was ushered to her seat. No similar occurrence had ever happened. A judgment notwithstanding the verdict was affirmed, the court stating (28 Cal.App.2d at page 119, 82 P.2d at page 69): "There is no doubt that the respondent owed to the appellant a reasonable degree of care to see that she was

not injured on the premises. However, the respondent was not an insurer of appellant's safety and could be held liable only where it knew, or should have known, of existing danger. There is no evidence of any actual knowledge on the part of respondent of the sailor's condition prior to the accident. Appellant relies upon the theory of constructive notice, in that the sailor was asleep prior to the accident and found to be intoxicated subsequent to the accident. Nothing in the record shows that any employee of the theatre saw the sailor asleep, although he was seen by appellant and her husband; nor is there any evidence to warrant the conclusion that in the exercise of ordinary care, respondent should have discovered the intoxicated condition of the sailor. There must be more evidence than mere surmise or conjecture, from which an inference of negligence can be drawn. *Curry v. Williams*, 109 Cal.App. 649, 293 P. 623." See also *Richter v. Adobe Creek Lodge*, 143 Cal.App.2d 514, 299 P.2d 941, reversing a judgment for plaintiff with directions to grant the defendant's motion for judgment notwithstanding the verdict.

On the other hand, there are several cases holding that it was a fact question as to whether the landowner knew or should have known of the danger. In *Sample v. Eaton*, 145 Cal.App.2d 312, 302 P.2d 431, a patron at a wrestling match was injured when hit by a bottle thrown by another patron. The proprietor of the wrestling club was held liable. The court pointed to evidence that before the plaintiff was hit spectators sitting opposite to him were fighting and throwing various articles. This went on for six or seven minutes without the ushers, private police, or police officers making any attempt to stop these activities. The court held that it was a question for the jury as to whether the proprietor used reasonable care to protect the plaintiff—that the jury could find that in the exercise of reasonable care the danger should have been anticipated.

The oft-cited case of *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 167 P.2d

729, is also in point. There the Canteen was held liable to a volunteer hostess for injuries received while dancing with an impetuous member of the armed forces. The court emphasized evidence that indicated that some of the guests had engaged in conduct that should have indicated to the Canteen that a danger existed, and held that the proprietor should have taken steps to restrain conduct that was potentially dangerous. See also *Raber v. Tumin*, 36 Cal.2d 654, 226 P.2d 574. In *Thomas v. Studio Amusements, Inc.*, 50 Cal.App.2d 538, 123 P.2d 552, the proprietor of a skating rink was held liable to a customer of the rink who was injured by the reckless skating of another patron because there was evidence to support the inference that the proprietor knew or should have known that reckless skating endangered patrons. See also *Goldsmith v. Mills*, 130 Cal.App.2d 493, 279 P.2d 51.

In *Johnstone v. Panama Pacific I. E. Co.*, 187 Cal. 323, 202 P. 34, the court considered the question as to whether a complaint stated a cause of action. The plaintiff in that case was injured by an electric carriage driven by another visitor to the exposition and rented from a concessionaire. The court stated (187 Cal. at page 329, 202 P. at page 36): "In this case it was alleged that the bailor was under the duty to use ordinary care to protect appellant from injury. It may well have been, and it was so alleged in the complaint, that the mere fact of giving the machine to the bailee for operation among pedestrians was an act of negligence and a breach of the duty."

In *Newman v. Clinton Cafeteria Co.*, 153 Cal.App.2d 646, 315 P.2d 64, a customer of the restaurant was injured when another customer turned around suddenly, causing the plaintiff to step back hitting a protective chain, which broke, causing the plaintiff to fall. At page 650 of 153 Cal.App.2d, at page 66 of 315 P.2d, the court stated: "As Mr. Newman was a business invitee, the respondent was obliged to exercise ordinary care to keep the premises in a reasonably safe condition or to warn him of

danger. This duty was not limited to conditions actually known by the owner to be dangerous, but extended also to conditions which might have been found dangerous by the exercise of reasonable care."

[6,7] How do these rules apply to the instant case? We think that there is enough evidence to make the question involved a fact question that was properly submitted to the jury. When a landowner invites customers to his place of business he is under a duty of reasonable care to protect those customers. He is responsible not only for those dangers he actually knows exist, but also of those dangers which, in the exercise of reasonable care, he should know might exist. There is no evidence that appellant had actual knowledge that Paris was engaging in negligent activities. But appellant furnished a place for customers to work on their cars. Appellant knew, or should have known, that persons using the facilities furnished by it might include amateurs, hot-rodders, and other do-it-yourselfers. It is certainly a reasonable possibility that such persons working on an instrumentality such as an automobile might create a dangerous situation. Yet appellant made no effort at all to discover what Paris was doing or how he might be doing it. He invited other customers to come to the area by maintaining the blackboard in the immediate vicinity of the area where Paris was working. No warning signs were posted to warn invitees of the possible danger. Appellant knew, or should have known, that Paris was working on his car for many hours. Appellant knew that the trouble was not battery trouble because appellant's employee had sold Paris a new battery and the employee knew that this did not start Paris' car. Certainly the attendant knew, or should have known, that Paris was having great difficulty in starting his car. The attendant knew, or should have known, that Paris might be engaged in any one of several activities that could create a danger to those nearby. He knew, or should have known, that among these possibilities was that if the person working on his car be-

lieved the gasoline line was stopped up he might use the air pressure to blow it out. He knew, or should have known, that the gasoline tank was capped with a rag stuffed in the vent. Paris was working on his car where the air hose was located. The possibility that the air hose might be used for this purpose was not so unlikely that it was unforeseeable as a matter of law. The duty of reasonable care that appellant owed its customers charged it with anticipating this danger, or at least of warning its invitees of the possible danger. Instead of giving such a warning appellant invited others to the area of possible danger by maintaining the blackboard. We think that, under these circumstances, it was a fact question as to whether appellant had notice of facts which required it to take steps to protect respondent from the acts of Paris. This being so, the judgment is adequately supported by the evidence.

The judgment appealed from is affirmed.

FRED B. WOOD, J., concurs.

BRAY, Justice.

I dissent. I find no evidence of negligence of appellant. The majority opinion holds that under the circumstances of this case, foreseeability of danger from allowing a patron to work on his car was a question of fact. It seems to me that this is carrying the doctrine of foreseeableness as a fact question too far. It does not seem reasonable to me to hold that any reasonable person would assume: (1) That a service station patron would use an air hose to blow out a gasoline line. There was no evidence that anyone had ever done this before. (2) That a person would do this with a gasoline tank capped only with a rag. Even assuming that the station operator should have known that the patron might have used the air hose to blow out the line, the operator had a right to assume that it would be done in the ordinary and customary manner. (3) That he would use the air hose with utter disregard of another person standing near. The opinion would require the operator to inspect the work

being done on the car. How often should he have done this? Unless he happened to make his inspection in the exact few minutes it took the patron to attach the air hose, an inspection would not have revealed the patron's intention.

The majority rule makes the operator practically an insurer of anyone injured by an air hose used by a patron. It requires an operator to foresee that anyone using an air hose might use it in a careless manner and injure another, so that the operator would have to provide enough attendants to supervise every patron using the air hose. For example, it is possible that a patron negligently might inflate a tire causing it to blow out and injure another patron waiting to use the air hose. In self-service stations, the rule would require an attendant to watch every patron serving himself gas because, perchance, the patron might negligently light a cigarette, and cause an explosion injuring another patron. To hold foreseeable the unusual circumstances in this case is holding, in effect, that there can be no lack of foreseeability as a matter of law, and that in every "but for" case, no matter how fantastic the circumstances, foreseeability is a fact question, because the accident would not have happened if the actor sought to be charged had not taken his car out of the garage, or as here, provided an air hose for his patrons.

In *Porter v. California Jockey Club, Inc.*, 134 Cal.App.2d 158, 285 P.2d 60, the court pointed out that in the absence of conduct to put him on notice to the contrary, a race track owner is entitled to assume that others will not act negligently. Why did defendant in our case not have that right? Moreover, foreseeability that persons are going to rush to make last minute bets at a race track and are likely to bump into one another, is just as warranted as foreseeability here, and yet the court in the *Porter* case held in effect that as a matter of law the danger was not reasonably foreseeable.

The rule would require the theatre owner in *Worcester v. Theatrical etc. Corp.*, 28 Cal.App.2d 116, 82 P.2d 68, to make sure that no intoxicated persons came into his

theatre, as it is more foreseeable that intoxicated people will go into a theatre and cause trouble than that a service station patron would negligently use an air hose.

In *Sample v. Eaton*, 145 Cal.App.2d 312, 302 P.2d 431, there was evidence that the patrons were fighting and throwing objects. This put the proprietor on notice of the possible danger to other spectators. No such notice appears in our case. In *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 167 P.2d 729, there was evidence, as the majority opinion states, "that indicated that some of the guests had engaged in conduct that should have indicated to the Canteen that a danger existed * * *". No such evidence here. In *Thomas v. Studio Amusements, Inc.*, 50 Cal.App.2d 538, 123 P.2d 552, as the majority opinion states, there was "evidence to support the inference that the proprietor knew or should have known that reckless skating endangered patrons." *Johnstone v. Panama Pacific I. E. Co.*, 187 Cal. 323, 202 P. 34, was based upon the reasonable proposition that one renting an electric carriage to be driven among pedestrians in crowded thoroughfares, could reasonably foresee danger to those pedestrians. *Newman v. Clinton Cafeteria Co.*, 153 Cal.App.2d 646, 315 P.2d 64, was based upon the reasonable foreseeability of patrons striking forcibly the protective chain which broke.

The opinion states that the operator should have known that amateurs and hot-rodders might want to repair cars on his premises. Whether that be true or not, there is no evidence that Paris was either an amateur or hot-rodder. Obviously he was a do-it-yourselfer. But amateur, hot-rodder or do-it-yourselfer, whichever he might be, defendant had the right to assume that he would use ordinary care in working on his car. To hold that a car needing repair is a dangerous instrumentality is applying to it the doctrine of absolute liability which does not apply even to automobiles in operation on highways. It is a matter of common knowledge that anyone tinkering on the engine of an automobile on the street or in a driveway will cause spectators to

gather around to watch the operation. It could hardly be held that in so doing the spectators were guilty of contributory negligence because they should foresee, in the absence of any notice to that effect, that the mechanic was going to do some foolish and negligent thing such as blowing the gasoline line with an air hose while using a rag for a tank cover. Yet the operator of a service station is to be held negligent where the spectator would not be. If such claimed foreseeability is to be the test, plaintiff herself, on seeing Paris working on the automobile, was put on the same notice of danger which it is claimed applied to defendant.

I would reverse the judgment.



158 Cal.App.2d 299

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Joseph ALVIDREZ, Defendant and
Appellant.
Cr. 3395.**

District Court of Appeal, First District,
Division 1, California.

March 10, 1958.

Rehearing Denied April 9, 1958.

Defendant was convicted in the Superior Court, City and County of San Francisco, Walter Carpeneti, J., for sale of narcotics, and he appealed. The District Court of Appeal, Peters, P. J., held that even prior to opinion which interpreted constitutional guarantees afforded to defendant as requiring, upon demand, that prosecution divulge name of participant-informer, there was no rule of law that name of informer-participant did not have to be divulged; and held that, therefore, even though such opinion had not yet been handed down when defendant's trial on charge of selling narcotics

was had, his failure to demand therein identification of informant-participant would preclude point from being raised on appeal.

Affirmed.

1. Witnesses ⇨216

In prosecution for sale of narcotics, defendant would have been entitled, upon proper demand, to be given name of informant-participant.

2. Courts ⇨100(1)

After fundamental and well-established rule of evidence has been reversed, appellate courts will apply new rule to cases tried before rule was reversed, even though no objection to evidence was made in such cases.

3. Criminal Law ⇨1028

Even prior to opinion which interpreted constitutional guarantees afforded to defendant as requiring, upon demand, that prosecution divulge name of participant-informer, there was no rule of law that name of informer-participant did not have to be divulged; and, therefore, even though such opinion had not yet been handed down when trial on charge of selling narcotics was had, failure to demand therein identification of informant-participant would preclude point from being raised on appeal.

Robert Stanton Rose, Frederick J. Whisman, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

The defendant was charged with the sale of narcotics and with several priors. He admitted the priors and was found guilty of the crime charged. He appeals from the judgment.

Appellant does not challenge the sufficiency of the evidence to sustain his conviction. Legally, he could not do so. Various inspectors of the State Bureau of Narcotic Enforcement testified that on the day in question they searched an informant and

found no narcotics or money upon his person; that they gave the informant \$10 in bills, the serial numbers of which were recorded; that they then observed the informant enter and leave the premises occupied by defendant; that when the informer came out of the premises, he had a bundle of heroin; that defendant was arrested and he had in his possession the marked bills; that a search of his room disclosed five bindles of heroin and narcotic paraphernalia, and that two other persons were in the room. This evidence, of course, sustains the judgment.

The sole contention of appellant on appeal is that he was deprived of due process of law in not being informed of the name of the informer, and that such point can be raised for the first time on appeal, although no demand for such identification was made in the trial court, nor was there any objection to the failure of the prosecution to disclose the identity.

[1,2] The case presents the typical informant-participant situation. There can be no doubt that, had proper demand been made for the identity of the informer, and had the request been refused, it would have been reversible error. *People v. Lawrence*, 149 Cal.App.2d 435, 308 P.2d 821; *People v. Castiel*, 153 Cal.App.2d 653, 315 P.2d 79. It is no longer open to question that in an informant-participant situation, upon demand, the defendant is entitled to be given the name of the informer. But here no such demand was made. It is a well settled rule of law that, with certain limited exceptions, "It is a general rule of appellate review, early established and long adhered to, that questions not raised in the trial court will not be considered on appeal." (3 Cal.Jur.2d 604, § 140, citing many cases.) One such exception to the general rule is that the appellate court will consider fundamental errors or gross irregularity where the error is of such a nature and so substantial that an objection would not have obviated it. (See cases collected 3 Cal.Jur.2d 605, § 141.) Another exception, really included in the one already stated, is that if

a fundamental and well-established rule of evidence is reversed, the appellate courts will consider the admissibility of evidence although no objection was made, in those cases decided before the rule was reversed. In such cases objection would have been futile. *People v. Kitchens*, 46 Cal.2d 260, 294 P.2d 17. It is this rule that appellant seeks to invoke here. It is claimed that the *Lawrence* case, *supra*, which was decided March 26, 1957,* established a new rule of evidence, and that prior to that case it was generally recognized that the prosecution had the privilege to refuse to divulge the name of any informant, whether a participant or not. Appellant places his main reliance on *People v. Kitchens*, 46 Cal.2d 260, 294 P.2d 17. That case held that the Supreme Court would review appeals based on the admission of illegally secured evidence although no objection had been made in the trial court, where such cases had been tried prior to the decision in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513. The basis of the court's ruling in the *Kitchens* case is disclosed by this quotation (46 Cal.2d 260, at page 262, 294 P.2d 17, at page 19): "Although we adhere to the rule that ordinarily the admissibility of evidence will not be reviewed on appeal in the absence of a proper objection in the trial court, we conclude that it is not applicable to appeals based on the admission of illegally obtained evidence in cases that were tried before the *Cahan* decision. This practice was adopted by the federal courts following the decision of the United States Supreme Court in *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, holding confessions obtained during a period of illegal detention inadmissible even if voluntarily made. [Citing decisions.] A contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal. Moreover, in view of the decisions of this court prior to *People*

v. Cahan, *supra*, an objection would have been futile, and 'The law neither does nor requires idle acts.' Civ.Code, § 3532."

This rule was sound. As early as 1909 in *People v. Le Doux*, 155 Cal. 535, 102 P. 517, and again in 1922 in *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, our Supreme Court had held that illegally secured evidence was admissible. That rule was followed by many appellate courts until April of 1955 when the *Cahan* case was decided. Prior to that date trial courts were bound by the prior decisions and were bound to rule that illegally secured evidence was admissible. Any objection to such evidence would have been futile. Therefore, when the Supreme Court reversed that rule, fairness, justice, equity and common sense required that the new rule be applied to all cases tried before April of 1955 even though no objection had been made.

[3] But no such situation is here presented. The *Lawrence* case did not establish a new rule of law, or overrule an old one. It simply interpreted constitutional guarantees afforded to defendant as requiring, upon demand, the prosecution to divulge the name of a participant-informer. But it did not involve evidence such as was subject to an inherent defect as in the *Cahan* case. There it was held that the unlawfully secured evidence was inadmissible. But, in the instant case, the officer's testimony about what he saw and heard the participant-informer do was clearly admissible evidence—there was nothing inherently wrong with it. The rule stated in the *Lawrence* case is not that such evidence is inadmissible if the name of the informer-participant is not first disclosed, but is to the effect that if demand is made for such identity it must be disclosed or the evidence of the officer will be stricken.

In the instant case we do not know whether, if a demand had been made, that either the district attorney or the witness would have claimed privilege, or whether, if such claim had been made, the trial court would

* In the instant case the evidence was introduced on March 8, 1957.

have sustained it. That is the purpose of the rule requiring the point to be raised in the trial court before it can be raised on appeal—to give opposing counsel and the court the opportunity of correcting or preventing the error.

This view is in accord with the decided cases. In *Lorenzen v. Superior Court*, 150 Cal.App.2d 506, 310 P.2d 180, this court held that information from a confidential informant, believed reliable, that the accused had committed a felony, justified, alone, his arrest without a warrant. The petitioner in that case, however, had not requested the identity of the informer. If appellant in the instant case is correct we should have granted the writ in the *Lorenzen* case. We denied it and, in so doing, were careful to state (150 Cal.App.2d at page 513, 310 P.2d at page 185): "In order that no implications might be attempted to be drawn from our decision under the facts of this case, as to what our ruling might be under different facts, we expressly call attention to the record showing that there is not involved herein the question of a denial of a demand by the defendant for the name of the informant. No such demand was made and therefore we neither directly nor indirectly are determining what the legal situation would be in a case where such demand is made." In *United States v. Conforti*, 7 Cir., 200 F.2d 365, the court was faced with the same problem here involved—an informer-participant, but no demand in the trial court for a disclosure of his identity—and a claim of error made on appeal. The court, while stating it would have been error to refuse the identity had a demand been made, held that the point could not be raised for the first time on appeal. The court stated (at page 369): "The Government was under no duty to volunteer the names of all possible witnesses, nor was it required to bring into court as witnesses all

persons who participated in or had some knowledge of the transactions here involved." Again on the same page the court concluded: "This court, of course, cannot reverse a judgment of the District Court on the theory that the District Court might have erred if it had been required to rule on an objection to a question which sought to establish the identity of No. 54 or No. 55."

A situation somewhat analogous to that presented in the instant case was presented in *Robison v. Superior Court*, 49 Cal.2d 186, 316 P.2d 1. There, at the preliminary hearing, the evidence produced by the prosecution showed that the petitioner was found in possession of a narcotic when arrested without a warrant, but it failed to show that the arrest was based on reasonable grounds. Petitioner sought a writ of prohibition, claiming the evidence of his possession should have been excluded. The court held: "By failing to object at the preliminary hearing to the admission of the evidence * * * defendant waived his right to claim that the evidence was improperly received because it had been illegally obtained." 49 Cal.2d at page 187, 316 P.2d at page 2.

Appellant makes a determined argument to the effect that the rule of the *Kitchens* case should be expanded to include the situation here involved. This we are not inclined to do. There was no rule of law that the name of an informer-participant did not have to be divulged. Appellant's trial counsel simply assumed the existence of a rule that did not exist, or did not seriously want to know the name of the informer. The present counsel are in no legal position to urge that the trial court committed an error which he never was afforded the opportunity to commit—or not to commit.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Lewis GUERRIERI et al., Plaintiffs and Appellants,

v.

Phil J. SEVERINI et al., Defendants and Respondents.*

Civ. 5641.

District Court of Appeal, Fourth District, California.

March 18, 1958.

Rehearing Denied April 17, 1958.

Hearing Granted May 14, 1958.

Action for breach of contract for purchase of 200,000 gallons of wine from defendants, who within 24 hours after execution of contract unconditionally repudiated contract and notified plaintiffs they would not deliver the wine. From adverse judgment of the Superior Court, Fresno County, Strother P. Walton, J., the plaintiffs appealed. The District Court of Appeal, Griffin, Acting P. J., held that evidence sustained finding that at time of repudiation there was available for purchase on open market assorted wines in sufficient quantities and of a like quality as that contracted for and at same identical price and that plaintiffs unjustifiedly refused to purchase it and accordingly suffered no damage.

Judgment affirmed.

1. Sales ☞183, 185

Where defendants, within 24 hours after execution of contract for sale of wine, unconditionally repudiated contract and notified plaintiffs that they would not deliver wine in accordance with agreement, plaintiffs were not required to make or tender payment for wine. West's Ann.Civ.Code, § 1440.

2. Sales ☞417

In action for breach of contract for purchase of 200,000 gallons of wine from defendants, who within 24 hours after execution of contract unconditionally repudiated contract and notified plaintiffs they would not deliver wine, evidence sustained finding that at time of repudiation there was available for purchase on open market assorted wines in sufficient quantities and of like quality as that contracted for and at

same identical price, and that plaintiffs unjustifiedly refused to purchase it and accordingly suffered no damage.

Wild, Christensen, Barnard & Wild, by William R. Manson, Fresno, for appellants.

James Robert Nielsen, Iener W. Nielsen, and Harold V. Thompson, Fresno, for respondents.

GRIFFIN, Acting Presiding Justice.

This action for damages for breach of a contract for the purchase of 200,000 gallons of wine, less lees and shrinkage, was before this court in *Guerrieri v. Severini*, 132 Cal.App.2d 269, 281 P.2d 879. The judgment in favor of defendants was reversed and it was there held that there was sufficient evidence of the existence of a valid contract notwithstanding the finding of the trial court to the contrary. On a new trial the court held that plaintiffs suffered no damage by reason of the breach of the contract; that although there was a breach or repudiation of the contract by defendants on the day it was executed, there was other wine available at that time and at the same price, and that plaintiffs could have replaced it then with such wine but failed to do so.

The factual background is about the same as there related, and in the interest of brevity we will not repeat it except such portion as may bear upon the time of the alleged breach and the finding of failure to minimize damages by the purchase of other wine. It is plaintiffs' claim that by such breach and due to the increase in the price of wine, they were later required to purchase wine elsewhere at an increase of 9¢ per gallon, and their damages amounted to \$18,000.

On April 6th, 7th and 8th, 1953, a freeze occurred and a few days thereafter and up to May 8th, the price of standard wines rose steadily from 35¢ to 45 and 50 cents per gallon.

The evidence does show that when Severini signed the original order set forth in detail in the reported case, he returned with-

in one hour and informed Fritz Kyer, the broker, that he could not deliver 200,000 gallons of wine because of some difficulty with his wife when he informed her he had sold the entire gallonage; that he told Kyer she threatened a restraining order against selling it; that he, at that time or later, offered to sell and deliver 88,000 gallons of specified wine at the same price and if the other one-half was released he would then sell and deliver that one-half to plaintiff. The testimony in reference to the price to be obtained for this other one-half, in case of release, is in doubt. Severini then said Kyer told him the order had gone in for the full amount and had been accepted by plaintiffs; that plaintiffs agreed that defendant could do his own gauging of the gallonage he had on hand and that the money would be immediately available; and that Kyer agreed to submit the new offer to plaintiffs for consideration.

Apparently Kyer and Severini thereafter were endeavoring to effect a new order that would place one-half of the net gallonage first agreed upon for sale to plaintiffs. Severini estimated that amount at 88,000 gallons. On April 24, 1953, Severini had his then attorney write Kyer as follows:

"On March 27, * * * my client, Severini Winery & Distillery Co. signed a document prepared by you calling for the sale of approximately * * * gals. of * * * Wine for the purchase price of .36¢ per gal. and that said wine was to be sold to Santa Fe Vintage Co. * * *.

"Since the signing of this document my client has never in any manner, shape or form received an acceptance of such offer to sell, and further your attention is called to the terms as stated in said document which plainly states that the buyer was to pay cash for the entire amount immediately, which would have been on March 27, 1953. Inasmuch as the prospective buyer, nor anyone acting for it, has made a valid acceptance and further for the reason that the payment has not been

paid as reflected in the offer, said offer is hereby withdrawn."

Thereafter dealings between Kyer and Severini were had in the hope that plaintiff would accept 88,000 gallons of wine as suggested, and this offer was submitted to plaintiff Lewis Guerrieri, through the broker Kyer, by letter dated April 29, 1953. It reads in part:

"Dear Lewis:

"Sorry I was unable to get in touch with Severini sooner today, but he did not show up until noon and had just walked into my office when you called me.

"Phil (Severini) tells me that the wine he offered to give you is his exact half and represents all the wine he has in the winery with the exception of lees. This is as follows: * * *.

"This totals 88,000 Gals.

"All this wine is ready to ship and Severini told me he would like for you to draw at least three truck loads a week until it is all out.

"As to payment, he would rather that you sent me checks covering sixteen loads and as fast as the trucks were loaded he could bring me the receipt and collect. This would be a more simple procedure than sending the money to the bank.

"I told Severini that I would let him have your definite answer on this sometime tomorrow morning. I did overlook mentioning that he also told me that in case he got a release from his wife on the second half that you would be given first opportunity to buy it."

(Signed) "Fritz Kyer"

Several days passed and there was no answer from Guerrieri. From the testimony produced it would appear that plaintiffs conditionally accepted this new offer and had Kyer inform Severini that if Severini would furnish plaintiffs with an inventory (Form No. 702) required by the United States Government, showing this to be a full one-half of all wine defendants had on hand he would take this 88,000 gal-

lons with the further understanding that in case of release of the other one-half he could have first refusal at the present market price. Severini refused to show or produce form No. 702, and said it was one-half of the wine on hand; that he was not showing form No. 702 to plaintiffs; and this was the "end of it".

It was agreed that no money was ever paid by plaintiffs to defendants and that no wine was ever delivered to plaintiffs from defendants. In November, 1953, after the commencement of this action on June 2, 1953, Severini sold to other persons all the wine he had, consisting of 176,000 gallons plus lees and shrinkage.

The evidence shows that on or about March 27, 1953, plaintiffs and defendants did enter into a binding contract for the sale and purchase of 200,000 gallons of wine, as set forth in the agreement. The prior decision so holds and the court so found. According to Kyer, within one hour after signing it, Severini called and stated he was "unable to deliver" the wine because his wife had or was going to obtain a restraining order and this information was telephoned to Guerrieri immediately. There is some confusion in the evidence as to what Severini said after Kyer told him the order had already been mailed and Guerrieri had accepted it. At the previous trial Severini said: "Well, if that is the way it is, there is nothing we can do about it".

Guerrieri testified that after receiving the original order by mail Kyer called him and said Severini did not want to deliver the wine on account of wife trouble and Guerrieri told him that was the deal he signed and he (Guerrieri) "will hold him to it"; that things just went along like that until he received the letter of April 24th, although he knew, in the meantime, Severini and Kyer were trying to get together on something.

Upon this testimony the court found that within 24 hours after the execution of the agreement, Severini unconditionally repudiated the contract and notified plaintiffs he would not deliver the wine in accordance

with the agreement, and such refusal of defendant to deliver the wine constituted a breach of the agreement. Although the evidence is not entirely satisfactory on this question, there is sufficient evidence to support the finding. It does appear that either at the time or subsequently, Severini did attempt to negotiate a new transaction or agreement whereby he would deliver one-half or 88,000 gallons at 36 cents and would agree to sell the other one-half if and when it became available to him for sale. Guerrieri did not unconditionally accept this offer but required Severini to furnish an inventory form No. 702, as required by the United States Government, showing this to be a full one-half of all wine defendant had on hand. Apparently believing the 88,000 gallons was not the full one-half of all wine defendants had on hand, Guerrieri did not accept this latter condition and accordingly there was no subsequent agreement reached on which plaintiffs could base a cause of action for its breach.

[1] The court found plaintiffs failed to immediately tender payment of the full amount of the purchase price of the 200,000 gallons of wine. Since Severini notified plaintiff he would not deliver the wine as originally agreed upon, plaintiff was not required to make or tender payment therefor in full. Civ.Code, Sec. 1440; Guerrieri v. Severini, *supra*. Under the facts found the notice from Severini's attorney, dated April 24, 1955, to the effect that the offer was withdrawn for failure to pay said money and failure to accept the offer was without effect and did not constitute the first repudiation or breach of the agreement.

[2] The court then found that at the time of defendants' refusal to deliver, which time it fixed as being "within 24 hours" after March 27, 1956, the date of the original contract, there was available for purchase on the open market at Fresno, assorted wines in sufficient quantities and of a like quality as that contracted for and at the identical price per gallon; that plaintiffs knew of the availability of these wines; that these wines were offered for

sale to them but they unjustifiably refused to purchase the same; and that if they had purchased the wines so offered they would have suffered no damage by reason of defendant's refusal to deliver the wine under the contract. The question is the sufficiency of the evidence to support this finding.

Guerrieri testified Kyer submitted samples of Severini wine ten days before March 27th; that he had it examined and analyzed, and found it to be very good wine; that another winery had likewise submitted samples through Kyer which he had examined and it was inferior to Severini wine. When asked if Kyer did not tell him, after Severini refused to deliver his wine, that Kyer could get that amount at the same price from another winery, Guerrieri said he did not remember, but even if he did, he was not interested because he bought the Severini wine; that later (time not indicated) he tried to buy that wine and found it had been sold to someone else.

Kyer testified as a broker he had previously submitted samples of defendants' wine as well as wine from other sources to plaintiffs; that during this period and up to April 29th, there was other wine available at the same price which plaintiff could have bought to fill this order in the full amount; that 225,000 gallons of other unfinished wine was available for sale by him on March 27th, about 3 p. m., and that later that day he sold it to another party. He said Guerrieri was offered both batches of wine and he chose the Severini wine; that after Severini refused to deliver his wine, this other wine was still available to Guerrieri; that Guerrieri knew about it; that he talked to him on the telephone about it before he sold the other wine and Guerrieri said he did not want that wine, he wanted the Severini wine because he liked it, and Guerrieri did not, at that time, ask Kyer to obtain any other wine for him because he still wanted the Severini wine. It does appear that Guerrieri did endeavor later to purchase this wine but it had been sold, and commencing about April 17th, Kyer did purchase other

wine for Guerrieri at the increased price indicated. It was upon this evidence that the court found plaintiff unjustifiably refused to purchase this other wine offered to him for sale, and that if he had accepted said offer he would have suffered no damage by reason of defendants' breach of the contract.

It is plaintiffs' claim that the breach of the contract by defendants was not on the date found but was an anticipatory breach and did not become actually a breach until so treated by the injured party, and that the bringing of the suit was plaintiffs' election to treat the repudiation as a breach, citing such authority as *Crown Products Co. v. California Food Products Corp.*, 77 Cal. App.2d 543, 175 P.2d 861; and *Wilton v. Clarke*, 27 Cal.App.2d 1, 80 P.2d 141. It is accordingly argued that since there was no similar wine that could be purchased at the price agreed upon at this later date, the claim that no damage resulted to plaintiffs was untenable.

While the evidence on the subject is far from convincing, we conclude that there is sufficient evidence to show that, at the time defendant stated he could not deliver the wine contracted for under the agreement, plaintiffs were informed of the availability of the other wine and they chose to stand on their contract rather than purchase this other wine at the same price. Although this was an unfinished wine, as compared to defendants' finished wine, the testimony is that the difference in price would be about one cent per gallon. The unfinished wine was sold for 35¢ per gallon. The finding that this wine was of a like quality to that of defendants is somewhat lacking in evidentiary support but it does appear from the exhibits and other evidence that other standard assorted desert wines were then selling for 35¢ a gallon or lower on the open market; that samples of the other wines were submitted to plaintiffs and when it was no longer available to them they were willing to buy it at the price listed even though they believed the quality of the Severini wine to be better. It should be further noted that

plaintiffs were offered 88,000 gallons of the Severini wine at 36¢ per gallon. There was sufficient evidence to support the finding that plaintiffs had an opportunity to purchase other similar wines in the same quantity and quality at the same price; that they unjustifiably refused to purchase it, and accordingly suffered no damage.

Judgment affirmed.

MUSSELL, J., concurs.

BARNARD, P. J., being disqualified, did not participate herein.

conditions did not, as a matter of law, render county zoning ordinance invalid and unconstitutional as it applied to landowner's forty acre tract, and that county board of supervisors did not, as a matter of law, act arbitrarily in refusing to reclassify the tract at the present time as heavy industrial, particularly where board was apparently endeavoring, in good faith, to hold question of reclassification in abeyance pending result of complete study of situation in entire county, and afforded landowner opportunity again to present a petition for reclassification.

Judgment reversed.



158 Cal.App.2d 230

**L. M. SLADOVICH, Plaintiff and
Respondent,
v.**

**COUNTY OF FRESNO, a body corporate and
politic, Bert DeLotto, Norman E. Foley,
Sidney L. Cruft, Sloan P. McCormick and
Henry J. Andreas, Members of the Board
of Supervisors of the County of Fresno,
Defendants and Appellants.**

Civ. 5648.

District Court of Appeal, Fourth District,
California.

March 5, 1958.

Hearing Denied April 30, 1958.

Landowner, who owned forty acre tract located near city and classified under county zoning ordinance as rural residential and agricultural, brought action against the county and county board of supervisors to have the classification of the tract declared illegal and void and for authorization to use the tract for heavy industry. The Superior Court of Fresno County, Milo Popovich, J., entered judgment in favor of the landowner, and the county and county board of supervisors appealed. The District Court of Appeal, Griffin, J., held that present

1. Counties ⇨21½

Present conditions did not, as a matter of law, render county zoning ordinance invalid and unconstitutional as it applied to landowner's forty acre tract, which was located near city, and which was zoned as rural residential and agricultural, and county board of supervisors did not, as a matter of law, act arbitrarily in refusing to reclassify tract at present time as heavy industrial, particularly where board was apparently endeavoring, in good faith, to hold question of reclassification in abeyance pending result of complete study of situation in entire county, and afforded landowner opportunity again to present a petition for reclassification.

2. Declaratory Judgment ⇨346

In action by landowner, whose forty acre tract near city had been zoned under county zoning ordinance as rural residential and agricultural, against county and county board of supervisors for declaratory judgment that classification of tract was illegal and void and that landowner was authorized to use tract for heavy industry, evidence was insufficient to justify Superior Court's holding that tract could not be classified other than heavy industry property, and Superior Court's conclusion usurped legitimate exercise of board's power.

3. Counties ⇨21½

Alleged fact that one of the seven planning commissioners of county owned

land near landowner's forty acre tract, which landowner sought to have reclassified from rural residential and agricultural land to heavy industrial land, and such commissioner believed that reclassification of forty acre tract would detrimentally affect his land, would not necessarily void actions of remaining members in denying reclassification and would not void action of county board of supervisors, which reconsidered action of planning commission and denied reclassification.

4. Mandamus ☞99

In action by landowner, whose forty acre tract near city had been zoned under county zoning ordinance as rural residential and agricultural, against county and county board of supervisors for declaratory judgment that classification of the tract was illegal and void and that landowner was authorized to use tract for heavy industry, portion of judgment of Superior Court in form of writ of mandate directing board of supervisors to rezone tract for heavy industry was beyond power of Superior Court, where there were intermediate classifications within which tract might fall. West's Ann.Code Civ.Proc. § 1094.5; West's Ann.Gov.Code, § 65463; West's Ann.Civ.Code, § 3423, subd. 7; West's Ann.Const. art. 3.

5. Constitutional Law ☞70(1)

Doctrine of separation of powers precludes courts from interfering with legislative processes. West's Ann.Civ.Code, § 3423, subd. 7; West's Ann.Const. art. 3.

6. Mandamus ☞28

Mandamus will issue to compel a court or quasi-judicial body to act on matter properly brought before it, but will not lie to compel it to act in a particular manner, unless situation presented is one in which court or body can exercise its discretion in but one way. West's Ann.Code Civ.Proc. § 1094.5; West's Ann.Gov.Code, § 65463.

Lawrence W. Young, Donald R. Francis, Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent L. M. Sladovich brought this action against the County of Fresno and its Board of Supervisors for declaratory relief, alleging that plaintiff owned property approximately 40 acres of land, in Fresno County immediately northwest of the City of Fresno, which was improved with a vineyard and a house located on the east side of Braley Avenue and about midway between Shaw Avenue on the north and Ashlan Avenue on the south; that the defendant Board of Supervisors, pursuant to its ordinance No. 322, and amendments thereto, zoned plaintiff's property as Zone R-A (Rural Residential and Agricultural). A zone map indicating 13 classes of zones is made a part of said ordinance and the property is so classified thereon. A copy of this map is used as an exhibit in this case. The Southern Pacific Railway tracks extend through the City of Fresno in a general northwest-southeast direction and immediately east of Highway 99. The bulk of the property to the east of the tracks and abutting on them in that neighborhood is classified as M-2 Zone (Heavy Industry). The general plan appears to be that to the immediate east of that zone, though irregular, Zone M-2 is joined by other land denominated M-1 (Light Industry). To the west of plaintiff's property are M-2 and M-1 zones. On the M-2 property, consisting of about 52 acres, is a cotton press located about 630 feet west of plaintiff's property, with extensive operations during the cotton season. The railway tracks are about one-fourth mile west of plaintiff's acreage. The general area to the north and east of plaintiff's property (80 acres), classified as R-A, is used partially by a warehouse company for the seasonal storage in the open of cotton bales which are often moved by large trucks. This use was considered by the Zoning Commission to be an "M-2" use but was permitted upon this R-A zoned property as a nonconforming use by rea-

Robert M. Wash, County Counsel,
Spencer Thomas, Jr., Asst. County Counsel,
Fresno, for appellants.

son of its existence there prior to the R-A zoning. Forty acres to the south and east of plaintiff's property is zoned M-2, and on it is located a Conduit Company for the manufacture of concrete pipe, which has extensive operations. South and east of it, near Ashlan Avenue, is located another concrete plant (M-2 Zone) with heavy operations. The cotton press and the concrete mixing plants are all served by spur tracks from the Southern Pacific Railway Company.

In July, 1956, plaintiff filed a petition with the Planning Commission to have his property reclassified from R-A to M-2 Zone. At the hearing before the Commission each party produced evidence as to the conditions prevailing. It was argued by plaintiff that due to these conditions, as an R-A Zone, his property was worth about \$21,500, and if classified as M-2 Zone, it would have a value of \$93,000. After consideration of the evidence the petition was denied without prejudice. Plaintiff appealed to the County Board of Supervisors. A full hearing was had resulting in a denial of plaintiff's petition without prejudice.

In this action plaintiff prayed that the establishment of the existing R-A Zone, as to his property, be declared illegal and void, and that he be authorized to use his property for heavy industry or "M-2 purposes".

Members of the Planning Commission and its director testified at the trial, held in January, 1957, that evidence, both pro and con, in relation to the petition of plaintiff to rezone his property, was produced at the hearing before the Commission on July 31, 1956. Zoning maps here in evidence were used and the particular uses to which the surrounding properties were put were fully described. It affirmatively appears from that testimony that the City of Fresno, the County of Fresno, and the City of Clovis had, in the month of March, 1956, due to certain existing conditions, entered into some form of agreement with an "Area Planning Commission" in consideration of many thousands of dollars, to

study and analyze properties in these cities and portions of the county surrounding them in regard to a land use study pertaining to adjustment of classifications, zoning or rezoning of said properties to the best advantage of said property owners, the cities, the county, and the metropolitan area, all of which involved approximately 80,000 parcels of property including the property in the area here in question. In July, 1956, the "Area Planning Commission" and staff began more intensive work on the subject in conjunction with the officers and staff of the several planning commissions, and certain information was made available to the County Planning Commission as the work progressed pertaining to the area here involved. It appears that several of these property owners near plaintiff's property were desirous of having the classification of their property changed, and these changes were in the process of study when plaintiff filed his petition to change his property one class from R-A to M-2 Zone.

Apparently the evidence thus produced before the County Planning Commission was considered by it. It appears that at least one of the motivating factors leading to the denial of the petition was the fact that an intense study was being made, as indicated, and that any present change in the classification of plaintiff's property might reasonably affect other surrounding property and that similar applications would be made by such owners, thus greatly enlarging the M-2 Zone, if granted, which might well interfere with and change the findings and report of the Area Planning Commission in respect to the entire district. Accordingly, the petition was denied, without prejudice. The general report was to be completed by June 30, 1957.

After due notice under said ordinance a hearing was had before the defendant Board of Supervisors. The evidence taken before the Commission as well as considerable additional evidence was received. The principal planner for the Area Planning Commission there testified as to the progress made in its general study under the contract,

in much more detail in reference to the area here involved, although his full report had not yet been completed. Several members of the Board of Supervisors testified and gave various reasons for upholding the Planning Commission in denying the petition. Some made personal observations of the surrounding territory and considered the fact that the prevailing wind was from the northwest across this M-2 industrial property, and in general blew over and across residential and possible residential districts of the city and county and that any increase in industrial use would be detrimental to such districts and their inhabitants, especially if used for hog-feeding purposes or similar unpleasant uses abusive to the senses and general health. Their testimony indicated that the board generally considered as a factor the fact that experts had been employed, at great expense, to study this, as well as the general problem confronting them and that petitioner should await the results of that study before the board should grant petitioner's request to have his property rezoned to M-2. It denied the petition without prejudice.

Volumes of evidence were produced before the trial court, both pro and con, including additional testimony of the Area Planner, showing what progress had been made in their study. Maps were produced and picture slides exhibited showing in detail many of the results affecting plaintiff's property and the surrounding area. There was testimony that the area in the vicinity of the subject property zoned for industrial uses is now about 50 per cent developed to industrial uses; that due to proposed realignment of Highway 99 as a freeway near there, there will soon be an undetermined change in the industrial zoning and traffic pattern; that the area lying east of Valentine Avenue and east of plaintiff's property is potentially good residential property; that there should be a buffer between M-2 uses and residential uses; and that this property should be classified as to constitute a buffer zone to it; that the open storage of cotton bales to the north and

east of the subject property is a nonconforming use involving minimum improvements, does not prove harmful to surrounding properties, and may possibly be terminated in time; that due to wind conditions this area would be just about the last place to expand or locate a new industrial development; that if not used for R-A Zone purposes there are many other purposes than M-2 which are "transitional" uses to which the property could be put and which would not aggravate the existing conditions.

Plaintiff produced evidence as to the dilapidated condition of his house, fig trees and grape vines on this acreage. He claimed it could not be economically maintained as such; that the noises and stench were unbearable for living purposes; that since the surrounding territory was classified and used for heavy industrial purposes the ordinance classifying his property as R-A was unconstitutional and void.

The court heard the evidence produced, viewed the surrounding territory and conditions and found that the Planning Commission and the Board of Supervisors acted arbitrarily, oppressively and unreasonably in denying plaintiff's petition, and found that the existing ordinance, as applied to plaintiff's property, was null and void. It entered an interlocutory decree to the effect that the Board of Supervisors reconsider plaintiff's application with a view to granting him "M-2 zoning within 30 days". After reconsideration the Board refused to rezone it. The court then made its findings and entered a final judgment ordering the Board of Supervisors to grant plaintiff's application for an M-2 Zone and directed a writ to it commanding it to rezone the property to "M-2". Defendants appealed from the judgment and certain provisions of the interlocutory judgment.

The findings, in general, describe the general nature of the surrounding properties, as indicated, and found that plaintiff's fig trees surrounding his vineyards were old and not economically productive; that extensive noises emanated from the area to the northeast; that clouds of dust

settled on plaintiff's property; that the cotton compress seasonal operations can be heard for a distance of four miles, sometimes for 16 hours a day; that these conditions and operations, together with the other operations mentioned, disturb plaintiff in his ability to live on said property and to farm it; that the owner of the 20 acres adjoining plaintiff's property to the north did not now farm it and does not object to an M-2 Zone for plaintiff's acreage. The court then found that one of the seven members of the Planning Commission actively participated in said hearing before the Commission, and that he owned property about one mile east of plaintiff's property and had an interest in seeing that his property would not be affected by granting such petition. It then found that due notice was given and another hearing was had before the Board of Supervisors. It also found in respect to the evidence produced by the County of Fresno that it was engaged, through the Fresno-Clovis Planning Commission, in a comprehensive study of general land uses in said county to determine the proper usages to which the land in said county should be zoned; that the reason for the denial of plaintiff's application by the Planning Commission and the defendants was to await the outcome of said study; and found as untrue the zoning of plaintiff's property to M-2 usages would adversely affect the comprehensive general zoning plan in progress, since all of the adjoining acreage around plaintiff's property is developed or committed to industrial development as indicated; that said defendants, in refusing to grant plaintiff's application acted arbitrarily and unreasonably; and that plaintiff's property is unsuitable for any uses other than M-2 Zone uses.

The main question here to be determined, as indicated by appellants, is whether or not the trial court was justified in finding that the Planning Commission and the Board of Supervisors acted arbitrarily, oppressively and unreasonably in not finding that the ordinance specifying the present "R-A" Zone, as applied to plaintiff's property, is

null and void; and whether the trial court exceeded its power in ordering a writ to be issued directed to the Board of Supervisors commanding it to rezone the property to an "M-2" Zone.

Plaintiff did not bring this action under section 1094.5 of the Code of Civil Procedure in reference to the review of administrative orders or decisions by writ of mandate. He resorts to an action for declaratory relief in which the trial court declared the ordinance to be unconstitutional insofar as it affected plaintiff's property and, in effect, directs, by writ of mandate, that the Board of Supervisors amend its ordinance by legislation to classify plaintiff's property as M-2 Zone.

It has been recognized that in an action for declaratory relief a county zoning ordinance may be tested as to its constitutionality where the Board of Supervisors acted arbitrarily or abused its power and discretion and where the restrictions imposed have no substantial relation to health, safety, morals or the general welfare. *Clemons v. City of Los Angeles*, 36 Cal.2d 95, 222 P.2d 439; *Carrier v. Robbins*, 112 Cal.App.2d 32, 245 P.2d 676; *Skalko v. City of Sunnyvale*, 14 Cal.2d 213, 93 P.2d 93. In *City and County of San Francisco v. Boyd*, 22 Cal.2d 685, 140 P.2d 666, in a mandamus proceeding, it was held that courts will not interfere with the discretion and deliberation of a rate-making authority unless its action is fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion, *as a matter of law*. See also *Carrier v. Robbins*, *supra*, 112 Cal.App.2d at page 35, 245 P.2d at page 677. In a proceeding under section 1094.5 of the Code of Civil Procedure (Mandamus) the power of the trial court is especially limited. It provides in part:

"(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and

may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent."

In *Clemons v. City of Los Angeles*, supra, it was held that a zoning ordinance is considered with every intendment in favor of its validity, and a court will not, except in a clear case of oppressive and arbitrary legislation, interfere with the legislative discretion which has been exercised in the adoption of the regulation; and that it is presumed that a zoning ordinance as a whole is justified under the police power and adapted to promote the public health, morals and general welfare, and so long as the necessity or propriety of the enactment remains a question on which reasonable minds might differ, there will be no judicial interference with the municipality's determination of policy. To the same effect is *McCarthy v. City of Manhattan Beach*, 41 Cal.2d 879, 264 P.2d 932, where it is held that where substantial reason exists to support the determination of the city council in matters of opinion or policy affecting zoning plans, and propriety of districting classification is fairly debatable in furtherance of community development, courts will not substitute their judgment for that of municipal authority; and that the fact that plaintiffs may suffer some financial detriment by city ordinance permitting them to use their property only for limited facilities does not require invalidation of such zoning restriction, since every exercise of police power is apt to affect adversely the property interest of somebody. See also *Wilkins v. City of San Bernardino*, 29 Cal. 2d 332, 175 P.2d 542, where it was held that where it is claimed that a city zoning ordinance is unreasonable as applied to plaintiff's property, or that a change in conditions has rendered application of the ordinance unreasonable, it is incumbent on plaintiff to produce sufficient evidence from which the court can make such findings as to the physical facts involved as will justify it in concluding, *as a matter of law*, that the

ordinance is unreasonable and invalid. It is not sufficient for him to show that it will be more profitable to him to make other use of his property, or that such other use will not cause injury to the public. It quotes from *Zahn v. Board of Public Works*, 195 Cal. 497, 234 P. 388, and said that where the facts surrounding the Board's determination are fairly debatable, the settled rule is that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.

[1] Notwithstanding the findings of the trial judge, based upon the evidence and his view of the premises, there is little, if any, dispute that the subject property, when classified as R-A by the Board of Supervisors, was, in fact, being used for agricultural and residential property. It was bordered on the north by property of the same character (R-A). To the north of that property is additional acreage so classified, although it was then being partially used for storage of cotton. To the north of that and between Herndon Canal and Shaw Avenue is agricultural land zoned A-1. Generally, to the northwest and bordering on the north half of plaintiff's property is M-1 Zone property partially occupied by the airport indicated. The property to the west of plaintiff's property (M-2 Zone) does not border plaintiff's property except as to its south one-half. The property to the east of it, though denominated R-A Zone, is partially occupied for residential purposes. It is, however, to the north of that, and to a great extent, used, at least seasonally, for the storage of cotton. It cannot be fairly said, as a matter of law, from the facts presented and the undisputed evidence produced, that present conditions render the ordinance invalid and unconstitutional as it applies to plaintiff's property or that the Board of Supervisors acted arbitrarily, particularly where it was apparently endeavoring, in good faith, to hold the question of reclassification in abeyance pending the result of a complete study of this, as well as other districts involved, and where it afforded

plaintiff an opportunity to again present a petition for reclassification. It appears to us that, in effect, the denial of plaintiff's petition under these circumstances was similar to the method provided for under section 65806 of the Government Code, where the County Board of Supervisors is authorized to pass a temporary ordinance under such conditions, holding the classification in abeyance until the results of studies in relation to the property could reasonably be determined. *Lima v. Woodruff*, 107 Cal.App. 285, 290 P. 480; *Price v. Schwafel*, 92 Cal.App.2d 77, 206 P.2d 683.

It is plaintiff's claim, as we construe it, that his property, with the exception of the 20 acres to the north, is surrounded by heavy industrial uses and that the failure to place his property in such category (M-2) amounted to classifying his property as an island within such zoning so as to bring him within the rule applied in *Reynolds v. Barrett*, 12 Cal.2d 244, 83 P. 2d 29. It appears to us that it is a reasonably debatable question whether the facts show, as a matter of law, that plaintiff's property was entirely surrounded by heavy industry (M-2) or its uses. Therefore, the rule set out in the *Reynolds* case is inapplicable.

The remaining claim is that the use of the adjacent property renders plaintiff's land entirely unsuited for the only purpose permitted by the ordinance. Here the property was planted to trees and grapes. It is true there was evidence of deterioration and lack of care, and it was economically inadvisable to replant or fertilize. At least it could be said that it was a reasonably debatable question as to whether it was suited only for M-2 uses. *Wilkins v. City of San Bernardino*, supra, 29 Cal.2d at page 340, 175 P.2d at page 548. It was stated in *Reynolds v. Barrett*, supra, 12 Cal.2d at page 249, 83 P.2d at page 32:

"The line between business and residential property must be drawn somewhere. The mere fact that business property is located across the street or even adjoining the residential property

involved does not determine that the ordinance is invalid or discriminatory * * *. The fact that nearby business property has the same characteristics as the parcel involved in the proceeding does not justify the court in substituting its judgment for the legislative judgment."

[2] We therefore conclude that the court's holding that plaintiff's property could not be classified other than M-2 (Heavy Industry Property) is not justified by the evidence, and it would be usurping the discretionary right of defendants to classify it in a less offensive category provided by said ordinance. The finding that the new Area Planning Commission could not, by its study, classify the plaintiff's property other than M-2, when considered in connection with other possible changes made or recommended to defendant Board, is but a conclusion and usurps the legitimate exercise of the Board's power. *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14; *Wilkins v. City of San Bernardino*, supra, 29 Cal.2d at page 337, 175 P.2d at page 546.

[3] The trial court's finding that one of the seven planning commissioners who owned land, planted to figs, located about one mile east of plaintiff's property, was biased because he erroneously believed that M-2 classification of plaintiff's property would detrimentally affect his property and that he failed to disclose his interest to the other commissioners, would not necessarily void the actions of the remaining members in denying the permit and would not void the actions of the defendant Board of Supervisors before whom the entire evidence and the action of the Planning Commission was reconsidered. Since other members voted to deny the petition, the Planning Commission had jurisdiction to act. *Nider v. Homan*, 32 Cal.App.2d 21, 89 P.2d 135. Plaintiff had a fair and impartial hearing before the Board of Supervisors, which was duly authorized by said ordinance to conduct said hearing. There was no sufficient showing that plaintiff's rights

were jeopardized. *Johnston v. Board of Supervisors*, 31 Cal.2d 66, 187 P.2d 686.

[4] As to the portion of the judgment in the form of a writ of mandate which directed defendant Board of Supervisors to rezone said property to an M-2 Zone and its uses, it appears to be beyond the power of the court to so direct, whether such Board be considered a judicial or legislative body in reference to its actions in these proceedings. Sec. 1094.5, Code Civ. Proc.; *Johnston v. Board of Supervisors*, supra; Sec. 65463, Government Code; *Nider v. Homan*, 32 Cal.App.2d 21, 89 P.2d 135.

[5] It is a fundamental rule under our system of government that the doctrine of separation of powers precludes the courts from interfering with the legislative processes. Art. 3, Calif. Constitution; Sec. 3423, subd. Seventh, Civ. Code; *French v. Senate*, 146 Cal. 604, 80 P. 1031, 69 L.R.A. 556.

[6] There are certain cases, as pointed out by plaintiff, which allow a writ to issue to a City Council to act in a particular manner when sitting as a quasi-judicial administrative body, and when there is no other legal manner in which it can act, such as *Kling v. City Council*, 155 Cal.App.2d 309, 317 P.2d 708. The general rule, in this respect, as conceded in that case, is that mandamus will issue to compel a court or quasi-judicial body to act on a matter properly brought before it but will not lie to compel it to act in a particular manner unless the situation presented is one in which such court or body can exercise its discretion in but one way. *Lissner v. Superior Court*, 23 Cal.2d 711, 146 P.2d 232; *Cramer v. County of Los Angeles*, 96 Cal.App.2d 255, 215 P.2d 497; *Johnston v. Board of Supervisors of Marin County*, 31 Cal.2d 66, 187 P.2d 686. In *Andrews v. City of Piedmont*, 100 Cal.App. 700, 281 P. 78, the court held that in a declaratory relief action the court did not err in declaring a zoning ordinance invalid, but it was error to go further and hold in effect that the city could not adopt any zoning ordinance that would be valid.

Here it appears from the evidence that there were several classifications between R-A and M-2 zoning in which plaintiff's property could reasonably fall, or at least the question was reasonably debatable. It therefore was a matter of discretion to be exercised by defendant Board of Supervisors. Accordingly, the order of mandate directed to said Board to adopt a new ordinance and reclassify said property as M-2 was unauthorized.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.



158 Cal.App.2d 220

Wilbert Lee LATHROP and Mable Lathrop,
Plaintiffs and Respondents,

v.

Warren J. KELLOGG, Defendant and
Appellant.

Civ. 9289.

District Court of Appeal, Third District,
California.

March 5, 1958.

Action to quiet title to real property as against an alleged void tax deed. Judgment for the plaintiffs in the Superior Court, Placer County, Lowell L. Sparks, J., and the defendant appeals. The District Court of Appeal, Schottky, J., held that a deposition was properly admitted in evidence; that a prior judgment was not res judicata and that statute of limitations was inapplicable because not pleaded and proved.

Judgment affirmed.

1. Depositions ⇐73

A return of a deposition by a party or his attorney is not objectionable if it be in the condition in which it left the hands of

the officer and due proof of that fact is made.

2. Depositions ⇨78

Where deposition was taken after notice to defendant's counsel who did not attend and it was signed and certified by notary before whom it was taken, and it was in substantial compliance with the statute except that the deposition was not transmitted to the clerk in the statutory manner, but the court was satisfied that it had not been tampered with, the deposition was admissible in evidence. West's Ann. Code Civ.Proc. § 2032.

3. Judgment ⇨581

The granting of an application to vacate a judgment leaves the matter in controversy open for future determination on the merits.

4. Judgment ⇨563(1)

Where court in its memorandum opinion indicated that the issues were not determined in equitable action to set aside a default judgment, the issues were not res judicata in a subsequent action.

5. Judgment ⇨336

The purpose of vacating a judgment is to allow a trial on the merits and party seeking relief need only to show with reasonable certainty that he would prevail in the retrial.

6. Judgment ⇨563(1)

In action to quiet title, findings and conclusions in a prior action to set aside default judgment were not res judicata where the court in its memorandum opinion indicated that the issues would not be determined in that action.

7. Taxation ⇨810(3)

In action to quiet title to real property, as against an alleged void tax deed, evidence sustained judgment for the plaintiff. West's Ann.Code Civ.Proc. § 738.

8. Taxation ⇨799

An owner may maintain an action under the statute to quiet his title as against
Cal.Rep. 321-322 P.2d-47

claim of ownership based on a void tax deed. West's Ann.Code Civ.Proc. § 738.

9. Taxation ⇨810(3)

A prima facie case is established under the statute in an action by an owner to quiet his title as against claim of ownership based on a void tax deed, when plaintiff establishes that he is the owner of the property and that defendant claims an interest therein adverse to plaintiff. West's Ann.Code Civ.Proc. § 738.

10. Taxation ⇨810(1)

Where plaintiff has established ownership to property, unless title has become vested in defendant through tax deed, defendant has burden to establish the validity of the tax deed and his title. West's Ann. Code Civ.Proc. § 738.

11. Descent and Distribution ⇨75, 90(1)

Upon death of owner of realty, dying intestate, the title thereto vests immediately in the heirs of the deceased subject only to administration and the heirs may maintain an action to quiet title and such right is also extended to a grantee of an heir. West's Ann.Prob.Code, § 300.

12. Taxation ⇨805(2)

The statute requiring actions to invalidate a tax deed to be commenced within one year after execution thereof, is inapplicable if the description of the property found in the state's deed is fatally defective. West's Ann.Rev. & Tax.Code, § 175.

13. Taxation ⇨809(5)

The statute requiring actions to invalidate a tax deed be commenced within one year after the execution thereof, being a statute of limitations was inapplicable where it was not pleaded and proved. West's Ann.Rev. & Tax.Code, § 175.

14. Quieting Title ⇨44(4)

In action to quiet title in realty, evidence did not sustain the contention of the defendant that the evidence was insufficient to show that person whose name appeared in the quitclaim deed, in the chain of title

of plaintiff was the person in whom the property was vested in 1916.

Bowers & Sinclair, Roseville, for appellant.

Tindall & Tindall, Auburn, for respondents.

SCHOTTKY, Justice.

Defendant, Warren J. Kellogg, appeals from a judgment quieting the title of Warren Lee Lathrop and Mable Lathrop in certain real property located in Placer County.

This action was originally filed in May, 1945. An answer was filed by Kellogg's then attorney on June 3, 1946. The cause was set for trial, after several postponements, on February 25, 1947. At the time the case was called, no appearance was made by Mr. Kellogg or his then attorney, though an associate of Kellogg's attorney appeared and requested a continuance on the ground that the attorney was ill and that the attorney had informed Kellogg that the cause would be continued. The motion for a continuance was denied and the matter was heard as a default proceeding. A notice of judgment in favor of the Lathrops was entered on May 23, 1952. On June 23, 1952, Kellogg filed an affidavit opposing entry of judgment. Judgment was then entered.

In November, 1952, a motion to set aside the judgment was made which was also denied. In February, 1953, Kellogg filed an action in equity to set aside the judgment entered in the quiet title action. This resulted in a judgment in behalf of Kellogg setting aside and vacating the judgment quieting the title of the Lathrops in the property.

As a result the original action was again set for trial. Kellogg then filed a motion for leave to file an amended answer. By the amendment he sought to assert that as a result of the equitable action to set aside the judgment quieting title, the Lathrops were estopped to claim actual possession of the

property or that they were entitled to possession, and that as a result of the findings and conclusions of law in the equitable action the doctrine of *res judicata* applied to certain issues. The court denied the motion to file an amended answer.

The evidence produced at the trial disclosed that in the year 1916 title to the property in question was vested in Ettie A. Sprague. It was stipulated that a Mr. Coquoz was qualified to testify as to the condition of the title, and he testified that after the record disclosed title in Ettie A. Sprague it showed that the next instrument was a tax deed to the State of California dated July 2, 1937, and then a deed from the tax collector to Warren J. Kellogg and Frank R. Kellogg, dated November 14, 1939. The next instrument was a quitclaim deed executed by Ettie L. Sprague, Marian L. Sprague, John H. Sprague, and George P. Low to Wilbert Lee Lathrop and Mable Lathrop, husband and wife. The instrument was signed by Marian L. Sprague, John Sprague and George Low but Ettie L. Sprague's signature was not on the instrument. Mr. Coquoz also testified that there was no record that the interest of Ettie A. Sprague had ever been divested.

A deposition of Marian L. Sprague was read into evidence. This disclosed that Ettie A. Sprague had died in 1936 and that she had two children, George P. Low and Marian L. Sprague, both of whom survived her, and a surviving husband, John H. Sprague, Jr., and that the signatures on the quitclaim deed to the Lathrops are those of the two children and the surviving husband.

The Lathrops offered the tax deeds in evidence but Kellogg objected to their introduction and the court sustained the objection. This was the extent of the Lathrops' case. Kellogg's motion for a nonsuit was denied.

As a defense to the action Kellogg sought to introduce in evidence the file in the equity action, but the court refused to admit it and Kellogg offered no further evidence. Judgment was then entered in favor of the Lathrops.

Appellant Kellogg contends that it was error to introduce in evidence the deposition of Marian L. Sprague; that the court erred in refusing to permit him to file an amended answer setting up the defense of estoppel and *res judicata*; and that the evidence was insufficient to support the verdict.

The deposition of Marian L. Sprague was taken in Covina, California. Kellogg's attorney was notified of the time and place of the taking of the deposition but he did not appear. The deposition was delivered to the clerk of the court, unsealed, by the Lathrops' attorney. Leading questions were asked Marian L. Sprague. Appellant Kellogg contends also that the certificate of the notary before whom the deposition was taken did not comply with requirements of the code in that it did not certify that the witness read and corrected the deposition after it was taken.

[1,2] We believe it was within the trial court's discretion to admit the deposition in evidence. The deposition was taken after notice to the appellant's counsel who chose not to attend. It was signed and certified by the notary before whom it was taken. The court was of the opinion that substantial compliance with section 2032 of the Code of Civil Procedure was had except that it had not been transmitted to the clerk in the manner provided by the code. The court was satisfied that it had not been tampered with or altered in any manner. It has been held that a return of a deposition by a party or his attorney is not objectionable if it be in the condition in which it left the hands of the officer and due proof of that fact is made. 26A C.J.S. Depositions § 79, p. 417. The document itself would be some evidence that it had not been tampered with and there was no evidence tending to show that it had been tampered with. The other objections raised are technical ones and are matters which are in the main within the discretion of the trial court and in the absence of a showing of an abuse of discretion the court's determination will be upheld. (See 15 Cal.Jur. 2d, Depositions, p. 736.)

[3-6] The second contention is that the trial court erred in not permitting appellant Kellogg to amend his answer to set up as a defense the findings and conclusions of law in the equitable action to set aside the judgment. Kellogg contends that the findings and conclusions in that action become *res judicata* as to the issues determined therein. The granting of an application to vacate a judgment leaves the matter in controversy open for future determination on the merits. (3 Pomeroy, Equity, 5th Ed., p. 836.) The court in its memorandum opinion indicated that the issues were not determined in the equitable action and in such a case the issues would not have been *res judicata*. In any event the purpose of vacating a judgment is to allow a trial on the merits and the party seeking relief need only show with reasonable certainty that he would prevail in the retrial. If, as claimed, the matter becomes *res judicata* it would render idle the act of conducting a trial on the merits. See *Hallett v. Slaughter*, 22 Cal.2d 552, 558, 140 P.2d 3; *Smith v. Busniewski*, 115 Cal.App.2d 124, 130, 251 P.2d 697. The judgment in the equitable action was not *res judicata* and the trial court properly refused the amendment to the answer.

[7] Appellant contends also that the evidence is insufficient to sustain the judgment. We do not agree with this contention. It was stipulated that the title to the property was vested in Ettie A. Sprague in 1916. Mr. Coquoz, the searcher of records, testified that the official records showed two tax deeds thereafter, one from the tax collector to the state and one from the state to appellant. However, respondents attempted to introduce these tax deeds in evidence in order to prove their asserted invalidity, but the court sustained appellant's objection to their admission. There was evidence that Ettie A. Sprague died in 1936 and was survived by her husband, a son and a daughter, all three of whom executed a quitclaim deed to the respondents.

[8-11] We agree with the following quotation from the court's memorandum opinion:

"It is established law that an owner may maintain an action under section 738 of the Code of Civil Procedure to quiet his title against a claim of ownership based upon a void tax deed. (22 Cal.Jur., par. 8, pp. 115, 116; *Dranga v. Rowe*, 127 Cal. [506] 507 [59 P. 944]; *Kittle v. Bellegarde*, 86 Cal. 556 [25 P. 55]; *Thompson v. Moore*, 8 Cal. 2d 367 [65 P.2d 800, 109 A.L.R. 1027].)

"A prima facie case is established in an action under Section 738 C.C.P. when it is established by plaintiff that he is the owner of the property and that defendant claims an interest therein adverse to plaintiff's ownership. It has even been held that a plaintiff may make out a prima facie case of ownership by evidence of possession, whereupon the burden shifts to defendant to prove title in himself. (*Davis v. Crump*, 162 Cal. 513 [123 P. 294]; [*City of*] *Fort Bragg v. Brandon*, 41 Cal.App. 227 [182 P. 454].)

"This rule has been held specifically applicable to quiet title actions where-in the defendant claims under a tax deed. The plaintiff having established ownership to the property, unless the title had become vested in defendant through the tax deed, it then becomes incumbent upon the defendant to establish the validity of the tax deed and his title. (*Jones v. Luckel*, 174 Cal. 532 [163 P. 906]; *Strauss v. Canty*, 169 Cal. 101 [145 P. 1012]; *Sinai v. Mull*, 80 Cal.App.2d 277 [181 P.2d 924].)

"Upon the death of an owner of real property, dying intestate, the title thereto vests immediately in the heirs of the deceased, subject only to administration. (Sec. 300, Probate Code; *Bates v. Howard*, 105 Cal. 173 [38 P. 715]; *Martinovich v. Marsicano*, 137 Cal. 354 [70 P. 459]; *State v. Miller*, 149 Cal. 208 [85 P. 609]; *Reinhard v. Lawrence Warehouse Co.*, 41 Cal.App.

2d 741 [107 P.2d 501]; [*In re*] *Estate of Meyer*, 107 Cal.App.2d 799 [238 P. 2d 597].) The heirs of a deceased person may maintain an action to quiet title. (Sec. 581, Probate Code; *Collette v. Sarrasin*, 184 Cal. 283 [193 P. 571]; *Wilson v. Stroudamire*, 60 Cal. App.2d 642 [141 P.2d 457]; *Reed v. Hayward*, 23 Cal.2d 336 [144 P.2d 561].) The right is also extended to a grantee of an heir. (*Jordan v. Fay*, 98 Cal. 264 [33 P. 95].)

* * * * *

"On this phase of the matter, the Court is of the opinion that plaintiffs made a sufficient prima facie case of ownership under section 738 C.C.P. to withstand a motion for non suit and to require defendant to proceed with proof of his claim of ownership, particularly in view of the fact that plaintiffs' attempt to show the claimed invalidity of the tax deed was blocked by defendant's own objection."

[12, 13] Appellant contends further that the action was barred by section 175 of the Revenue and Taxation Code which requires that all actions to invalidate a tax deed must be commenced within one year after the execution of said deed. This section is inapplicable if the description of the property found in the state's deed is fatally defective (*Edwards v. City of Santa Paula*, 138 Cal. App.2d 375, 292 P.2d 31), and since it is a statute of limitations (*Edwards, supra*) it is inapplicable in the present proceedings because it was not pleaded and proved. (31 Cal.Jur.2d, Limitation of Actions, p. 653.)

[14] Appellant's final contention is that the evidence was insufficient to show that the *Ettie L. Sprague* whose name appears in the quitclaim deed was the *Ettie A. Sprague* in whom the property was vested in 1916. The deposition disclosed that *Ettie Adele Sprague* was formerly *Ettie Low*. She died intestate on January 2, 1936. No probate proceedings were ever had. She left two children and a husband who signed the quitclaim deed to the *Lathrops*. The deponent said that her mother had owned

property in Placer County. This evidence is sufficient to show that Ettie A. Sprague was the same person as Ettie L. Sprague.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



158 Cal.App.2d 216

John R. EASTTEAM, Plaintiff and Appellant,
v.

O. L. HULL, Defendant and Respondent.
Civ. 9123.

District Court of Appeal,
Third District, California.

March 5, 1958.

Rehearing Denied April 2, 1958.

Hearing Denied April 30, 1958.

Action for personal injuries sustained by plaintiff when he was struck, while running across highway at railroad crossing, by automobile driven by defendant. From adverse judgment of the Superior Court, Mendocino County, Hale McCowen, J., the plaintiff appealed. The District Court of Appeal, Peek, J., held that court erred prejudicially in instructing jury on its own motion that each party was entitled to presumption of law that every person takes ordinary care of his own concerns and that he obeys the law.

Judgment reversed.

I. Trial ⇨29(1), 118

In action for injuries sustained by plaintiff when he was struck while running across highway at railway crossing by defendant's automobile, wherein plaintiff's counsel argued that defendant was driving in excess of 15 mile per hour prima facie speed limit prescribed by statute, comment by defendant's counsel that there was no violation of any speed law and comment by court that speed limit to which plain-

tiff's counsel referred had no application to case, did not amount to misconduct. West's Ann.Vehicle Code, § 511(a) (2).

2. Automobiles ⇨246(20)

In action for personal injuries sustained by plaintiff, who was struck while he was running across highway at railroad crossing by automobile driven by defendant, court erred when, in effect, it instructed jury that 15 mile per hour prima facie speed limit prescribed by statute was not applicable to case. West's Ann.Vehicle Code, § 511(a) (2).

3. Appeal and Error ⇨1064(1) **Automobiles** ⇨246(60)

In action for personal injuries sustained by plaintiff when he was struck, while running across highway at railroad crossing by automobile driven by defendant, court erred prejudicially in instructing jury on its own motion that each party was entitled to presumption of law that every person takes ordinary care of his own concerns and that he obeys the law.

Burke & Rawles, Ukiah, for appellant.

Geary, Spridgen & Moskowitz, Santa Rosa, S. Richard Shostak, Santa Rosa, of counsel, for respondent.

PEEK, Justice.

Plaintiff appeals from an adverse judgment entered pursuant to the jury's verdict in an action for personal injuries.

The facts, which are not in dispute, show that defendant was driving his automobile east on Talmage Road, a state highway running east and west in Mendocino County, at or near a point where the highway intersects at right angles a grade crossing of the Northwestern Pacific Railroad. The highway at this point is approximately 21 feet wide, straight, level, and surfaced with asphalt, and at the time of the accident was not posted.

As a result of the injuries he suffered, which included a brain concussion, plaintiff was unable to testify concerning the events immediately preceding the accident

nor to give any of the facts and circumstances surrounding the same. His only testimony, except that having to do with his injuries, was that at the time of the accident he was employed by the railroad company as a section foreman; that he remembered receiving a call advising him that signals at the crossing were not lighted; and that he left his home at about 7 p. m. to go to the crossing and repair the same.

Defendant testified as follows: He and his wife were driving easterly on Talmage Road behind a pickup truck. When the truck turned off of the highway approximately 200 feet west of the crossing, defendant accelerated his speed to about 30 miles an hour. He met a westbound car 50 or 100 feet west of the crossing. A second westbound car, driven by Orville Elliott, was about 250 or 300 feet east of the tracks. It was dark and he was driving with his headlights on low beam. During the last 100 feet of his approach to the crossing his view of rail traffic approaching from either side was limited to about 200 feet by reason of buildings on either side of the highway. When he was about two car lengths from the crossing, he first saw the plaintiff who was a step from the north edge of the pavement and was running. At that time the Elliott car was approximately 75 to 170 feet east of plaintiff. Defendant applied his brakes and turned slightly to the right. Plaintiff kept the same pace and appeared to be looking east. About six feet east of the crossing defendant's automobile collided with the plaintiff and carried him along for approximately 30 feet to where the defendant brought his car to a stop and plaintiff fell to the ground in front of the car.

A highway patrolman, who arrived at the scene of the accident shortly afterward and conducted an investigation, was called by plaintiff. He testified he observed tire marks made by defendant's car extending 48 feet in the eastbound lane with more footage on the east side of the tracks than on the west and with a gap in the marks where the car crossed the tracks. He

found plaintiff lying on the southerly edge of the pavement in front of the defendant's car which was then approximately five feet south of the center lane. This testimony was the only evidence offered by plaintiff relative to the facts and circumstances surrounding the accident.

Mr. Elliott, the driver of one of the westbound cars, testified on behalf of defendant that he saw defendant's car collide with plaintiff in the eastbound lane of the highway about three or four feet from the center line; that he, Elliott, was proceeding at a speed of 25 or 30 miles an hour westerly on Talmage Road and first saw the plaintiff some 50 feet ahead of him; that plaintiff hesitated at the edge of the highway and then started running across; that the collision occurred about ten feet east of the crossing, and defendant's car traveled 10 or 15 feet before it came to a stop; and that the headlamps were lighted on his car as well as on the defendant's car.

[1] Plaintiff's first contention concerns the comments by the court and defense counsel during the course of plaintiff's argument to the jury. The gist of that argument was that defendant was traveling in excess of the 15-mile-per-hour prima facie speed limit prescribed by section 511, subdivision (a), paragraph (2), of the Vehicle Code, and that there was no reason for plaintiff to know or assume that defendant " * * * was going to violate that speed law." Thereupon defendant's counsel objected to the comment as " * * * an improper statement of the law. There was no violation of any speed law," and cited plaintiff's counsel's statement as misconduct. During the colloquy which ensued, plaintiff's counsel stated he felt the court should clarify defense counsel's statement, to which the court replied, "Well, it's my feeling Mr. Burke, if you want my thoughts, that the speed limit to which you were referring had no application to this case." Mr. Burke then replied, "Very well, your Honor. I wish to take exception to the Court's remarks before the jury for the purpose of the record." Thereafter plaintiff's counsel moved for a mistrial upon the

grounds of misconduct of the court and of defendant's counsel in stating to the jury that the 15-mile-speed limit rule did not govern in this case. The motion was denied.

[2] It cannot be said that the comment of the court and defense counsel amounted to misconduct, but undoubtedly the court erred when in effect it instructed the jury that the speed limit referred to by plaintiff's counsel was not applicable to the facts in this case. *McVea v. Nickols*, 105 Cal. App. 28, 286 P. 761. However it becomes unnecessary to determine whether or not such error was prejudicial since the case must be reversed for other reasons hereinafter discussed.

[3] Plaintiff's second contention is that the court erred prejudicially in instructing the jury on its own motion on the presumption of due care that "* * * each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law." On several recent occasions this court has had before it similar situations, and in each we have held upon the rule stated in *Gigliotti v. Nunes*, 45 Cal.2d 85, 93, 286 P.2d 809, that the giving of such instruction was prejudicially erroneous. See *Bertoli v. Hardisty*, 154 Cal.App.2d 283, 315 P.2d 890; *Nunnemaker v. Headlee*, 140 Cal.App.2d 666, 676, 295 P.2d 438; and *Norton v. Futrell*, 149 Cal.App.2d 586, 590, 308 P.2d 887. In each case it was noted that the benefit of the presumption clearly was not available to one whose claimed negligence is at issue where he as well as witnesses called on his behalf gave detailed testimony concerning his actions at the time involved. We further held that to give the instruction under such circumstances was to give added weight to defendant's claim that he was free of negligence and concluded with the words of the court in *Ford v. Chesley Transportation Co.*, 101 Cal.App.2d 548, 553, 225 P.2d 997, 1001: "The considerations pointing to negligence would have to overcome not only those pointing to a contrary conclusion, but also the presumption that

defendant was not negligent." Under such circumstances, we said in the *Nunnemaker* case, it could well be that the jury relying upon the presumption determined that the defendant was not negligent.

Since it is our conclusion that the case must be reversed, it becomes unnecessary to discuss the further question raised by plaintiff in regard to the denial of his motion for a new trial upon the basis of newly discovered evidence.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



158 Cal.App.2d 204

**In the Matter of the Estate of Robert
P. VAE LL, Incompetent.**

**Robert P. VAE LL and Marie P. Vaell, Con-
testants and Appellants,
v.**

**Frank M. STEPHENS and Security-First
National Bank of Los Angeles, Peti-
tioners and Respondents.**

No. 22770.

**District Court of Appeal, Second District,
Division 2, California.**

March 5, 1958.

Proceeding in the matter of the estate of an alleged incompetent. The incompetent joined by his mother appeals from portions of a judgment of the Superior Court for Los Angeles County, Harold W. Schweitzer, J., declaring that the incompetent was incompetent and unable to manage and take care of his property. The District Court of Appeal, Kincaid, J. pro tempore, held that court had jurisdiction after due notice given to proceed with the hearing notwithstanding the incompetent voluntarily absented himself,

but that the grant in effect by the court, of letters of general guardianship was error.

Judgment reversed and cause remanded with directions.

1. Mental Health ☞138

In proceeding for appointment of guardian of an alleged incompetent who had been rated incompetent by the veterans administration in order to receive payments from the government the court had jurisdiction after due notice given to proceed with the taking of evidence as to incompetency and to make findings thereon even though the incompetent voluntarily absented himself from the hearing. West's Ann.Prob.Code, §§ 1650-1669; West's Ann.Code Civ.Proc. § 1833.

2. Mental Health ☞135

Evidence justified appointment of a guardian for an alleged incompetent who had been rated incompetent by the veterans administration for the purpose of receiving compensation from the government and who voluntarily absented himself from the hearing. West's Ann.Prob.Code, §§ 1650-1669; West's Ann.Code Civ.Proc. § 1833.

3. Mental Health ☞102

The Veterans' Guardianship Act was never intended as a substitute for the provisions of the probate code relating to the appointment of guardians for insane or incompetent persons. West's Ann.Prob.Code, §§ 1440-1462, 1461, 1650, 1651, 1652, 1655, 1657.

4. Mental Health ☞146

In proceeding for appointment of a guardian of an alleged incompetent who had been rated as such by the veterans administration in order to receive govern-

ment compensation, order that the subject was incompetent and unable to manage and take care of his property constituted an unauthorized finding beyond the issues presented and was in effect the unauthorized granting of letters of general guardianship rather than of limited guardianship as provided for by the Veterans' Guardianship Act. West's Ann.Prob.Code §§ 1440-1462, 1461, 1650, 1651, 1652, 1655, 1657.

Robert P. Vaell and Marie P. Vaell, in pro. per., for appellants.

Calvin L. Helgoe and James T. Byrne, Los Angeles, for respondents.

KINCAID, Justice pro tem.

Robert P. Vaell, joined by his mother, Mrs. Marie P. Vaell, appeals from those portions of the judgment entered herein as follows:

1. "Provisions of Section 1654, Probate Code of the State of California, the Administrator of Veterans Affairs, Veterans Administration Facility, Los Angeles filed its Certificate of Incompetency upon due examination."

2. "That the said Robert P. Vaell is incompetent and is unable unassisted to manage and take care of his property."

3. "That the said sum of One Hundred Fifty Dollars (\$150) is necessary * * *."

Section 1654, Probate Code¹ is a part of the Uniform Veterans' Guardianship Act adopted in numerous states (West's Annotated Codes, Probate, Chapter 15, p. 662) including California and covered by sections 1650 to 1669, Probate Code.

A petition for appointment of guardian of estate of Robert P. Vaell hereinafter referred to as the incompetent, was filed

1. Probate Code, section 1654: "Where a petition is filed for the appointment of a guardian for a mentally incompetent ward, a certificate of the administrator or his duly authorized representative, that such person has been rated incompetent by the Veterans Administration on examination in accordance with

the laws and regulations governing such Veterans Administration and that the appointment of a guardian is a condition precedent to the payment of any moneys due such ward by the Veterans Administration, shall be prima facie evidence of the necessity for such appointment."

on September 5, 1956, under the provisions of section 1652, Probate Code. It alleged that Vaell had been rated incompetent by the United States Veterans' Administration on examination in accordance with the laws and regulations governing such United States Veterans' Administration and that the appointment of a guardian is a condition precedent to the payment by the United States Veterans' Administration of any monies due said incompetent person as is provided by section 1654, Probate Code. That no guardian of his estate has been appointed and his estate needs care and attention; that the bank (later appointed guardian) is a proper party to act as such; that the estate of the incompetent consists of compensation from the United States Government payable monthly from November 1954 at the rate of \$181 per month; that the incompetent requires \$150 per month for his necessary support and maintenance; that said bank be appointed guardian of the estate of the incompetent and that the guardian be instructed and authorized to pay to his mother the sum of \$150 per month for his necessary support and maintenance beginning September 1, 1956 and until further order.

On September 15, 1956, a citation was served on the incompetent citing him to appear in a hearing on the petition on September 27, 1956. On September 21, 1956, Marie P. Vaell, mother of the incompetent, filed an objection to the appointment of a guardian.

On September 27, 1956, the Veterans' Administration filed its Certificate of Incompetency reciting that Robert P. Vaell has been rated incompetent under section 1654, Probate Code, by the Veterans' Administration on examination in accordance with the laws and regulations governing such Veterans Administration and that the appointment of a guardian is a condition precedent to the payment by the Veterans' Administration of any monies due to said incompetent person. On September 27 the incompetent entered his written appearance in this proceeding by the filing of a peti-

tion to dismiss the petition for appointment of guardian. On that date a hearing was had at which the incompetent failed to appear in person and a continuance of the hearing was ordered for the purpose of allowing the incompetent to personally appear or to allow a doctor to examine him.

On October 26, 1956, a further hearing was held, the incompetent again failing to appear. His mother appeared stating that he would not appear nor would she produce him in court. Evidence was received that a doctor from the Veterans' Administration had visited the home of the incompetent for the purpose of examining him but had been refused admittance. Both at the first and second hearings the incompetent filed written statements opposing the granting of the petition, and renouncing all claims of compensation from the United States Government. He further lodged his objection to the granting of a petition on the ground that he might thereby lose his powers to administer other properties consisting of oil lands and oil royalties to which he claimed heirship.

The court thereupon made its findings of fact that, after due notice given, the incompetent had wilfully absented himself from appearing in person at the time of the hearing in court; that the Certificate of Incompetency having been filed by the Veterans' Administration showing him to have been rated incompetent upon due examination in accordance with the laws and regulations covering the said Administration, the appointment of a guardian of the estate of said incompetent is a condition precedent to the payment of any monies due him by said Administration; that after hearing the evidence finds he is unable unassisted to manage and take care of his property and that his estate needs the care and attention of a fit and proper party to act as guardian thereof; that the incompetent is in need of a monthly allowance for his necessary support and maintenance beginning September 1, 1956, of \$150 per month and that the proper party to whom such payment should be made for his use and benefit is his moth-

er; that the bank should be appointed as guardian of the estate of said incompetent.

An order appointing the bank as guardian of the estate of the incompetent and for payment of a monthly allowance for his support and maintenance was thereupon signed and filed. Appellants challenge the finding of the court that Robert P. Vaell is incompetent and is unable unassisted to manage and take care of his property, and argue that such finding cannot be premised alone on the filing by the Veterans' Administration of its Certificate of Incompetency upon due examination.

Under section 1654, Probate Code, in a proceeding filed under the Veterans' Guardianship Act for the appointment of a guardian, a certificate of the administrator or his duly authorized representative that the ward has been rated incompetent by the Veterans' Administration on examination in accordance with the laws and regulations governing it and that the appointment of a guardian is a condition precedent to the payment of any monies due such ward by the Veterans' Administration shall be prima facie evidence of the necessity for such appointment. Section 1833, Code of Civil Procedure, defines prima facie evidence as "that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. * * *" Appellants had the privilege of presenting any evidence that would tend to refute the prima facie evidence offered by the Veterans' Administration but failed to avail themselves of this opportunity.

[1] It is well settled that the court had jurisdiction, after due notice given, to proceed with the taking of evidence as to incompetency and to make findings thereon even though the incompetent voluntarily absented himself from the hearing. Guardianship of Walters, 37 Cal.2d 239, 243, 231 P.2d 473. As was said in Sacks v. Superior Court, 88 Cal.App.2d 808, 811, 199 P.2d 396, 398: "Statutes enacted to protect a person against his own misguided acts or against the avarice and greed of others are conceived in the noblest of paternalistic principles for the preservation

of the estate and the security of such person and for the serenity of society as well. If an alleged incompetent could defeat the superior court of jurisdiction by a mere refusal to respond to a citation, the misguidance of his person and the losses of his estate would fall far short of the protection and security intended by the authors of the Probate Code. The contention that the court is divested of jurisdiction by the naked act of a refusal to respond to a citation is contrary to the very purpose and spirit of the law. Such statutes do not constitute pawns to be used in strategical games of wit but are enacted for social welfare and for the protection of those who are so unfortunate as to suffer brain decadence or disorders. It is inconceivable that the legislature could have intended that the superior court should not proceed to try the petition accusing such person because the alleged incompetent is not 'produced in court.'"

[2] Under the evidence here presented, the prima facie showing made is sufficient to support the findings and order of the court of incompetency for the purposes of these proceedings.

Appellants further contend that the finding and order that the said Robert P. Vaell is incompetent and "is unable unassisted to manage and take care of his property" constitute a finding beyond the issues presented by the petition filed herein under the Veterans' Guardianship Act and is, in effect, the granting of letters of general guardianship under the provisions of section 1461, Probate Code. With this contention we agree.

The Uniform Veterans' Guardianship Act applies only to a beneficiary of the Veterans Administration defined as a "ward." It covers only "*Benefits*" payable to the ward by the Veterans Administration which are defined as "all moneys paid or payable by the United States through the Veterans Administration" and "*Income*" which "means moneys received from the Veterans' Administration and revenue or profit from any property wholly or partially acquired therewith." "*Estate*" means in-

come on hand and assets acquired partially or wholly with 'income.'" § 1650, Prob. Code.

The act is applicable whenever, pursuant to any law of the United States or regulation of the Veterans' Administration, it is necessary, prior to payment of benefits, that a guardian be appointed. Prob.Code, § 1651. Under section 1652 provisions are made for the filing of a petition for the appointment of a guardian of any such ward. The contents of the petition are enumerated and it is provided that notwithstanding any law as to priority of persons entitled to appointment, or the nomination in the petition, the court may appoint some other person as guardian if the court determines it is for the best interest of the ward. In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent by the Veterans' Administration on examination in accordance with the laws and regulations governing the Veterans' Administration. Notice shall be given to the ward, and to such other persons, and in such manner as is provided by the general law of this state and also to the Veterans' Administration. Prob.Code, § 1655.

An annual accounting is provided for with notice and a true copy given the Veterans' Administration. If the guardian is accountable for property derived from sources other than the Veterans' Administration, he shall be accountable as is or may be required under the applicable law of this state pertaining to the property of minors or persons of unsound mind who are not beneficiaries of the Veterans' Administration and as to such other property shall be entitled to the compensation provided by such law. Prob.Code, § 1657. Compensation to a guardian under the Veterans' Guardianship Act is limited by the provisions of section 1659, Probate Code.

As stated in the annotation on the Uniform Veterans' Guardianship Act found in 173 A.L.R., 1061, at page 1080: "While the sections of the uniform act concerning the disposition of the 'income' and the 'estate' of the ward seem broad enough to

include all income or estate, these provisions must be limited by the definitions of terms contained in section 1 of the original and revised acts. This view is strengthened by the facts that the original act requires an accounting only for moneys received from the Veterans' Bureau, that the revised act requires an accounting of moneys thus received and 'earnings, interest or profits derived therefrom and all property acquired therewith,' and that the revised act also provides that where a guardian is accountable for property derived from other sources, the general laws of the state shall govern the accounting, and he shall not be limited to the compensation provided by the uniform act with respect to the management of such other property, although he may combine his accountings for both types of property in a single account or report." At pages 1077-1078: "The effect of the appointment of a guardian under the uniform act is very limited as compared with the effect of an appointment under the general laws. * * * Accordingly, the appointment of a guardian under the uniform act has been held not to affect the legal capacity of the ward with respect to various matters other than the administration of property received from the United States under veterans' legislation." (Citations.) And on page 1079: "Although it has been held that the uniform act is broad enough to authorize a decree giving a guardian control of all the ward's property, the better view is that the act deals only with property derived from the Veterans' Administration and the income of property acquired in whole or in part therewith" citing *Mitchell v. Mitchell*, 201 Ga. 621, 40 S.E.2d 738; *Morse v. Caldwell*, 55 Ga. App. 804, 191 S.E. 479; *Rentz v. King*, 65 Ga.App. 292, 17 S.E.2d 896; *In re Parks*, 210 La. 63, 26 So.2d 289, 173 A.L.R. 1056; *Borough of East Paterson v. Karkus*, 136 N.J.Eq. 286, 41 A.2d 332; *In re Farina*, 253 App.Div. 510, 2 N.Y.S.2d 987, reversed on another ground *In re Hewson*, 279 N.Y. 780, 18 N.E.2d 865.

As was said in *Morse v. Caldwell*, *supra*, 191 S.E. at page 484: "What definition of

'incompetent' is applied by the Veterans' Administration, in determining whether or not the condition of a hospital patient requires that a guardian be appointed to receive and disburse for him such benefits as he may be entitled to is not shown by the record. But, upon the issuance of the certificate by the Director or his authorized representative 'setting forth the fact that such person has been rated incompetent,' etc., the court of ordinary may, upon a petition filed, appoint a guardian to handle the benefits due such person by the federal government. Except as to the relationship thus created for the special purpose named, it does not follow that the ward is not sui juris, and, with respect to his other property and purposes, entitled to assert for himself his full legal rights in and out of court."

[3] The Veterans' Guardianship Act was never intended as a substitute for the provisions of the Probate Code found in Chapters III and IV (§§ 1440 to 1462) relating to the appointment of guardians for minors, insane or incompetent persons. The latter include all classes of persons and property and sets up materially different standards as a prerequisite of such appointment. The priority of persons entitled to appointment differs. Under the Veterans' Guardianship Act, as to minors, the certificate of the administrator, or his authorized representative setting forth the age of the minor and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due him by the Veterans' Administration is prima facie evidence of the necessity for such appointment. No other showing of necessity, convenience or investigation is required as must be made under the provisions of section 1440, et seq., Probate Code. As to mentally incompetent persons the act limits its provisions to a "ward"

and then only the certificate of rated incompetency is required to establish a prima facie showing whereas under section 1460, Probate Code, all insane or mentally incompetent persons are covered including "any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons."

[4] When the court made its findings herein "that the said Robert P. Vaell is unable unassisted to manage and take care of his property and whose estate needs the care and attention of a fit and proper party to act as guardian over the property of his said estate" and its order appointing the bank as guardian of his estate followed by the issuance of letters of guardianship appointing a "Guardian of the estate of Robert P. Vaell, an Incompetent Person," such findings, order and letters of guardianship must be construed to erroneously constitute the granting of letters of general guardianship under the provisions of section 1461, Probate Code, rather than of a limited guardianship as provided for by the Veterans' Guardianship Act and were in excess of the issues properly to be considered as presented by the pleadings herein.

The judgment is reversed and the cause is remanded to the lower court with directions to modify its findings, order and letters of guardianship so that all property and estate of the incompetent Robert P. Vaell be excluded therefrom excepting such benefits, moneys or estate paid or payable to him by the United States through the Veterans' Administration and all revenue or profit from any property wholly or partially acquired therewith.

FOX, P. J., and HERNDON, J., concur.

158 Cal.App.2d 330

George E. TIBBETS and Velda Tibbets,
Plaintiffs and Respondents,

v.

Dawson E. ROBB and Flora M. Robb,
Defendants and Appellants.

Civ. 22609.

District Court of Appeal, Second District,
Division 2, California.

March 12, 1958.

Action to quiet title and terminate defendants' rights under a contract for purchase from plaintiffs of certain realty. The Superior Court, Ventura County, E. Perry Churchill, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Ashburn, J., held that where written agreement for sale of certain land and an improvement to be erected thereon provided for payment of a certain installment on June 1st to be based on a percentage of the cost of the lot and building, and plaintiffs-sellers proceeded with diligence in constructing the building but were prevented from completing it before such date by wrongful interference of defendants, defendants' first payment became due on June 1st, and upon defendants' default in such payment, as adjusted for value due to noncompletion, plaintiffs were entitled to terminate buyers' rights under the contract and to quiet title on account of their default.

Judgment affirmed.

1. Appeal and Error §714(1)

Where a motion to dismiss an appeal was denied with leave to appellants to proceed upon the judgment roll alone, and, upon condition that they do so, District Court of Appeal could not give consideration to a partial reporter's transcript and to exhibits apparently received in evidence which were filed with the court. West's Ann.Rules on Appeal, rule 5(f).

2. Appeal and Error §544(3)

Inclusion of exhibits in a clerk's transcript on appeal is appropriate only as a

supplement to a reporter's transcript, and such procedure does not apply to an appeal on the judgment roll and cannot enlarge the scope of same. West's Ann.Rules on Appeal, rules 4(b, d), 5(b, f).

3. Appeal and Error §544(3)

Where an appeal was made upon the judgment roll, sufficiency of the evidence to support findings of the trial court could not be reviewed, but District Court of Appeal was confined to a determination of the questions as to whether complaint stated a cause of action, whether findings were within issues, whether the judgment was supported by findings, and whether reversible error appeared upon face of record.

4. Quietling Title §7(2)

Vendor and Purchaser §77, 185

Where written agreement for sale of certain land and an improvement to be erected thereon provided for payment of a certain installment on June 1st to be based on a percentage of cost of lot and building, and plaintiffs-sellers proceeded with diligence in constructing building but were prevented from completing it before such date by wrongful interference of defendants, defendants' first payment became due on June 1st, and upon defendants' default in such payment, as adjusted for value due to noncompletion, plaintiffs were entitled to terminate defendants' rights under the contract and to quiet title on account of their default.

5. Appeal and Error §931(3)

Any subsidiary findings necessary to support ultimate facts are implied upon appeal, pursuant to rule that findings must be so construed as to support the judgment if possible.

6. Quietling Title §54

Where agreement for sale of certain realty provided that in event purchasers default and vendors shall take any proceedings to obtain possession of property or commence any action to acquire title to said property, purchasers agree to pay cost of any such proceedings including an attorney's fee to be set by the court, action by vendors to quiet title and terminate pur-

chasers' rights under the contract fell within scope of such agreement, and trial court was therefore authorized to include attorney's fees in judgment for vendors.

Charles W. Engelbertson, Santa Barbara, for appellants.

Durley, Todd & Cearnal, by W. Mark Durley and Dale Cearnal, Oxnard, for respondents.

ASHBURN, Acting Presiding Justice.

Defendants appeal from a judgment terminating their rights under a contract for purchase from plaintiffs of certain real property. The complaint and the judgment are in the form of quiet title. The major question on appeal is whether defendants were required to make an installment payment on June 1, 1956, and whether they were in default in failing to perform. This question involves numerous subsidiary ones which turn largely upon the resolution of an ambiguity in the contract and the manner of its disposition in the findings and judgment.

On February 17, 1956, the Tibbets, designated as "sellers," agreed to sell, and the Robbs, as "buyers," agreed to purchase, certain real property in the city of Oxnard. The written agreement provided that sellers should erect at their own cost a certain building upon the land according to plans and specifications therein approved by all parties; that erection of same should begin within ten days and be completed within a reasonable time. The sale price of the land and improvement to be erected thereon was stated to be "a sum equal to Eleven Thousand Two Hundred Fifty Dollars (\$11,250.00) plus the actual cost of the building to be erected thereon * * *. When the total cost of the building has been ascertained an amendment to this lease shall be executed, setting out the full cost of such building." As a down payment buyers were to assign to sellers a certain contract of January 13, 1955, executed by Joe and Alma Faye Buckingham in favor

of F. M. Engelbergstron, upon which the unpaid balance then was \$1,984.29. This assignment was duly executed. The balance of the purchase price was payable in installments at the rate of one per cent of the full purchase price per month. The governing paragraph reads: "The said buyers do hereby agree to pay the purchase price of and for said real property together with the improvements to be erected thereon at the rate of one percent (1%) per month or more on the entire cost of the lot and building (the lot, as heretofore stated, to be priced at \$11,250.00), the first of which payments shall be made on the 1st day of June, 1956 and a like amount on the first day of each month thereafter until all of the purchase price and interest thereon have been fully paid. The payments so to be made shall include interest at the rate of six percent (6%) per annum, payable monthly, and said Buyers, and each of them, do hereby agree to pay interest on the said purchase price and the decreasing amounts thereof at the rate of six percent (6%) per annum, payable monthly and in the manner hereinbefore set forth." The event of default by buyers is dealt with as follows: "In the event of the failure on the part of the Buyers to comply with any of the terms or conditions hereof by said Buyers and said default shall be in existence for the period of thirty (30) days or more, the Sellers shall be released from all obligations in law or equity to convey said real property or to perform any other obligation imposed upon them by this agreement, and the Buyers shall forfeit all right thereto and to the property hereby agreed to be sold, and all right, title and interest in and to any monies paid under the terms hereof, such money to be considered in such case as compensation for the use of said property." Also: "[A]nd provided also that the rights of the owner in and to any of the real property herein described, arising by reason of a reversion of the title to said lot or land occurring under a breach of these conditions and restrictions, shall not be exercised until, and no action shall

be brought to enforce and/or establish such reversion unless, a notice of such breach, setting forth the facts of the breach, has been given to the owner of said land, and such breach has not been remedied within thirty (30) days after the giving of said notice." Buyers were to have possession upon completion of the building and "during such times as they may not be in default as to any of the terms or provisions of this agreement."

The building was not completed by June 1, 1956, the date specified for payment of the first installment of purchase price, and no payment was made. Thereupon, on June 7, 1956, sellers gave buyers a written notice of non-payment of the installment of June 1, adding: "The cost of the building has not yet been established, and, therefore, at this time, demand is made on you for the payment due June 1, 1956 based on the price of the lot reduced by the unpaid amount of the contract which was assigned to us pursuant to said Agreement, plus interest as provided for in the Agreement. We reserve the right to change, from time to time, the basis of the amount due from you monthly to include the cost of the building." But the buyers made no payment whatever. On September 25, 1956, the sellers sued to quiet title, for restoration of possession, etc.

All parties recognize that, when applied to the following facts, the contract was ambiguous with respect to the time for beginning payments, i. e., the building was to be completed within a reasonable time, the first payment to be made on June 1, 1956, and to consist of one per cent of the lot value (\$11,250) plus the actual cost of the building; the building was under construction until July 25, 1956, and the full cost not ascertained or ascertainable on or before June 1, 1956. Plaintiffs alleged the intent of the parties as follows: "It was the true intent and meaning of the terms of said Agreement, and by its terms the said defendants agreed and undertook, that, regardless of whether or not said improvements to be constructed on said lot were finished on June 1, 1956, defendants

were to pay on the first day of each month commencing June 1, 1956, an amount of money equal to one percent of the amount of \$11,250.00 (the cost of the lot) plus the cost of the building, whether completed or uncompleted, as of the time of payment reduced by the unpaid amount of a contract dated January 13, 1955 executed by Joe and Alma Fay Buckingham, and in favor of F. M. Engelbergstron (\$1,984.-29)." Defendants' answer: "Further answering, defendants allege it was the true intent and meaning of the terms of said agreement, and by its terms said defendants agreed and undertook that the said payments were to commence only when said improvements were completed. It was the true intent and meaning of the terms of said agreement that defendants were to commence said payments only when said improvements were completed, whether on June 1, 1956, or after June 1, 1956." Oral and documentary evidence was taken at the trial and judgment rendered in favor of plaintiffs. The court found: "2. Under and pursuant to the terms of said Agreement defendants were obligated to make a payment on or before June 1, 1956, and said payment was not made. * * * 6. A notice of default setting forth the nonpayment of moneys due on or before June 1, 1956 was given as required by said Agreement from plaintiffs to defendants and this action was not commenced until thirty days after the giving of said notice. 7. Defendants' default, as set forth above, continued for a period of thirty days. 8. Plaintiffs performed all of their obligations under said Agreement until they were excused from performance after defendants' default had been in existence for a period of thirty days. * * * 13. The work of constructing the building done by plaintiffs pursuant to the Agreement proceeded with reasonable diligence except during times that delays were caused by the wrongful interference of defendants."

Appellants undertake to argue the sufficiency of the evidence to support the findings, particularly those which are to

the effect that the failure to complete the building was due to their unjustified interference with the work and that their payment was due on June 1 regardless of noncompletion of the structure. These arguments cannot be entertained for this appeal must be treated as one upon the judgment roll.

[1] Respondents moved to dismiss the appeal and appellants made a counter motion to be relieved from default wherein they requested "that they may be permitted to appeal only on the clerk's transcript under Rule 5(f)." The motion to dismiss was denied on September 12, 1957, "with leave to appellants to proceed upon the judgment roll alone and upon condition that they do so." Nevertheless, appellants filed on September 26, 1957 a partial reporter's transcript and caused to be included in the clerk's transcript, filed on the same day, two exhibits which apparently had been received in evidence. This court's order of September 12th precluded either of these maneuvers and they must be disregarded for that reason.

Moreover, Rule 4(b) of the Rules on Appeal permits the use of a partial reporter's transcript only by stipulation or when "appellant, in his notice to the clerk, states the points to be raised by him on the appeal." Neither of these conditions precedent was fulfilled here.

[2,3] The inclusion of exhibits in a clerk's transcript (Rules 4(d) and 5(b)) is appropriate only as a supplement to a reporter's transcript. That procedure does not apply to an appeal on the judgment roll and cannot enlarge the scope of the same. The presumption that the record includes all matters material to a determination of the points on appeal does not apply to a judgment roll appeal unless the error claimed by appellant appears on the face of the record (Rule 52). The sufficiency of the evidence cannot be reviewed. "In this type of appeal, since 'the evidence is not before this court, we are confined to a determination of the questions as to whether the complaint states a cause of

action; whether the findings are within the issues; whether the judgment is supported by the findings and whether reversible error appears upon the face of the record.'" *Hunt v. Plavsa*, 103 Cal.App.2d 222, 224, 229 P.2d 482, 483. Appellants declare in their opening brief that "[t]his appeal is based solely on the clerk's transcript and appellants' Exhibit 'A' and 'F.'" But the designated exhibits cannot aid their cause. "Appellants cannot, by designating for inclusion in the clerk's transcript documents not properly a part of the judgment roll, or by requesting that the exhibits received in evidence be transmitted to the appellate court, enlarge the scope of the appellate court's review." *Hunt v. Plavsa*, supra, 103 Cal.App.2d page 224, 229 P.2d at page 483. The situation thus presented is clearly explained by Mr. Justice Nourse, Pro Tem., in *White v. Jones*, 136 Cal.App.2d 567, 569-571, 288 P.2d 913, 914. It is there said, in part:

"The record on appeal here consists only of the clerk's transcript which contains the judgment roll and certain documents received in evidence in the court below.

"In disposing of appellant's contention this appeal is therefore to be treated as one on the judgment roll. On such an appeal the question of sufficiency of the evidence to support the findings is not open. [Citation.]

"The judgment here can only be attacked for errors which affirmatively appear upon the face of the judgment roll. Appellant cannot broaden the scope of this court's inquiry by incorporating in the clerk's transcript the documentary evidence received in the court below. [Citations.]

"On an appeal based on a record such as that here, we must presume that in the oral proceedings there was substantial evidence to support the findings. In that inquiry we cannot look beyond the 'facts appearing in the findings' and here it is admitted that those facts support the judgment. [Citations.]

"Rules 4(b), 6, 7 and 52 of the Rules on Appeal were designed to make appeals less burdensome and expensive. They were not, however, designed to nor do they broaden the questions that may be raised on a record such as the one here. * * *

"In order that an appellant might safely prosecute an appeal upon one of the limited records provided for by the rules we have mentioned, Rule 52 was adopted and then read as follows: 'If a record on appeal does not contain all of the papers, records and oral proceedings, but is certified by the judge or the clerk, or stipulated to by the parties, in accordance with these rules, it shall be presumed in the absence of proceedings for augmentation that it includes all matters material to a determination of the points on appeal.' * * *

"Effective January 1, 1951, Rule 52 was amended by adding thereto the following sentence: 'On an appeal on the judgment roll alone, or on a partial or complete clerk's transcript, the *foregoing presumption* shall not apply unless the error claimed by appellant appears on the face of the record.' Under the rule as amended the presumptions in support of the judgment that were made prior to the adoption of the Rules on Appeal apply except as expressly limited by Rule 52, and it is not presumed, in the absence of the oral proceedings being made a part of the record on appeal pursuant to one of the methods provided for by the Rules, that the record on appeal contains all matter material to the determination of the appeal. Therefore we must presume that the trial court received evidence which would support its findings."

[4] So we look to the judgment roll to determine whether reversible error appears in this cause. That includes, of course, the pleadings and their exhibits (the contract and notice of default), the findings and

judgment. The basic question of whether defendants defaulted upon their obligations thus emerges. The parties having alleged their respective theories of the intent of the ambiguous language of the contract concerning installment payments, it became the duty of the trial judge to pass upon that issue and declare the result. *Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co.*, 46 Cal.2d 517, 525, 297 P.2d 428; 12 Cal.Jur.2d § 119, p. 324. Oral and documentary evidence was received below and it is to be presumed that it went to this issue as well as others. The pertinent findings are 2 and 13 quoted above. In effect they declare that plaintiffs proceeded with diligence in constructing the building but were prevented from completing it before June 1, 1956, by wrongful interference of defendants, and therefore defendants' first payment became due on June 1 regardless of prior completion of the building. We must assume that competent oral and documentary evidence was received which warranted these factual findings concerning plaintiffs' diligence and defendants' interference. The conclusion that the first payment accrued on June 1, 1956, flows from the application of settled legal principles to those facts.

So far as an appellate tribunal is concerned the governing principle is stated in *Transportation Guarantee Co. v. Jellins*, 29 Cal.2d 242, 245, 174 P.2d 625, 627: "Contrary to the rule contended for by defendant we must, on this appeal, in determining whether the judgment shall be reversed or affirmed, construe all ambiguities in the contracts against defendant and in favor of plaintiff. This is true, if for no other reason, than that on a judgment roll appeal it will be presumed that all evidence necessary to support the findings was received. (*Freeman v. Gray-Cowan, Inc.* (1933), 219 Cal. 85, 88, 25 P.2d 415.) In accordance with such rule it is to be presumed that evidence was received establishing that the contracts in question, at least insofar as any ambiguous language is concerned, were prepared

and formulated by defendant and hence are to be construed against him."

In the trial court the following considerations were pertinent. Sections 1511 and 1512, Civil Code, declare the fundamental principle that prevention of performance is the equivalent of actual performance by the party so interfered with. The decisions reach the same result. "Performance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party." *Central Oil Co. of Los Angeles v. Southern Refining Co.*, 154 Cal. 165, 167, 97 P. 177." *Vineland Homes, Inc. v. Barish*, 138 Cal.App.2d 747, 759, 292 P.2d 941, 950. See, also, to the same effect, *Norins Realty Co., Inc. v. Hoytt*, 61 Cal.App.2d 194, 199-200, 142 P.2d 353. Applied to the situation at bar this means that when defendants' interference prevented the completion of the building in time for its entire cost to be ascertained before June 1, plaintiffs stood in the same legal position as if the building were completed before that date. Hence the full payment was then due. But the realities of the situation could not be ignored. It was then impossible to determine the full cost of the structure and the vendors, through no fault of their own, were placed in the position where they could not insist upon the full loaf—one element of the computation of the payment due was unknown and at that time unknowable. So they did the next best thing and waived that portion of the installment due them and demanded one per cent of the agreed value of the lot, \$11,250, less the unpaid portion of the assigned Buckingham-Engelbergstron contract, plus interest as specified in the agreement. The right which they waived belonged to them and not to the buyers for it was created for the benefit of the sellers.

[5] The court found the notice of default to be a proper one and the default to be complete when 30 days had elapsed after service of same. All of these things are implicit in the findings as made. They state the ultimate facts; it is not necessary to include evidentiary matters in findings. 2 Witkin California Procedure, p. 1843, § 112; 24 Cal.Jur. § 203, p. 968. Any subsidiary findings necessary to support the ultimate facts are implied pursuant to the recognized rule that findings must be so construed as to support the judgment if possible. "It is well established that findings will be liberally construed in order to make them complete and internally consistent, thus avoiding reversal on purely technical grounds. * * 'It is also to be noted that while full findings are required upon all material issues a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made.'" *Daniels v. Daniels*, 143 Cal.App.2d 430, 439, 440, 300 P.2d 335, 341. Accord: *Sears, Roebuck & Co. v. Blade*, 139 Cal.App.2d 580, 592, 294 P.2d 140; *Haigler v. Donnelly*, 18 Cal.2d 674, 677-678, 117 P.2d 331; *Richter v. Walker*, 36 Cal.2d 634, 640, 226 P.2d 593. We conclude that the findings are sufficient to dispose of the issue embracing the fact of default and its consequences.

Counsel debate the question whether this is an action to quiet title or one to foreclose a conditional sale contract. The distinction is without significance here. Actually this suit encompasses both types of relief,—termination of buyers' rights and quieting of title on account of their default. However, the attempted distinction suggests a question of applicability of the line of cases stemming from *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367, which deal with the adjustment of the equities of vendor and vendee in the event of termination of an installment contract

for default of the vendee. The Barkis case says, 34 Cal.2d at page 120, 208 P.2d at page 370: "Similarly, although a quiet title action is equitable in nature [citations], and equity cannot 'enforce a penalty or forfeiture in any case' [citations], it is generally held in the absence of a showing that the vendor will realize more than the benefit of his bargain that he may quiet his title to the property without refunding any part of the price paid." *Baffa v. Johnson*, 35 Cal.2d 36, 39, 216 P.2d 13, 14, says: "Under these sections a defaulting vendee seeking restitution of part of his payments will be denied relief if his breach is wilful. On the other hand, if he is able to prove that the vendor has received more than the benefit of his bargain, the court is precluded by section 3369 from quieting the vendor's title unless he refunds the excess." The burden of so showing rests on the vendee, as indicated in the foregoing quotation from *Baffa* and as held in *Major-Blakeney Corp. v. Jenkins*, 121 Cal.App.2d 325, 332, 263 P.2d 655, and *Furst v. Scharer*, 119 Cal.App.2d 605, 612, 260 P.2d 198. It appears at bar that the vendees never made any cash payments; they did assign the Buckingham-Engelbergstron agreement and, according to the findings, "certain moneys have been paid to plaintiffs" thereon, but the amount does not appear. The judgment provides: "[T]hat all sums received by plaintiffs, as assignees, under and pursuant to a certain contract dated January 13, 1955 in the principal sum of \$1,984.29 executed by Joe and Alma Faye Buckingham in favor of F. M. Engelbergstron from and after date hereof, be applied in payment of amounts which plaintiffs are entitled to recover from defendants pursuant to this Decree; and, when plaintiffs have received all amounts which they are entitled to recover from defendants pursuant to this Decree, plaintiffs assign to Dawson E. Robb and Flora M. Robb (also known as F. M. Engelbergstron) all of their

right, title, and interest in and to said Agreement * * *." Defendants-appellants did not raise this issue, did not assume the burden of showing that the instant judgment would result in unjust enrichment to the vendors, and the Barkis line of cases is not applicable here.

[6] Appellants complain of the fact that the judgment, which quiets title in plaintiffs and declares them entitled to possession, also awards plaintiffs an attorney fee of \$1,000. This was done pursuant to the terms of the agreement: "In the event that said Buyers shall make any default hereunder and said Sellers shall take any proceedings to collect any payments herein agreed to be made by said Buyers, or to obtain possession of said property, or shall commence any action to quiet title to said property, said Buyers agree to pay the cost of any such proceeding, including an attorney's fee to be set by the Court, if Sellers prevail in such action." Manifestly, this action falls within the scope of the agreement. Cf. *Johnson v. Kaeser*, 196 Cal. 686, 695, 239 P. 324. The argument proceeds upon the predicate that "[i]t is not claimed that this is an action to obtain possession or title," which lacks factual support. The complaint is designated as one to quiet title and prays for such relief. Respondents' brief declares on page one that the action is one to quiet title, for restitution of the real property, etc. But it is immaterial what the parties assert in this connection for the record shows that the action is one described in the quoted paragraph of the contract. That being true, the form of the action becomes inconsequential.

Other arguments have been considered but do not require discussion.

Judgment affirmed.

HERNDON, J., and KINCAID, J. pro tem., concur.

158 Cal.App.2d 481

Roy V. FOSTER, Plaintiff and Appellant,
v.

MASTERS PONTIAC COMPANY, Inc., a California corporation, California Funding Corporation, a California corporation, Defendants and Respondents.

Civ. 22467.

District Court of Appeal, Second District,
Division 3, California.

March 18, 1958.

Action by automobile buyer, against seller, for declaratory relief and for money. The Superior Court, Los Angeles County, Ralph K. Pierson, J., sustained a general and special demurrer, and entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that buyer's complaint alleging that automobile order delivered to him by seller failed to contain all agreements between the parties and was in violation of statute in that among other things, it did not specify amount of time-price differential, and did not specify contract balance owed by buyer to seller, and further alleging that a controversy had arisen between the parties as to their rights and duties under such automobile order, as to a contract of conditional sale, and as to the validity and enforceability of them, presented an actual controversy as to such agreements, and as to the justification of buyer's excuses for nonperformance, and stated a cause of action for declaratory relief.

Judgment reversed with directions.

1. Declaratory Judgment ⇨311

Rule that a complaint is to be liberally construed is particularly applicable to one for declaratory relief.

2. Declaratory Judgment ⇨142

Questions relating to the formation of a contract, its validity, its construction and effect, excuses for nonperformance, and termination are proper subjects for declaratory relief.

3. Declaratory Judgment ⇨6, 394

Although court may refuse to exercise power to grant declaratory relief in any case where its declaration is not necessary or proper at the time under all circumstances, such discretion is not unlimited, but is a legal or judicial discretion subject to appellate review, and declaratory relief must be granted when facts justifying that course are sufficiently alleged. West's Ann. Code Civ.Proc. § 1061.

4. Declaratory Judgment ⇨143

Buyer's complaint alleging that automobile order delivered to him by seller failed to contain all agreements between the parties and was in violation of statute in that, among other things, it did not specify amount of time-price differential, and did not specify contract balance owing by buyer to seller, and further alleging that a controversy had arisen as to rights and duties under order and contract, and, as to validity and enforceability of them, presented an actual controversy and stated a cause of action for declaratory relief. West's Ann. Civ.Code, § 2982(a); West's Ann.Code Civ. Proc. § 1061.

5. Pleading ⇨192(2)

A demurrer for uncertainty does not lie to matters which lie within the knowledge of a defendant.

Roger J. Pryor and Pauline Day Bakst, Compton, for appellant.

Sidney A. Cherniss, El Monte, for respondent Masters Pontiac Co., Inc.

VALLÉE, Justice.

Appeal from a judgment entered on an order sustaining a general and special demurrer to the third amended complaint, referred to as the complaint, without leave to amend.

The complaint alleges:

1. On November 24, 1953 plaintiff, as buyer, and defendant Masters Pontiac Company, called defendant, as seller, entered into an oral agreement whereby plaintiff

agreed to buy a 1953 Pontiac for \$3,653.53 and defendant agreed to take plaintiff's 1951 Kaiser in trade for a net allowance of \$910; plaintiff agreed to pay the usual sales tax and license and transfer fees; plaintiff agreed to pay \$233.35 cash and pay defendant \$91.22 a month for six months, and it was agreed that at that time plaintiff could refinance at a lower figure. 2. At the time one Bruning, as agent of defendant, acting within the scope of his employment, represented to plaintiff that he would take plaintiff's 1951 Kaiser, pay off the encumbrance thereon, and trade his 1949 Hudson in its place, and that plaintiff would nevertheless receive the same net allowance of \$910. 3. Thereupon the parties executed a conditional sales contract in writing titled "Car Order" for the sale of the Pontiac under which defendant delivered the Pontiac to plaintiff and plaintiff delivered the Kaiser to defendant. The "Car Order" is made part of the complaint. It is addressed to defendant; is dated November 24, 1953; is an order for a 1953 Pontiac with motor number; and states:

Price of Car	\$ 3653.53
Sales Tax	109.61
License and Transfer	15.00
Total	3778.14
Deposit Received	\$ 10.00
Used Car Allowance	\$ 1395.00
Less Pay Off Security	
First Compton	485.00
Net Allowance	\$ 910.00
Cash on Delivery	213.35
Total Credit	\$ 1133.35
Unpaid Balance of Cash	
Price	\$ 2644.89
Insurance--	
Comprehensive Collision	\$ 78.00
	\$ 2722.89
Total Time Payment	
Balance	\$ 109.85
Payable in CFC note to reduce	\$ 91.22

4. Concurrently with the signing of the "Car Order," defendant required plaintiff to sign another form titled "Contract of Conditional Sale" which was a printed form with none of the blanks filled in; defendant represented to plaintiff that it would be

filled in to conform to the "Car Order." 5. About 10 days later plaintiff received a copy of the contract of conditional sale with words and figures typed in the blank spaces; the typed words and figures did not conform to the "Car Order." A copy of the contract of conditional sale is made a part of the complaint. The figures and promise inserted in it were:

Cash Selling Price	\$3653.53	\$109.61	\$ 3763.14 (a)
motor vehicle sales tax			
Registration, Transfer and Title Fees			15.00 (b)
Lines (a) plus (b)			\$ 3778.14 (c)
Less:			
Down Payment: Cash	\$333.35		
Agreed Net Value Trade-In	810.00		\$ 1143.35 (d)
Amount Unpaid on Cash			
Price (c) less (d)			\$ 2634.79 (e)
Insurance.			
Comprehensive 12 Mos; Prem.	\$ 22.00		
\$50 Deductible			
Collision 12 Mos; Prem.	54.00		
Towing and Road			
Service 12 Mos; Prem.	2.00		
Total Insurance Premiums			\$ 78.00 (f)
Unpaid Balance, (e) plus (f)			\$ 2712.79 (g)
Plus Time Price Differential			\$ 570.71 (h)
Total Contract Balance Due Seller from Purchaser			\$ 3283.50 (i)

"which purchaser agrees to pay in installments of \$109.45, on the 10th day of each succeeding month for a period of 30 months, beginning 1-10-54." The contract sent plaintiff was not signed by defendant. It shows the sale of a new Pontiac. 6. Concurrently defendant required plaintiff to sign a promissory note in terms and conditions unknown to plaintiff and he never has received a copy of it. 7. The "Car Order" does not contain all of the agreements between the parties and is in violation of section 2982(a) of the Civil Code in that: a. it did not specify the correct trade-in; b. it did not specify the kind of insurance, the premiums for fire and theft, comprehensive, or collision insurance coverage, nor the term of insurance charged to plaintiff; c. it did not specify the amount of the time-price differential; d. it did not specify the contract balance owed by the buyer to the seller; e. it did not specify the number of installments required to pay the contract balance, the amount of each installment, and the day of payment for each installment; f. it specified \$15.00 as and for

"license and transfer," whereas that fee was not payable by the seller at the time of the contract and should not have been charged to plaintiff. 8. The contract of conditional sale does not contain all or the true agreement and is in violation of section 2982(a) of the Civil Code in that a copy was not delivered at the time of its execution. 9. Pursuant to the "Car Order," plaintiff has paid to defendant a down payment of \$213.35, has traded in to defendant the 1949 Hudson of the agreed value of \$910, and has paid to defendant \$91.22 a month for the months of January through June, 1954, a total of \$547.32. 10. On June 21, 1954 plaintiff returned the Pontiac to defendant on the ground the contract is unenforceable and it is now in its possession. 11. On June 23, 1954 defendant informed plaintiff the Pontiac had been placed in storage for plaintiff's protection to its damage in the sum of \$2.00 a day.

The complaint alleges further: An actual controversy has arisen between plaintiff and defendant as to their respective rights and duties under the "Car Order" and the contract of conditional sale and as to the validity and enforceability of them in that plaintiff contends: they are invalid and unenforceable and the "Car Order" is in violation of Civil Code, section 2982(a); plaintiff is under no obligation to make any further payment on any unpaid installments of the contract balance and is entitled to recover from defendant the cash he has paid and the agreed value of the car he traded in; defendant did not pay off the Kaiser as agreed; the Pontiac was a used car when delivered to plaintiff, and a license had previously been issued for it; plaintiff's interest and liability ceased on June 21, 1954. Defendant contends it is entitled to the balance due on the contract of conditional sale, and on default to repossess the Pontiac, sell it, and collect any deficiency from plaintiff; plaintiff wrongfully returned the Pontiac and defendant is entitled to charge him storage of \$2 a day while it is in defendant's possession.

A second count is for money had and received. The prayer is for declaratory

relief and for money under the second count.

As stated, the demurrer was general and special. The record does not disclose the ground on which the court sustained the demurrer without leave, a practice we have had occasion to severely criticize. See *James v. Herbert*, 149 Cal.App.2d 741, 309 P.2d 91.

The argument here centers entirely around the question whether the complaint states facts sufficient to constitute a cause of action for declaratory relief. We have concluded it does.

[1-3] The rule that a complaint is to be liberally construed is particularly applicable to one for declaratory relief. 15 Cal. Jur.2d 159, § 32. It is elementary that questions relating to the formation of a contract, its validity, its construction and effect, excuses for nonperformance, and termination are proper subjects for declaratory relief. 15 Cal. Jur.2d 225, § 71. Section 1061 of the Code of Civil Procedure states the court may refuse to exercise the power to grant declaratory relief in any case where its declaration is not necessary or proper at the time under all the circumstances. This discretion is not unlimited. See *Lawrence Barker, Inc., v. Briggs*, 39 Cal.2d 654, 663, 248 P.2d 897. It is a legal or judicial discretion subject to appellate review, and declaratory relief must be granted when the facts justifying that course are sufficiently alleged. *Kessloff v. Pearson*, 37 Cal.2d 609, 613, 233 P.2d 899.

"[S]ection 1061 of the Code of Civil Procedure, which allows the trial court to refuse to render a declaratory judgment, does not apply where, upon the facts stated, the plaintiff is entitled to some relief in connection with the matter which occasioned the controversy." *Lord v. Garland*, 27 Cal.2d 840, 852, 168 P.2d 5, 12 "Where, therefore, a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the

trial court may not properly refuse to assume jurisdiction; and if it does enter a dismissal, it will be directed by an appellate tribunal to entertain the action. Declaratory relief must be granted when the facts justifying that course are sufficiently alleged." *Columbia Pictures Corp. v. DeToth*, 26 Cal.2d 753, 762, 161 P.2d 217, 221, 162 A.L.R. 747.

At the time in question, section 2982(a) of the Civil Code provided:

"(a) Every conditional sale contract for the sale of a motor vehicle, with or without accessories, shall be in writing and shall contain all of the agreements between the buyer and the seller relating to the personal property described therein. It shall be signed by the buyer or his authorized representative and by the seller or its authorized representative, and when so executed an exact copy thereof shall be delivered by the seller to the buyer at the time of its execution. It shall recite the following separate items as such, in the following order:

"1. The cash price of the personal property described in the conditional sale contract.

"2. The amount of the buyer's down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with a statement of the respective amounts credited for cash and for such property. * * *

"3. The amount unpaid on the cash price, which is the difference between Items 1 and 2.

"4. The cost to the buyer of an insurance, the premium for which is included in the contract balance.

"5. A description and itemization of amounts, if any, which will actually be paid by the seller or his assignee to any public officer as fees in connection with the transaction, which are included in the contract balance.

"6. The amount of the unpaid balance, which is the sum of Items 3, 4, and 5.

"7. The amount of the time price differential.

"8. The contract balance owed by the buyer to the seller, which is the sum of Items 6 and 7.

"9. The number of installments required to pay the contract balance, the amount of each installment, and the date for payment of the installments."

"According to the *Carter* case [*Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 203 P.2d 758], 'The obvious purpose of the statute is to protect purchasers of motor vehicles against excessive charges by requiring full disclosure of all items of cost' (page 573 of 33 Cal.2d, at page 764 of 203 P.2d); the form and requisites prescribed by the statute are mandatory; a contract which does not substantially conform thereto is unenforceable; and a buyer who has made payments to the seller under such a contract may recover them because 'A member of the class for whose protection the statute was enacted is ordinarily not considered *in pari delicto* with those who violate the statute' (page 574 of 33 Cal.2d, at page 765 of 203 P.2d)." *Estrada v. Alvarez*, 38 Cal.2d 386, 389, 240 P.2d 278, 280.

We must assume, of course, that the facts alleged in the complaint are true. Whether the "Car Order" or the conditional sale contract be taken as the contract it is manifest that it violates section 2982(a). The "Car Order" did not "contain all of the agreements" of the parties relating to the personal property described therein. It appears to violate section 2982(a) in at least some of the particulars specified in the complaint. The contract of conditional sale delivered to plaintiff was not signed by defendant and a copy of it was not delivered by defendant to plaintiff at the time it was signed by plaintiff. The "Car Order" did not recite the amount of the time-price differential. The "Car Order" recited the cash down payment as \$213.35

—the conditional sale contract recited it as \$333.35. The "Car Order" recited the net allowance for trade-in as \$910—the conditional sale contract recited it as \$810. On substantially the same facts as alleged in the complaint at bar, the court in *Adams v. Caruso Enterprises, Inc.*, 134 Cal.App.2d 403, 285 P.2d 1022, held the plaintiff was entitled to recover the payments made on the vehicle and the agreed value of a trade-in.

[4] "A complaint seeking declaratory relief must, of course, allege facts which justify the declaration of rights or obligations in respect of a matter of 'controversy', the controversy being 'actual' within the purview of section 1060, Code of Civ.Proc., and involving justiciable rights. 'Doubtless, the requirement is met by allegations showing a controversy respecting the rights of parties to a written instrument, accompanied by a request that these rights be determined and declared.' 5 Cal.Jur. [10-Yr.] Supp. (1944 Rev.) 131, sec. 30; and authorities there cited." *Wilson v. Los Angeles County Civ. Serv. Comm.*, 106 Cal.App.2d 572, 577, 235 P.2d 620, 623. The facts justifying declaratory relief are sufficiently alleged. The complaint presents the existence of an actual controversy as to which document, if either, is the contract, as to the validity of the alleged contract, and as to the justification of plaintiff's excuses for nonperformance.

[5] Defendant makes no point with respect to the special demurrer. We have examined the specifications of uncertainty made below and find them inconsequential. They are largely matters which lie within the knowledge of defendant. A demurrer does not lie as to such matters. *Schaefer v. Berinstein*, 140 Cal.App.2d 278, 298, 295 P.2d 113. The trial court abused its discretion in sustaining the demurrer.

The judgment is reversed with directions to the superior court to overrule the demurrer.

SHINN, P. J., and PARKER WOOD, J., concur.

Edna Mae HENDERSHOTT, Plaintiff
and Appellant,

v.

MACY'S, R. H. Macy & Co., Inc., a corporation, et al., Defendants and Respondents.

No. 17583.

District Court of Appeal, First District,
Division 1, California.

March 12, 1958.

Action for personal injuries allegedly sustained by plaintiff when she slipped while riding on an escalator in corporate defendant's store. The Superior Court, City & County of San Francisco, Milton D. Sapiro, J., entered judgment for defendants and denied plaintiff's motion for new trial, and plaintiff appealed. The District Court of Appeal, Bray, J., held that error, if any, of trial court in refusing to instruct on subject of *res ipsa loquitur*, was not prejudicial, in view of fact court instructed jury that defendants, as operators of an escalator were under a duty of utmost care and diligence for safety of persons using escalator and would be responsible for injury occasioned by even the slightest neglect which human care and foresight might have guarded against, and thus, if jury believed accident was due to improper construction, it would necessarily have found defendants guilty of negligence.

Appeal from order dismissed, judgment affirmed.

1. Carriers $\S$ 316(1)

If plaintiff's fall on an escalator in defendants' store could have been due to improper construction, in that a certain strip projected $\frac{1}{8}$ of an inch above a panel parallel to the escalator, causing a box which plaintiff was carrying to wedge on such strip and throw plaintiff off balance, *res ipsa loquitur* would not apply as plaintiff knew as much about the cause of the accident as did defendants.

2. Carriers Ⓒ280(4)

Operator of an escalator owes the duty of utmost care and diligence analogous to that required of a common carrier, towards a person using such escalator.

3. Negligence Ⓒ121(2)

There are three conditions which must appear for the doctrine of *res ipsa loquitur* to apply, the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence, it must be caused by an agency or instrumentality within the exclusive control of defendant and it must not have been due to any voluntary action or contribution on part of plaintiff.

4. Negligence Ⓒ121(2)

The doctrine of *res ipsa loquitur* will not apply if plaintiff had control of instrumentality, and even if doctrine does apply, plaintiff may be unable to recover because of contributory negligence.

5. Trial Ⓒ260(8)

In action for personal injuries allegedly sustained when plaintiff slipped while riding on an escalator in defendants' store, error, if any, by trial court in refusing to instruct on subject of *res ipsa loquitur*, was not prejudicial, in view of instruction given.

6. Evidence Ⓒ150

In action for personal injuries allegedly sustained when plaintiff slipped while riding on an escalator in defendants' store, trial court did not err in admitting in evidence testimony of defendants' escalator mechanic that he conducted an experiment in which he took a cardboard box and while riding the escalator, held it against allegedly defective panel and found that when it passed a certain strip which allegedly wedged against a box plaintiff was carrying, causing her to fall, it just nudged him a little.

Lenz, Jarvis, Miller & Decker, San Francisco, for appellant.

Bronson, Bronson & McKinnon, Edward A. Morris, San Francisco, for respondents.

BRAY, Justice.

Plaintiff appeals from a judgment in favor of defendants after jury verdict and attempts to appeal from an order denying new trial.*

Questions Presented.

1. Refusal of certain instructions, particularly on *res ipsa loquitur*.

2. Admission of evidence of experiment. Evidence.

Plaintiff with her husband purchased some dishes on the fifth floor of Macy's San Francisco store. Four cups, four saucers and four dinner plates were packed in a box and plaintiff proceeded to take the down escalator, carrying the box in her right hand. In her left hand she had a small soft package of "towels and things" and a purse over her left arm. Almost immediately after stepping on the escalator "We came to something that automatically stopped me from the right side. The box wedged on something which hit my hip and threw me back, and I ground my left heel into the treads of the step that was there and I hit my back on the second step back." By the time she reached the fourth floor she had regained her feet. She claims to have received serious permanent injury from the fall. On the side panel of the right side of the escalator there are metal strips. These strips are perpendicular to the treads of the escalator and are about $1\frac{1}{2}$ inches wide. They are either $\frac{1}{8}$ inch thick as testified to by plaintiff's witnesses or $\frac{3}{32}$ inch as testified to by defendant's escalator mechanic. The latter testified that the function of the strips is to bind together the various sections of the plywood veneer panel and to hold them in

* In spite of the fact that appellate courts for many years have been announcing that an order denying a new trial is not appealable as the order is reviewable

upon the appeal from the judgment, we continue to get purported appeals from such orders in a large percentage of cases.

place. A structural engineer called by plaintiff who had examined the escalator and who testified that he was not familiar with escalators but was familiar with the various ways of joining panels, stated that the strips were merely for appearance. Plaintiff testified that the escalator itself was working properly, did not jerk or cause her to fall. It was her testimony and that of her husband that a corner of the box which she had been holding some 3 to 5 inches away from the panel struck one of the panel strips, causing the box to wedge against her hip. As the tread upon which she was standing was proceeding forward, the box pushed her backward, causing her to fall. Defendants' evidence was that the strip with its slight protrusion beyond the wall of the panel could not cause a box to catch on it. However, their mechanic testified that when he held a box against the strip the box did not catch but caused only a "gentle nudge." There is a conflict in the evidence as to whether the strip is necessary and as to whether other types of panels than the plywood might be better. There is no evidence that in using the escalator plaintiff held on to or intended to hold on to the rails.

1. Instructions. (a) *Res Ipsa Loquitur*.

[1] The court refused to instruct on this subject. It was plaintiff's theory that under the evidence the accident could have been caused in either one of two ways, one, due to improper construction, that is, that the strip projected $\frac{1}{8}$ th inch above the panel. Under this theory, *res ipsa loquitur* would not apply as plaintiff knew as much about the cause of the accident as did defendants. Both plaintiff and her husband testified that the accident was caused by the projecting strip. As said in *Billeter v. Rhodes & Jamieson, Ltd.*, 104 Cal.App. 2d 137, 147, 231 P.2d 93, 100: "The doctrine is not applicable to the facts here involved because all the parties knew the facts relating to the injury. They all knew not only how the appellant was injured, but why he was injured—there was insufficient clearance between the fin and the cross

brace. Under such circumstances the doctrine should not be applied.

"The California authorities on this subject are by no means consistent and clear. It is possible to find authority in this state for many different statements of the elements of the doctrine. (See cases collected and commented upon in *Leet v. Union Pac. R. Co.*, 25 Cal.2d 605, 155 P.2d 42, 158 A.L.R. 1008; see, also, an excellent article on the subject by William L. Prosser entitled '*Res Ipsa Loquitur* in California,' in 37 Cal. L.Rev. 183.)

"Regardless of this apparent conflict, it is perfectly clear that, where the evidence of how and why the accident occurred is equally open and known to all parties, the doctrine has no application. As was stated in *Ybarra v. Spangard*, 25 Cal.2d 486, 490, 154 P.2d 687, 689, 162 A.L.R. 1258, quoting from *Wigmore on Evidence*: 'If the doctrine is to continue to serve a useful purpose, we should not forget that "The particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person."'

[2] Whether the operator of an escalator is held to the duty of utmost care and diligence as is required of a common carrier or only of ordinary care has never been decided in California. There seems to be a split of authority on the subject elsewhere. See 152 A.L.R. 562. In *Schwerin v. H. C. Capwell Co.*, 1934, 140 Cal.App. 1, 34 P.2d 1050, the court assumed without deciding that the escalator operator was charged with the highest degree of care as of a common carrier. In *Katoka v. May Dept. Stores Co.*, 60 Cal.App. 2d 177, 182, 140 P.2d 467, where the point was not involved, there is an intimation that the operator is required to exercise the highest care towards a person using the escalator as in the case of operators of elevators. It is well settled in this state that

an elevator operator is held to the duty of utmost care and diligence analogous to that required of a common carrier. See cases cited in 17 Cal.Jur.2d 556. We see no reason why the same standard of duty should not be required of the operator of an escalator.

If plaintiff's story was believed, namely, that a condition existed which caused the box being carried by plaintiff to wedge, then plaintiff proved negligence and the burden would fall on defendants of showing that the condition was not due to negligence.

The second way in which plaintiff claims that the accident may have happened was that of alleged improper maintenance, namely, that as plaintiff and her husband had no time to examine the strip to see its actual condition, the wedging may have been caused by the strip buckling or being somewhat above its natural position. The condition of the strip would be something within defendants' sole knowledge and would entitle plaintiff to a proper instruction on *res ipsa loquitur*.

[3] There are three conditions which must appear for the doctrine to apply. "The doctrine of *res ipsa loquitur* has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' Prosser, Torts, p. 295." *Ybarra v. Spangard*, 25 Cal.2d 486, 489, 154 P.2d 687, 689.

[4] If plaintiff's story is believed all three conditions could have existed here. It should be pointed out that the third condition should not be confused with contributory negligence. It refers to the question of control and means that the doctrine will not apply if the plaintiff had control of the instrumentality. See *Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, 445, 247 P.2d 344. The doctrine may apply and yet the plaintiff be unable to recover because of contributory negligence.

Plaintiff proposed two instructions upon *res ipsa loquitur*. The first, plaintiff's No. 13 (BAJI, 4th ed., No. 206-B) was improper in that in effect it instructed that as a matter of law the accident occurred as testified by plaintiff. (Incidentally, this instruction should never be given unless the cause of the accident is established as a matter of law.) The second, plaintiff's No. 12 (BAJI, 4th ed., No. 206) would have required modification as otherwise it would have applied to the plaintiff's first theory of the accident as to which, as we have shown above, it is not legally applicable.

[5] Even if the instruction were proper, the failure to give it in this case was not prejudicial. A jury, under the evidence, could very well have found that even though, if the box wedged, defendants were unable to overcome a showing of negligence on their part, plaintiff herself, burdened as she was, was negligent in using the escalator instead of the elevator, or in failing to protect herself by holding on to the rails. This is a case in which for the jury to have found for plaintiff they would first have to believe plaintiff's story that the box wedged and not merely struck against the panel or its strip. If they did not believe her story there could be no recovery in any event. If they did believe her story they would necessarily have to find that defendants were negligent in maintaining a strip which protruded even as slight as $\frac{1}{8}$ inch beyond the panel. The negligence charged in the complaint and claimed to have been shown by the evidence was the installation and maintenance of the strip protruding $\frac{1}{8}$ inch beyond the panel and not being flush with it. It was conceded that the strip did so protrude. The court properly instructed the jury that defendants were under a duty of the utmost care and diligence for the safety of persons using the escalator and would be responsible for injury occasioned by even "the slightest neglect which human care and foresight might have guarded against * * *" Thus, it is obvious that if the jury believed that the box was wedged by the protrusion of the strip it

would necessarily have found defendants guilty of negligence. It obviously either did not believe plaintiff's story, or, if it did, it also concluded that plaintiff, too, was guilty of negligence.

(b) Other Instructions.

Plaintiff's proposed instruction No. 10 is based on language in *Schance v. H. O. Adams Tile Co.*, 131 Cal.App.2d 549, 280 P.2d 851. Plaintiff's proposed instruction No. 11, based in part upon language in *Crane v. Smith*, 23 Cal.2d 288, 144 P.2d 356, is mostly a variation of instruction No. 10. The substance of both instructions was sufficiently covered by the instructions given, one of which is BAJI No. 101-H, which the fourth edition, page 235, states was suggested by the *Schance* and *Crane* cases.

Plaintiff cannot complain of BAJI No. 101-H, for under the state of the record it is presumed that she offered it. (See cases cited in 3 Cal.Jur.2d 820, 821.) Moreover, the transcript shows that during the trial plaintiff's counsel recommended it to the court.

2. Experiment.

[6] Defendants' escalator mechanic testified over objection to an experiment made by him in which he took a square, sharp edged box made of cardboard like a shoe box, approximately 18 inches square, and riding the escalator held it against the panel, and found that when it passed the strip in question "it just nudged me a little." "The question of the similarity of conditions and the remoteness of experiments offered is one lying in the discretion of the trial court * * *" *Miller v. Dollar Steamship Lines, Inc.*, 19 Cal.App.2d 206, 214, 64 P.2d 1163, 1167. We do not find any error in the admission of such evidence here.

The appeal from the order is dismissed. The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

158 Cal.App.2d 448

Edmund G. BROWN, Attorney General,
Plaintiff and Respondent,

v.

MEMORIAL NATIONAL HOME FOUNDATION, etc., Defendant, Cross-Defendant and Appellant;

American Gold Star Mothers, Inc., etc., Defendant, Cross-Defendant and Respondent;

Eleanor D. Boyd, Cross-Defendant and Appellant;

R. E. Allen and George D. Lyon, as Receivers, Respondents.

Civ. 22766, 22871.

District Court of Appeal, Second District,
Division 2, California.

March 17, 1958.

Action by Attorney General for purpose of resolving dispute between two private corporations over charitable trusts managed and controlled by one of them. From interlocutory judgment and orders made after judgment by the Superior Court, Los Angeles County, Lloyd S. Nix, J., appeals were taken and motions were made to dismiss appeals. The District Court of Appeal, Herndon, J., held that where judgment denominated as interlocutory deprived corporation of all the trust assets, removed it as trustee and provided for appointment of new receivers, even though it ordered an accounting, judgment determined all substantial issues affecting corporation's rights and was a final and appealable judgment, but minute order approving report of receivers and concluding that receivers were to prepare written order, was not an appealable order.

Motion to dismiss one appeal denied, appeal from minute order dismissed, and appeal from formal order denied.

1. Appeal and Error ☞80(4)

Where judgment in action commenced by Attorney General to resolve dispute between two private corporations over charitable trusts managed and controlled by one of them was denominated as interloc-

utury, but deprived corporation of all of its trust assets, removed it as trustee, and appointed new receivers, judgment determined all substantial issues affecting corporation's rights and was final and appealable, notwithstanding fact that it also ordered a subsequent accounting. West's Ann.Code Civ.Proc. § 963, subsd. 1, 2.

2. Appeal and Error ⇨76(1)

Denomination of a judgment as interlocutory is by no means determinative of its finality for purposes of appeal, since the substance and effect of the judgment determines its finality. West's Ann.Code Civ. Proc. § 963, subsd. 1, 2.

3. Appeal and Error ⇨66, 870(1)

Piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and a review of intermediate rulings should await final disposition of the case. West's Ann.Code Civ.Proc. § 963, subd. 1.

4. Appeal and Error ⇨71(4)

Receivers ⇨1

Remedy of receivership is regarded as drastic and severe, and Legislature in making exceptions to so-called final judgment rule by providing that an order granting an injunction or appointing a receiver is appealable, recognized the drastic character of the remedies of receivership and injunction. West's Ann.Code Civ.Proc. § 963, subd. 2.

5. Appeal and Error ⇨71(4), 870(4)

An order appointing a receiver made at any stage of the action is appealable, and failure of party claiming to be aggrieved to take a timely appeal from such order will cost him his right to have it reviewed. West's Ann.Code Civ.Proc. § 963, subd. 2.

6. Appeal and Error ⇨71(4)

Where action was commenced by Attorney General for purpose of resolving dispute between two private corporations over charitable trusts managed and controlled by one of them, judgment of trial court, although denominated as interlocutory, which, among other things, provided for appointment of receivers over trust

assets, was an appealable order. West's Ann.Code Civ.Proc. § 963, subd. 2.

7. Receivers ⇨36, 37, 38

Evidence to justify appointment of a receiver may be presented in form of allegations in a complaint or other pleading by affidavit or by testimony.

8. Appeal and Error ⇨955

An appellate court in passing on order appointing a receiver must view the cause as it appeared to the lower court when making the order. West's Ann.Code Civ.Proc. § 963, subd. 2.

9. Appeal and Error ⇨123

Order approving report on first account of receivers and providing that receivers were to prepare written order was not an appealable order but a mere memorandum affording data from which a proper final order could thereafter be drafted, and appeal from such minute order would be dismissed. West's Ann.Code Civ.Proc. § 963, subsd. 1, 2.

10. Appeal and Error ⇨101(2)

Where action was commenced by Attorney General for purpose of resolving dispute between two private corporations over charitable trusts, managed and controlled by one of them and interlocutory judgment deprived corporation of its trust assets, removed it as trustee and provided for appointment of new receivers, subsequent order of trial court approving first account of receivers and fixing compensation of receivers on a continuing salary basis at a specific sum per month and unconditionally ordering payment out of receivership funds was an appealable order. West's Ann.Code Civ.Proc. § 963, § 1.

Trent G. Anderson, Jr., Wright, Wright, Goldwater & Wright, Loyd Wright, Richard M. Goldwater, Dudley K. Wright, Edgar R. Carver, Jr., Los Angeles, for appellant Memorial Nat. Home Foundation.

George W. Trammell, Long Beach, for appellant Eleanor D. Boyd.

Loeb & Loeb, Herman F. Selvin, Los Angeles, for respondent receivers.

Edmund G. Brown, Atty. Gen., George M. Goffin, Deputy Atty. Gen., for respondent Edmund G. Brown.

Wise, Kilpatrick & Pulley, Long Beach, for respondent American Gold Star Mothers, Inc.

HERNDON, Justice.

There are pending before this court motions to dismiss two appeals which arise out of the same action: (1) An appeal taken by defendants Memorial National Home Foundation, hereinafter referred to as "Memorial," and Eleanor D. Boyd from a judgment entered on December 10, 1956, and denominated "Interlocutory Judgment" (No. 22766); and (2) an appeal taken by Memorial from certain orders, hereinafter more definitely identified, approving the first account current of the receivers (appointed by provisions of the above-mentioned judgment), fixing the compensation of the receivers and authorizing its payment out of the receivership estate. (No. 22871.)

Our treatment of these motions to dismiss will be made more easily understandable, we trust, by first presenting a very brief general description of the underlying controversy as set forth in appellants' opening brief, the only brief upon the merits thus far filed:

"This action was brought by the Attorney General of the State of California for the purpose of resolving a dispute between two private corporations, American Gold Star Mothers, Inc., and Memorial National Home Foundation, over the charitable trusts managed and controlled by Memorial National Home Foundation. The Attorney General of the State of California did not take sides in the dispute either by way of the pleadings or at the trial, but rather left it up to the court to determine the merits of the dispute between appellants and American Gold Star Mothers, Inc.

"The dispute between American Gold Star Mothers, Inc. and appellant was over two matters—the first being who was entitled to control Memorial National Home Foundation, and the second being who were

the beneficiaries of Memorial National Home Foundation. American Gold Star Mothers, Inc., maintained that the funds and properties held by Memorial National Home Foundation were held for the benefit of its members. Memorial National Home Foundation and Eleanor D. Boyd, its President, maintained that all but a small percentage of the funds and properties under its control were held for the benefit of all Gold Star parents without regard to membership in any organization."

It appears that these complicated matters involve trust assets valued at several millions of dollars and thousands of actual or potential beneficiaries of the charitable trusts. An examination of the record immediately suggests the desirability of accomplishing a final adjudication as promptly as orderly processes of law will permit.

The Appeal from the Judgment (No. 22766)

As above noted, the judgment appealed from was entered on December 10, 1956, and was denominated "Interlocutory Judgment." Contending that the judgment is interlocutory in fact as well as by denomination, respondents Attorney General and American Gold Star Mothers, Inc. move to dismiss.

This judgment, based upon detailed findings of fact and conclusions of law, was rendered after a lengthy nonjury trial. The substance of each major provision of the judgment is indicated by the following summary statement of its effect:

(1) Decrees that the Attorney General is a proper and necessary party to safeguard the public interest and to prevent the loss and misuse of the assets of a charitable and benevolent trust;

(2) Declares that Memorial is a non-profit corporation organized for charitable purposes and that the property in its possession is held in trust for the charitable uses and purposes set forth in its original articles of incorporation;

(3) Declares that all funds and properties held or owned by Memorial, other than a certain housing project, are held in trust for members of American Gold Star Mothers,

ers, Inc., and that said housing project and its income are held in trust for members of American Gold Star Mothers, Inc., but limited to parents of World War II servicemen;

(4) Removes Memorial as trustee of all assets in its possession and under its control and declares that the court will appoint a successor trustee or trustees to carry out the purposes of the trust as decreed;

(5) Appoints Allen and Lyon as receivers to take possession of all the assets, books, records and papers of Memorial and directs Memorial, its officers, directors, etc., to deliver to said receivers all said assets, books, records and papers;

(6) Restrains Memorial and its officers and directors from using any of the assets except for limited and specified purposes;

(7) Requires Memorial to render an accounting of all assets in its possession or under its control and of all income, disbursements, etc.;

(8) Again decrees "that this court appoint a new trustee, or trustees, to carry out the provisions of the trusts * * *"; (Note: the judgment does not presently appoint a new trustee, that action being left for a future contemplated order.)

(9) Decrees "that this court from time to time make such other and further orders as are competent, lawful and proper, for a complete determination of this action."

[1] We have concluded that the provisions of the judgment as above summarized give it the character of a *final* judgment within the meaning of subsection 1 of section 963 of the Code of Civil Procedure and, additionally, that the provision of the judgment appointing a receiver is specifically appealable under subsection 2 of the same section.

[2] It is well settled, of course, that the denomination of a judgment as "interlocutory" is by no means determinative of its finality for purposes of appeal. It is the substance and effect of the judgment which determines its finality. *Lyon v. Goss*, 19 Cal.2d 659, 669-670, 123 P.2d 11; *In re Los*

Angeles County Pioneer Society, 40 Cal.2d 852, 857-858, 257 P.2d 1.

As stated in *Lyon v. Goss*, *supra*, 19 Cal.2d at pages 669 and 670, 123 P.2d at page 17: "A decree in equity which is denominated 'interlocutory' and directs a further hearing for certain purposes, may make so complete and final an adjudication of all issues of fact and law as to constitute a 'final judgment' within the meaning of that term as used in the statutes concerning appeals. The problem of determining whether a particular decree is essentially interlocutory and nonappealable, or whether it is final and appealable is often a difficult one."

Lyon v. Goss, *supra*, 19 Cal.2d at page 670, 123 P.2d at page 17, provides us with a *general* test as follows: "As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory."

In *Zappettini v. Buckles*, 167 Cal. 27, 138 P. 696, the Supreme Court was called upon to determine whether the judgment there involved was final and appealable or interlocutory and nonappealable. This decision is very helpful because in that case further judicial action remained to be taken (after entry of the judgment there appealed from) generally quite similar in character to the judicial action which remains to be taken in the instant case. In that case the action was brought by one partner against another for dissolution of the partnership, an accounting and distribution of the assets after payment of debts. A receiver appointed by interim order took possession of all the assets. Thereafter, judgment was entered determining the rights of the partners as between themselves and ordering: (a) dissolution of the partnership, (b) sale of

its assets by the receiver, (c) payment of its debts, and (d) distribution of any balance to the partners in the proportions determined by the judgment. In holding that the judgment was final and appealable the Supreme Court commented (167 Cal. at page 32, 138 P. at page 698): "There remains only the question whether the judgment appealed from is a 'final judgment,' within the meaning of those words in our statutes on appeal. Notwithstanding the deferring of the fixing of the compensation of the receiver and of the referee, and the reservation of the determination of the question of the debts of the firm to others, the judgment fully and finally determined all the rights of the parties as between themselves."

And in 167 Cal. at page 33, 138 P. at page 699, the court, after enunciating the same general rule as that given in *Lyon v. Goss*, supra, stated the following guiding principles which we regard as being directly applicable to the instant case: "Mr. Freeman in his work on Judgments says that, if after a decree has been entered, no further questions can come before the court except such as are necessary to be determined in carrying the decree into effect, the decree is final. Section 22. In section 24 he says that, although other proceedings before the master are necessary to carry the decree into effect, yet, if all consequential directions depending upon the result of the proceedings are given in the decree, it is final. He further says that it is none the less final because some future orders of court may be necessary to be carried into effect, nor because some independent branch of the case is reserved for future consideration, *nor because an account is directed to ascertain what sum is due from one to the other as the result of the decision.*" (Emphasis added.)

With the foregoing basic principles in mind, we readily conclude that the judgment here under consideration is final because it leaves undetermined no substantial issue affecting appellants' rights. Memorial has been deprived of all its assets. It has been removed as trustee. All essential

determinations have been made with reference to the terms of the trust, its purposes and its beneficiaries. The appointment of a new trustee will in no wise affect the substantive rights of appellants. The sole purpose of the accounting is to insure full and complete performance of the provisions of the judgment which require Memorial to surrender all of the trust assets.

It seems to us that we must say here, as was said in *Zappettini v. Buckles*, supra, that the further proceedings remaining to be taken in the future "are simply such proceedings as are necessary to carry the judgment into effect" and that "all consequential directions depending on the result of the subsequent proceedings are given in the decree."

We turn now to important aspects of the instant judgment which readily distinguish it from the interlocutory judgment involved in *In re Los Angeles County Pioneer Society*, 40 Cal.2d 852, 257 P.2d 1. The instant judgment in removing Memorial as trustee not only stripped it of all right, title and interest in and to the assets of the trust, but by appointing a receiver it immediately deprived Memorial of *possession* both of its assets and its records. The receivers are now in possession. Paragraph VI of the instant judgment is injunctive in character. It presently restrains Memorial from using any assets in its possession except for limited and specified purposes. The receivership and injunctive aspects were absent from the interlocutory judgment involved in *Pioneer*.

[3] It has been said of subsection 1 of section 963 of the Code of Civil Procedure, authorizing an appeal from "a final judgment" that "This provision states the *final* judgment rule, or rule of *one final judgment*, a fundamental principle of appellate practice in the United States. The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case. (See *Bank of America Nat. Trust & Sav. Ass'n v.*

Superior Court, 1942, 20 Cal.2d 697, 701, 128 P.2d 357; 33 Harv.L.Rev. 1076 * * *.)” 3 Witkin, California Procedure, p. 2151.

[4] It is elementary that the remedy of receivership is regarded as drastic and severe. *Golden State Glass Corp. v. Superior Court*, 13 Cal.2d 384, 393, 90 P.2d 75; *Takeba v. Superior Court*, 43 Cal.App. 469, 475, 185 P. 406; *Whitely v. Bradley*, 13 Cal.App. 720, 725, 110 P. 596. Manifestly in recognition of the drastic character of the remedies of receivership and injunction, the legislature made exceptions to the so-called final judgment rule by providing in subsection 2 of section 963 that an order granting an injunction or appointing a receiver is appealable. There is nothing unclear or equivocal in the language of this provision. We see no reason to doubt that it applies to the instant order.

[5] The decisions clearly establish, not only that an order appointing a receiver made at any stage of the action is appealable, but also that failure of the party claiming to be aggrieved to take a timely appeal from such order, will cost him his right to have it reviewed. *McCarthy v. Tally*, 46 Cal.2d 577, 297 P.2d 981; *West v. Parker*, 97 Cal.App.2d 286, 217 P.2d 473; *Weygandt v. Larson*, 130 Cal.App. 304, 19 P.2d 852; *Caminetti v. Imperial Mut. Life Insurance Co.*, 54 Cal.App.2d 514, 129 P.2d 432. In *Neider v. Dardi*, 130 Cal.App.2d 646, 279 P.2d 598, an order appointing a receiver contained in an interlocutory judgment was held appealable.

[6] Bearing in mind the common-sense and practical reasons underlying the policy against multiple appeals and “piecemeal dispositions,” what valid and relevant practical considerations do we find here present? The primary considerations, we take it, are to expedite final dispositions, to minimize costs and to avoid the oppression and expense of successive appeals from intermediate rulings.

None of these practical considerations, in our view, argues against a present appellate review of the instant judgment.

Indeed they argue in favor of it. If we are right in our conclusion that the order appointing the receivers is appealable, our review of that provision of the judgment will require us to review all of the evidence relied upon to justify it. In the instant case the justification for the appointment of the receivers depends upon the merits. The occasion for the receivership was the immediate removal of Memorial as trustee. Thus a review of the order appointing the receivers must be essentially co-extensive with a review of the merits.

[7,8] Evidence to justify the appointment of a receiver may be presented in the form of allegations in a complaint or other pleading, by affidavit or by testimony. *Armbrust v. Armbrust*, 75 Cal.App.2d 272, 171 P.2d 75. An appellate court, in passing on an order appointing a receiver, must view the cause as it appeared to the lower court when making the order. *California Delta Farms v. Chinese American Farms*, 204 Cal. 524, 269 P. 443. As was said in *Whitley v. Bradley*, supra, 13 Cal.App. 720, 725, 110 P. 596, 598: “The determination of the question here (appointment of a receiver) must therefore of necessity rest upon the proposition whether the evidence upon which the order appealed from was made affirmatively discloses an abuse of discretion.”

The recent decision in *McCarty v. Macy & Co.*, 153 Cal.App.2d 837, 315 P.2d 383, 385, relied upon by respondents, does not contradict any of the principles we have enunciated here. The plaintiffs in that case sought to enjoin the operation of a grain mill, contending that it constituted a nuisance, and also sought recovery of damages. It was agreed that the equitable issues should be tried first and that the claims for damages should be tried later. After completion of the first part of this bifurcated trial, the court made minute orders indicating that it would deny the injunctive relief sought. Plaintiffs appealed, apparently regarding the minute orders as orders refusing to grant an injunction appealable

under subsection 2 of section 963. In dismissing the appeals the appellate court stated: "It is clear from the record, as hereinabove stated, that it was not the intention of the court to enter any judgment until the issue of damages had been disposed of, and it is likewise clear that no final judgment, or any judgment, has been entered." Obviously these minute orders were not intended to be the effective embodiments of the court's denial of relief. They were intended solely as informative indications with respect to the content of one aspect of a judgment to be rendered upon completion of a half-finished trial.

In summary, we hold that the judgment here involved is final and appealable because (1) it determines all of the substantial issues affecting appellants' rights and gives "all consequential directions" for such further proceedings as may be necessary to carry it into effect; (2) under subsection 2 of section 963 of the Code of Civil Procedure appellants have an unqualified and unquestionable right to an immediate review of the provisions of the judgment appointing the receivers and depriving Memorial of the use and possession of all assets of the trust; and (3) the review of the order appointing receivers must to a large extent involve a review of the merits of the ultimate issues.

For the reasons stated, the motion to dismiss in No. 22766 should be denied.

The Appeal from the Receivership Orders (No. 22871)

[9] Here Memorial has appealed from a minute order dated April 1, 1957, and a formal written order dated April 18, 1957 approving, settling and allowing the Report and First Account Current of the respondent receivers; fixing the compensation of the receivers at \$2,500 per month from the date of their qualification until further order of the court; and authorizing them to pay themselves this compensation out of the receivership funds in their possession. In view of the final sentence of the minute order: "Receivers to prepare written order," it cannot be regarded as an appeal-

able order, "but is a mere memorandum affording data from which a proper final (order) judgment might thereafter be drafted." *Security-First National Bank of Los Angeles v. Cooper*, 62 Cal.App.2d 653, 662-663, 145 P.2d 722, 727; *In re Estate of Yale*, 208 Cal. 102, 104, 280 P. 358. The appeal from the minute order, therefore, should be dismissed.

[10] The respondents Attorney General and American Gold Star Mothers, Inc. have moved to dismiss the appeal on the sole ground that it is taken from a non-appealable order. The respondent receivers and appellant Memorial resist the motion to dismiss urging that an order which finally determines the rights of a party in respect of a collateral matter distinct from the general subject of litigation and upon which the correctness of the decision of the main litigation does not depend is a "final judgment" within the meaning of section 963 of the Code of Civil Procedure. The decisions sustain this latter contention. *Howe v. Key System Transit Co.*, 198 Cal. 525, 531, 246 P. 39; *Sjoberg v. Hastorf*, 33 Cal. 2d 116, 119, 199 P.2d 668; *Colma Veg. Ass'n v. Superior Court*, 75 Cal.App. 91, 94-95, 242 P. 82.

The general rule governing the problem before us was stated by the Supreme Court in *Sjoberg v. Hastorf*, *supra*, 33 Cal.2d 116, 119, 199 P.2d 668, 670, as follows: "An appeal is allowed if the order is a final judgment against a party in a collateral proceeding growing out of the action. (Citations.) It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by appellant or the performance of an act by or against him. (Citations.)"

In *Fish v. Fish*, 216 Cal. 14, 13 P.2d 375, it was held that an order settling a receiver's account, fixing his compensation, and directing sale of receivership property to pay such compensation, was appealable by a party to the main action, since it was in effect an order for the doing of an act against such party. An order fixing a

receiver's compensation and ordering it paid by one of the parties has been held appealable, even though made before there was a final judgment in the main action. *City of Los Angeles v. Los Angeles City Water Co.*, 134 Cal. 121, 66 P. 198.

In *Grant v. Superior Court*, 106 Cal. 324, 39 P. 604, it was held that an order fixing the amount of a receiver's compensation and ordering it paid "out of the fund in the receiver's hands * * * would be a final judgment upon a collateral matter arising out of the action, and would be appealable by any party interested in the fund. * * *" To the same effect are *Grant v. Los Angeles & P. Ry. Co.*, 116 Cal. 71, 72, 47 P. 872; *Elliott v. Superior Court*, 144 Cal. 501, 506, 77 P. 1109; *Edwards v. Western Land & Power Co.*, 27 Cal.App. 724, 728-729, 151 P. 16; *Steinberg v. Goldstein*, 122 Cal.App.2d 516, 518, 265 P.2d 153; *California Fruit Growers Ass'n of Los Angeles v. Superior Court*, 8 Cal.App. 711, 713, 97 P. 769.

All of the decisions relied upon by the moving parties are readily distinguishable. In *Rochat v. Gee*, 91 Cal. 355, 27 P. 670, 671, the order in question merely approved the receiver's account and deferred the allowance of any compensation "until the coming in of his final report." *Wilson v. Day*, 112 Cal.App.2d 598, 246 P.2d 996 and went no further than to hold that "An interim order approving an account of a receiver is not appealable * * *" In *Illinois Trust & Savings Bank v. Pacific Railway Co.*, 99 Cal. 407, 33 P. 1132; in *Free Gold Mining Co. v. Spiers*, 135 Cal. 130, 67 P. 61; and in *Title Insurance & Trust Co. v. California Development Co.*, 159 Cal. 484, 114 P. 838, the orders involved did not provide for payment of receivers' compensation; they related only to the authorization of expenditures incident to the preservation or management of the receivership estate.

The order involved in the instant case fixes the compensation of the receivers on a continuing salary basis of \$2,500 per month and unconditionally orders payment out of the receivership funds. This is pre-

cisely the type of order held appealable in *Grant v. Superior Court*, supra, 106 Cal. 324, 39 P. 604. If, as the moving parties suggest, a doubt was cast upon *Grant* by the decision in *Title Insurance & Trust Co. v. Calif. Development Co.*, supra, 159 Cal. at page 493, 114 P. 838, that doubt was removed by the later decision in *Fish v. Fish*, supra, 216 Cal. at page 16, 13 P.2d 375, which cited the *Grant* case, among others, as authority for the holding that an order which fixed a receiver's compensation and ordered it paid out of the proceeds of a sale of receivership property was appealable by a party having an interest in the property.

In No. 22766 the motion to dismiss the appeal is denied. In No. 22871 the appeal from the minute order is dismissed, and the motion to dismiss the appeal from the formal order dated April 18, 1957, is denied.

ASHBURN, Acting P. J., and KINCAID, J. pro tem., concur.



The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Luther POINDEXTER, Defendant and
Appellant.*

Cr. 3344.

District Court of Appeal, First District,
Division 2, California.

March 17, 1958.

Rehearing Denied April 16, 1958.

Hearing Granted May 14, 1958.

Defendant was convicted of furnishing narcotics to a minor and of murder in the second degree and from a judgment and order denying new trial by the Superior Court, City and County of San Francisco, C. Harold Caulfield, J., the defendant ap-

* Opinion vacated 330 P.2d 763.

pealed. District Court of Appeal, Kaufman, P. J., held, inter alia, that where witness and decedent jointly conspired to purchase narcotics, and witness aided and abetted purchase and administration of narcotics and death resulted as result of the unlawful purchase and use of the narcotics, witness participated in unlawful act in which death resulted so that he could be charged with second degree murder and hence such witness was an accomplice of defendant as matter of law so that witness' testimony was required to be corroborated, and jury should have been so instructed, and that the error in failing to so instruct the jury was prejudicial to defendant who was entitled to new trial.

Judgment and orders reversed.

1. Criminal Law ☞1159(2)

The test on appeal is whether there is substantial evidence to support conclusion of trier of fact.

2. Criminal Law ☞1160

The court on appeal will not attempt to determine weight of evidence, but will decide only whether upon face of evidence it can be held that sufficient facts could not have been found by jury to warrant inference of guilt since it is function of jury in first instance, and trial court after verdict, to determine what facts are established by the evidence, and before verdict of jury, which has been approved by trial court, can be set aside on appeal upon ground of insufficiency of evidence it must be made clearly to appear that upon no hypothesis is there sufficient substantial evidence to support the conclusion reached in the court below.

3. Criminal Law ☞1144(13), 1159(2)

The determination of a charge in criminal case involves proof of two distinct propositions: First, that offense charged was committed; and second, that it was perpetrated by person or persons accused thereof, and appellate court must assume in favor of verdict existence of every fact which jury could have reasonably deduced

from the evidence, and then determine whether such facts are sufficient to support the verdict and if circumstances reasonably justify verdict of jury, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of jury.

4. Poisons ☞9

Evidence sustained conviction of furnishing narcotics to a minor. West's Ann. Health & Safety Code, § 11714.

5. Homicide ☞18(1)

"Murder in the second degree" is any killing which occurs in perpetration of a felony other than arson, rape, burglary, robbery, mayhem or a violation of Penal Code, § 288, and the furnishing, selling or administering of narcotics to a minor is a felony. West's Ann. Health & Safety Code, § 11714; West's Ann. Pen. Code, § 288.

See publication Words and Phrases, for other judicial constructions and definitions of "Murder in the Second Degree".

6. Homicide ☞18(1)

Any killing which occurs in commission of an unlawful act dangerous to human life constitutes murder in the second degree.

7. Homicide ☞254

Evidence sustained conviction of murder in the second degree resulting from administration of narcotics. West's Ann. Health & Safety Code, §§ 11712, 11714.

8. Criminal Law ☞507(1)

Mere fact that minor had participated with defendant in illegal transaction involving narcotics was punishable for such cooperation did not make the minor an accomplice. West's Ann. Pen. Code, § 1111.

9. Criminal Law ☞507(1)

Similarity of offenses is not the same as identity of offenses within meaning of statute providing that accomplice is one who is liable to prosecution for identical offense charged against defendant. West's Ann. Pen. Code, § 1111.

10. Poisons ☞4

A minor can be convicted of furnishing narcotics to another minor. West's Ann. Health & Safety Code, § 11714.

11. Criminal Law ☞507(1), 510, 780(1)

Where witness and decedent jointly conspired to purchase narcotics, and witness aided and abetted purchase and administration of narcotics and death resulted as result of the unlawful purchase and use of the narcotics, witness participated in unlawful act in which death resulted so that he could also be charged with second degree murder and hence such witness was an accomplice of defendant as matter of law so that witness' testimony was required to be corroborated, and jury should have been so instructed. West's Ann. Health & Safety Code, §§ 11712, 11714; West's Ann. Pen. Code, §§ 31, 971, 1111.

12. Criminal Law ☞1038(3)

A defendant in criminal prosecution cannot complain on appeal that court failed to give an instruction where such instruction was not requested.

13. Criminal Law ☞824(1)

In a criminal prosecution the jury should be instructed on general principles of law which apply to the case, and court should give such instructions even though not requested by parties.

14. Criminal Law ☞1173(2)

In prosecution for furnishing narcotics to a minor and for murder of minor to whom narcotics were furnished, error in failing to instruct jury that witness who aided and abetted purchase and administration of narcotics was an accomplice so that his testimony was required to be corroborated was prejudicial to defendant under all the circumstances so that defendant was entitled to new trial. West's Ann. Health & Safety Code, §§ 11712, 11714; West's Ann. Pen. Code, §§ 31, 971, 1111.

erny, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty. of the City & County of San Francisco, Walter H. Giubbini, Asst. Dist. Atty., San Francisco, for respondent.

KAUFMAN, Presiding Justice.

The appellant was indicted for the murder of Douglas Callies and for furnishing narcotics to a minor in violation of Health & Safety Code Section 11714. The indictment was subsequently amended to include three prior felony convictions which the appellant admitted. The jury returned verdicts of guilty and found the murder to be second degree. Appellant was sentenced to San Quentin, the sentences to run consecutively. He appeals from the orders denying his motions for a new trial and the judgment asserting the insufficiency of the evidence; that he was convicted on the uncorroborated evidence of an accomplice, and that the trial court erred in its instructions to the jury.

The only accusatory evidence was in the testimony of Stanley Hoffman, to the following effect: In September, 1956, Stanley Hoffman was twenty years old. In June, 1956, he had been dishonorably discharged from the Marine Corps as a result of narcotic activity. He had been using narcotics since 1954, and only took it by injection. He had known the appellant for several months, had purchased narcotics from the appellant a few times and had been in the appellant's room in the Fillmore Hotel where he had used the appellant's "outfit" [needle, syringe and spoon] to give himself an injection of heroin. Douglas Callies, the deceased and Hoffman had been friends for four or five years. They "used to run around with each other" and had purchased narcotics together. In September, 1956, Douglas Callies was in the Merchant Marine; he was due to leave on a ship for Houston, Texas.

On the evening of September 27, 1956, Stanley Hoffman had made plans to go to the show with two girls, Cloreen Adams and Sherry Small, age 19 and 18. At 5:30 p.m., just as he was leaving his home on Lee Avenue to pick up the girls, Callies

Kenneth C. Zwerin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McIn-

telephoned to ask Hoffman if he could go out with one of the girls. Hoffman agreed and then left in his father's 1956 Chevrolet and picked up Callies at his home on near-by Victoria Street. Callies asked to be driven to Brighton Street to see a friend. The friend was not at home and Callies asked to be taken to Fillmore Street as he had been out on the ship for a long time and wanted to get some heroin. Callies had two \$50 dollar bills in his wallet. Hoffman drove down Fillmore Street and saw the appellant near Golden Gate Avenue. He stopped the car and the appellant got into the back seat. The following conversation took place between Hoffman and the appellant:

"A. Well, I asked him if he knew Doug and he said he had seen him before, he thought. He said, 'I think I have seen him before.'

"And I said, 'He just came back from his ship, cruise on the ship, and he wants to buy some heroin and he's down here looking for somebody to get some heroin from,' I says, 'So, can you get him any?'

"And he says, 'Yeah, I think so.' And, he said, 'I'll try. If he wants some heroin, I'll get him some.'

"Q. I see. All right, then, what happened? A. Well, then we drove around the corner and we parked and Doug gave him \$50 and he left the car.

"Q. Doug gave \$50 to Luther Poindexter, is that correct? A. No, he gave it to me, first, to change. He wanted me to change it. Poindexter and myself walked down. I tried to change it, but I couldn't change the \$50.

"He said, 'Just give me the \$50. Don't worry about it. Go back to the car and I'll meet you there.'"

A few minutes later, the appellant returned with \$15, which he gave to Callies and told Hoffman to drive to the parking lot in back of the Safeway Store on Turk Street. This they did, and Hoffman and Callies

waited in the automobile. The appellant returned in about ten to fifteen minutes and said, "Let's go to a gas station. Everything is all right. Let's go to a gas station."

They stopped at a gas station at Fell and Baker Streets, and drove up to the pumps. The appellant said only two should go in at a time, so Hoffman told Callies to put \$1 worth of gas in the car. Hoffman and the appellant went into the men's room, which consisted of a small room with a partition which separated the toilet from the sink. They both went behind the partition. The appellant had the "outfit" and the heroin in a paper bundle. The appellant prepared the drug by cooking it in a spoon filled with water from the toilet bowl. The appellant helped Hoffman put a tourniquet around his arm, and held the tourniquet while Hoffman injected himself. Hoffman then went outside to telephone the girls that he would be late, and then waited in the car. In the meantime, Callies went into the men's room. A few minutes later, the appellant and Callies returned to the car. Callies sat in the front seat, with his chin on his chest. "He was * * * like he was almost unconscious. He was mumbling a little bit. He wasn't saying too much, sort of moving around and groaning and moaning." The defendant got in the back seat and asked to be taken back to Fillmore Street.

After dropping the appellant across the street from his hotel, Hoffman drove to Westwood Drive in the Ingleside District, to pick up the two girls who sat in the back seat. Hoffman then drove to Daly City to see a friend for a few minutes while the others remained in the car. The girls wanted to sit in the front seat, so some one helped Hoffman move Callies to the back seat. Callies "was able to stand on his feet * * * but he was sort of fumbling around." Hoffman then drove to the El Rey Theater on Fairfield Street and parked on one of the streets along side the theater. It was about 7:30 p.m. The girls got out, and Hoffman testified as follows as to Callies:

"A. Well, I pushed him and asked him if he wanted to go to the show and—(mumbling)—'No.'"

"'Well, I'll leave you here.' I rolled down the window, locked all the doors and took his wallet, in case someone would try to roll him, think he was a drunk, try to roll him in the car, and I gave the girl his wallet to put in her purse and took them to the show."

"Q. And you left him sitting in the back seat of the car? A. Yes."

"Q. Was he on the sidewalk side or street side? A. He was on the sidewalk side."

"Q. He was near the window, which you had opened? A. Yes, sir."

Hoffman and the girls then left for the theater. They stayed for two entire features and did not know what time it was when they returned to the automobile. As they got to the car, Hoffman could not see Callies.

"A. Well, when I first was walking up the street, I thought he had left the car, couldn't see him. I told the girls he probably left. And as I got closer, I could see him leaning over toward the window, so I went up there and I said, 'He must be asleep', and I reached in and I slapped him and he didn't move, so I slapped him again and he still didn't move. I felt his face and his face was cold and I got scared and felt his pulse and he had no pulse and I told the girls he was dead."

Hoffman further testified as follows:

"A. Well, I was going to go down and phone the Police and I walked all the way down to the corner and by the time I got down there, the girls, they said, no, and they started crying. And one of the girls just got out of the hospital. She'd had a baby and her husband got put in jail for something. I don't know what it was, and she said she had enough publicity, she said, and she didn't want to get in any more trouble and her parents were mad at her. She started crying and they were

afraid, so this one girl kept yelling at me to take her home. The other one's crying. I didn't know—and went back to the car and I took the youngest girl home."

"Q. I see. And you took her to her home and still had with you then one other girl, is that correct? A. That is right."

"Q. Which girl was that? A. That was Mrs. Adams, Cloreen Adams."

"Q. Mrs. Adams. All right. Then, when you and Mrs. Adams, Cloreen Adams, were together, where did you go then? A. Well, we drove over to the churchyard. She said that we better let him off at a churchyard. She said that would be the best. So I took him—I set him out of the car and oaid (sic) on the ground of the church."

"Q. That was out by St. Thomas More's Church, out by Junipero Serra Boulevard? A. Yes, sir."

Then Hoffman took Mrs. Adams home and returned to his own home, without contacting the police. He was arrested about 11:00 a. m. on September 28th.

On cross-examination Hoffman denied that he or Callies had given the defendant any money to pay rent or that he had asked the defendant to use his "outfit" that evening in return for a little "stuff".

A number of experts employed by the San Francisco Coroner testified that Douglas Callies died due to narcotics poisoning. An amount of morphine sufficient to cause death was found. There was also an amount of alcohol equivalent to 3½ bottles of beer or shots of whiskey, which was ingested a relatively short time before death. The amount of alcohol, however, was not significant enough to contribute to death. No needle marks were found on the body by the autopsy surgeon, who indicated, however, that this was not uncommon and that it was very easy to inject material so that the site of the injection would be completely invisible. The autopsy surgeon estimated that at the time of the autopsy

which took place at 11:00 a. m. on September 28th, the deceased had been dead over four to six hours but less than two or three days. None of the experts ascertained the time of death or the time when the narcotic entered the body.

The appellant took the stand in his own behalf and testified that he had known Hoffman for about three months and had seen him several times. He denied selling narcotics to Hoffman or using narcotics with Hoffman except on September 27th. The appellant stated that Hoffman had once asked him to sell narcotics which a friend of Hoffman's was to bring back from overseas, but that he had refused. He stated that Hoffman had borrowed his "outfit" on one occasion and had come to his hotel to ask to use his room to take an injection on another occasion, and had gotten into trouble with appellant's landlord.

As to the events of September 27, 1956, the appellant testified he was walking toward Fillmore on Ellis Street and saw Hoffman drive by, then back-up and stop. The following conversation took place:

"I said, 'Hello, Stan, how are you?' and I walks over to the car, and he says, 'Say, how about going up to your room, using your outfit?'"

"And I says, 'Have you all got some stuff?', and he says, 'Yes, we have a whole spoon of stuff.'"

"I says, 'Well, Stan, you know you and the landlord had some kind of ruckus down there. I don't think he would let you up in the hotel. However, if you give me some of the stuff,' I says, 'I'll let you use my outfit.' And, I says, 'In the meantime, I'll see if the landlord is at the hotel.'"

"So, he said, 'Well, get in the car.' So I gets in the car and I—proceeds to my hotel. So I gets out of the car and goes into the hotel and it so happens that the manager of the hotel is on duty so I goes up in the hotel and I had kind of a little—it was a little vacant room that they use for a fire escape purpose and I used to take my

hypodermic paraphernalis and lay it outside this little window on the ledge. So, I got it and I went on back downstairs and got in the car. So, I told them, when I approached the car, I says, 'Stan', I says, 'My landlord is on', and I says, 'I can't get you up in the hotel.' And he said, 'Well, get in the car. We'll go to some station or some place.' So we gets in his car and he proceeds to drive to Fell and Baker and we gets to the station. He pulls up in the gas station and all three of us starts to get out of the car. By the time he stopped, Callies and I had got out, so he got out on the driver's side—oh, Callies says, 'Well, pull up in the pump—'" * * *

"A. (continuing) We approach—when we got to the station, pulled up to—just drive right into the pumps and stopped. We stopped somewhere midway between the lavatory and the pumps and he and myself and Douglas, all three of us got out of the car. Although Douglas and I got out of the car first. And he gets out of the car and comes around to the side where we were and when the three of us start into the lavatory—so, he tells Doug, 'Doug, you get back in the car and pull the car into the pumps and order a dollar's worth of gas.' And he and I goes in the lavatory together.

"The Court: Whom do you mean by 'He'?"

"The Witness: Mr. Hoffman."

The appellant testified that he assembled the syringe while Hoffman prepared the drug by mixing it in a wine bottle top with water from the toilet bowl. Hoffman then asked him to stand by the door which he did, while Hoffman remained on the partition side of the lavatory. He did not see Hoffman "take a fix". The appellant testified further:

"Q. Then did he come out? A. Yes, sir, he came out and when he came out I start to go in the partition side and take a fix, myself, and he says,

'Wait, let me call Doug and let him take a fix,' and says, 'In that way there be one of us at the car at all times.' So, he goes—immediately goes out and he calls Doug. Doug comes to the lavatory and I watch the door for him. Now, if he took a fix, I don't know, because I did not see him. I couldn't swear he would—that he did.

"Q. All right. Then he came out, is that right? A. Yes, sir.

"Q. Then, you went in? A. Yes, sir.

"Q. I see. Now, when this narcotic was prepared, did each of you prepare an amount to use, or was an amount prepared and each of you used some of it? A. There was over half of it put in the spoon for all three of us.

"Q. So that half of the spoon was used for the three of you? A. Yes, sir.

"Q. Then, what happened to the other half? A. Mr. Hoffman taken it with him and when he went out of the lavatory he taken the spoon, what was left of the narcotics with him to tell Douglas to come back and get his fix, I suppose, and when Douglas and I went out of the lavatory, we got in the car and Mr. Hoffman handed the stuff to Douglas because, he said, 'Here, Doug, I better let you hold your own stuff,' you know."

The appellant then stated that he asked to be dropped off near his hotel and that Hoffman stopped on Golden Gate Avenue between Steiner and Fillmore. As he left the car, he asked Callies, "for a couple of dollars to pay my rent." Callies had no small bills, so Hoffman handed him \$2 which he immediately used to pay his rent.

The prosecution then offered the testimony of a policewoman who accompanied Hoffman to the defendant's room on the afternoon of October 1, 1956, before the appellant's arrest. She stated that the defendant told Hoffman in her presence that he had sold a "\$35 paper" to Callies. The defendant denied making this statement

and stated that he did not know what the expression meant and had never heard it before, although he admitted using narcotics for about 14 years, and testified that Hoffman had come to his room with a girl named Mae and asked him to get some "stuff", but that he refused.

[1-3] First, as to appellant's contention that the evidence does not support the verdict. Appellant incorrectly relies on *People v. Staples*, 149 Cal. 405, 86 P. 886 and *People v. Lamson*, 1 Cal.2d 648, 36 P.2d 361, to argue that there is a failure of proof as a matter of law when every circumstance relied upon as incriminating is equally compatible with the presumption of innocence. The *Lamson* and *Staples* cases were rejected in *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778, and the rule recently restated in *People v. Daugherty*, 40 Cal.2d 876, at page 885, 256 P.2d 911, at page 916 as follows: "The test on appeal is whether there is substantial evidence to support the conclusions of the trier of fact * * * (Citing cases)" The court quoting from the *Newland* case continues: "The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense

charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

[4-7] Applying the above test, first to the charge of furnishing narcotics to a minor, we think that there is no merit in the appellant's contention. The testimony of Hoffman and the appellant conflicted on the question of who supplied the heroin, but the jury chose to believe Hoffman's version of the facts, rather than the appellants. As to the sufficiency of the evidence to support the charge of murder in the second degree, we also think there is no merit in this contention. Murder in the second degree is any killing which occurs in the perpetration of a felony other than arson, rape, burglary, robbery, mayhem or a violation of Penal Code Section 288. *People v. Powell*, 34 Cal. 2d 196, 208 P.2d 974. The furnishing, selling or administering of narcotics to a minor is a felony. (Health & Safety Code Section 11714). Here there was uncontroverted testimony that Douglas Callies died of narcotics poisoning and that taking a shot of heroin was an act dangerous to human life. Any killing which occurs in the commission of an unlawful act dangerous to human life constitutes murder in the second degree. *People v. Copley*, 32 Cal.App.2d 74, 89 P.2d 160.

Appellant argues that at best the evidence supports only a verdict of manslaughter, citing *People v. Hopkins*, 101 Cal.App.2d 704, 226 P.2d 74. In that case, as in this one, the decedent died as the result of narcotics poisoning. Hopkins held the tourniquet while the decedent administered an injection to himself. In reversing the order dismissing the indictment

for want of probable cause, this court held that Hopkins was a principal within Section 31 of the Penal Code. Thus, if the jury here believed Hoffman's testimony that the appellant held the tourniquet while Hoffman took his injection, they could have reasonably inferred that the appellant did the same thing when Callies took the fatal injection. This court further pointed out in the Hopkins case at page 707 of 101 Cal.App.2d at page 76 of 226 P.2d: "If respondent had not touched decedent's arm or otherwise physically aided him, but had merely stood by and kept a lookout for passers-by he could still be charged as a principal under § 31, Penal Code, [citing cases]". Thus, if the jury here believed appellant's statement that Callies had supplied the narcotic and that he only watched the door while Callies was behind the partition, the appellant would be equally a principal in the killing of Callies. The manslaughter charge was proper in the Hopkins case as there the defendant assisted the decedent in an unlawful act not amounting to a felony. In the instant case, in view of the appellant's prior convictions which were admitted, any violation of the narcotics laws is punishable as a felony. Health and Safety Code §§ 11712, 11714. Furthermore, in the instant case, the appellant assisted the decedent minor in an unlawful act dangerous to human life.

Second as to appellant's contention that the evidence is insufficient to support the verdict as he was convicted on the uncorroborated evidence of an accomplice, Penal Code Section 1111 provides:

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

"An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against

the defendant on trial in the cause in which the testimony of the accomplice is given."

[8-10] It is not questioned here that Stanley Hoffman participated with the appellant in the illegal transaction. The mere fact that he is punishable for such cooperation does not make him an accomplice. The question is whether under Sections 31 and 971 of the Penal Code, Hoffman is subject to prosecution under Health & Safety Code, section 11714, which the appellant is accused of violating, or whether Stanley Hoffman's acts constitute a separate and distinct offense. *People v. Clapp*, 24 Cal.2d 835, 151 P.2d 237. Similarity of offenses is not the same as the identity of offenses within the meaning of Penal Code, section 1111. *People v. De Paula*, 43 Cal.2d 643, 276 P.2d 600. Respondent contends that Hoffman was not an accomplice as a matter of law as a minor is regarded as a victim, *People v. De Paula*, supra, 43 Cal.2d 643, 276 P.2d 600, even if he is guilty of the same charge as the defendant, as to other minors, *People v. Drake*, 151 Cal.App.2d 28, 310 P.2d 997. A minor can be convicted of furnishing narcotics to another minor. *People v. Freytas*, Cal.App., 321 P.2d 782. The reason for the ruling in the *De Paula* case, where the defendant was accused of using the prosecuting witness, a minor, in the transportation of narcotics, was stated as follows at pages 647 and 648 of 43 Cal.2d, at page 603 of 276 P.2d:

"Since the minor involved is the victim and the offense denounced by section 11714 of the Health and Safety Code is the harmful act to that victim with the resulting harm to society in general, it necessarily follows that in a prosecution under that section the minor involved cannot be held a principal in the sense of being subject to prosecution for the same identical offense, within the meaning of section 1111 of the Penal Code. See *People v. Doetschman*, 69 Cal.App.2d 486, 489-490, 159 P.2d 418. The same principle applies as in statutory rape cases, in which it has been consistently held that the minor

victim is not an accomplice. *People v. Murray*, 91 Cal.App.2d 253, 256, 204 P.2d 624."

In the instant case, however, the appellant was not charged with furnishing narcotics to the prosecuting witness, but to a third party who died therefrom. In all of the above cited cases, the defendants were charged with narcotic crimes in relation to the minor prosecuting witnesses. In the instant case, Stanley Hoffman would be an accomplice if he could be charged with the identical offense as the appellant in relation to the identical victim. There is the further distinction that the crimes charged in the above cases were simply a violation of Health & Safety Code, section 11714, not an additional separate and distinct offense as in this case. While we are in full agreement with the policy of protecting minors, we do not think the rule of the *De Paula*, case, supra, was meant to apply to a case like the instant one.

[11] In the instant case, Hoffman and the decedent jointly conspired to purchase narcotics, and Hoffman aided and abetted the purchase and administration of the narcotics. Death resulted as a result of the unlawful purchase and use of the narcotics. Under Hoffman's own testimony he participated in an unlawful act from which death resulted, so that Hoffman could also be charged with second degree murder. Therefore, he was an accomplice as a matter of law and the jury should have been so instructed.

[12] Whether or not this error was prejudicial so as to deny the appellant due process, and require reversal as he contends, is the question. The record indicates that no specific instructions were requested by any of the parties. It has also been held that a defendant in a criminal prosecution cannot complain on appeal that the court failed to give an instruction where such instruction was not requested. *People v. Owens*, 79 Cal.App.2d 290, 179 P.2d 401.

[13] However, as pointed out in *People v. Hughes*, 107 Cal.App.2d 487, at pages 492, 493, 237 P.2d 64, at page 67: "It is the

law that in a criminal case that the jury should be instructed on the general principles of law which apply to the case, and even though not requested by the parties, the court of its own motion, should give such instructions." In *People v. Warren*, 16 Cal.2d 103, at page 119, 104 P.2d 1024, at page 1032, the court referring to the failure of the trial court to instruct the jury in accordance with Penal Code, section 1111, said: "that the failure of the trial court to so instruct the jury under such circumstances, with or without a specific request for such instructions, constitutes error; but that in the event of such failure in any case, the entire record must be considered in determining whether such error constitutes prejudicial error requiring a reversal of the judgment of conviction." In *People v. Crain*, 102 Cal.App.2d 566, 228 P.2d 307, it was held that it was the duty of the court to instruct the jury with respect to accomplices and their testimony, without any request from the defendant. In *People v. Ahern*, 113 Cal.App.2d 746, 249 P.2d 63, this court held it to be prejudicial error to refuse the accomplice instructions where there is a disputed question of fact as to whether a witness was an accomplice and where the appellate court cannot say with assurance that the verdict would have been the same had the instructions been given.

Respondent contends, of course, that the verdict would have been the same, as the appellant admitted standing guard while Callies injected himself. The record, however reveals that the appellant admitted standing guard while Hoffman injected himself. Nor do we think that the testimony of the policewoman as to the appellant's out of court admission that he sold "a \$35 paper" was sufficient by itself to establish the guilt of the appellant.

[14] After consideration of the entire record, we are of the view that the errors noted above have resulted in a miscarriage of justice.

In view of the foregoing the judgment and orders denying motions for new trial must be reversed.

Judgment and orders denying Motions for New Trial reversed.

DOOLING and DRAPER, JJ., concur.



158 Cal.App.2d 187

In the Matter of the ESTATE of J. F. T. O'CONNOR, Deceased.

Minnie L. TREPANIER, L. E. O'Connor and John O'Connor, Petitioners, Contestants and Appellants,
v.

UNIVERSITY OF NORTH DAKOTA, St. Mary's Catholic Church, St. Michael's Catholic Church, St. James High School and St. Michael's Hospital, Legatees and Respondents,
Bank of America, Executor and Respondent.
No. 22484.

District Court of Appeal, Second District,
Division 2, California.

March 5, 1958.

Proceeding in the matter of the estate of the deceased to determine heirship. From an order and judgment of the Superior Court of Los Angeles County, Newcomb Condee, J., the petitioners appealed. The District Court of Appeal, Kincaid, J. pro tem., held that previous orders for partial distribution constituted an adjudication of the validity of the trust created by the will and that the remainders created were not invalid as restraints upon alienation.

Order affirmed.

I. Executors and Administrators 315(5)

In petition to determine heirship of decedent leaving no descendants, who left

a will bequeathing property in trust, order for partial distribution constituted an adjudication of validity of trust where there was a finding that notice had been regularly given as required by law, and no appeal was taken by anyone from orders nor had any motion been made to modify or set them aside. West's Ann.Prob.Code, §§ 1200, 1240.

2. Executors and Administrators Ⓒ315(6)

A decree of distribution that has become final is a conclusive determination of the terms and validity of a testamentary trust and of the rights of all parties thereunder, and is such even though the provisions of the trust may have been erroneously construed. West's Ann.Prob.Code, §§ 1200, 1240.

3. Executors and Administrators Ⓒ315(5) Judgment Ⓒ668(1)

An order of partial distribution made after a hearing to which all parties are cited by due and legal notice, and which has become final and wherein terms of the will were construed and the validity of trust established is an adjudication of the will binding upon all the parties. West's Ann.Prob.Code, §§ 1200, 1240.

4. Perpetuities Ⓒ8(1)

Where under will, two of petitioners were to receive net income from estate so long as they lived, and remainder on their death was to be paid to four charitable institutions, subject to their then qualifying, but in any event on failure of all such institutions to qualify, residue was to be distributed to a hospital and charitable institutions were eleemosynary as to their purposes, there was no restraint upon alienation. West's Ann.Civ.Code, §§ 715, 716, 771, 772; West's Ann.Const. art. 20, § 9.

5. Perpetuities Ⓒ8(1)

Code provisions respecting suspension of power of alienation have no application to charities and charitable uses. West's Ann.Civ.Code, §§ 715, 716, 771, 772; West's Ann.Const. art. 20, § 9.

6. Wills Ⓒ629

In construing the language of a bequest the primary common-law rule in favor of early vesting of title in remaindermen and the preference for vested rather than contingent remainders is applicable. West's Ann.Prob.Code, § 143.

7. Wills Ⓒ634(9), 636

Where under will a hospital as last named beneficiary took upon a condition precedent that it should receive benefits thereunder only in event of failure of four previously named charitable beneficiaries to qualify, its interest in the residue could not vest until such failure had become final when taken with the lapse of the prescribed period, and until that time, it had a mere expectancy in the estate bequeathed, and in the interim title vested in the four beneficiaries subject to divestiture. West's Ann.Prob.Code, §§ 142, 143.

Sander L. Johnson and Henry P. Lopez,
Los Angeles, for appellants.

Brady, Nossaman & Walker, Los
Angeles, for respondent legatees.

KINCAID, Justice pro tem.

This is an appeal on the judgment roll from the order made on a petition to determine heirship filed in the Estate of J. F. T. O'Connor, deceased. The court found that decedent had no descendant and left no ancestor surviving him and determined and enumerated his only heirs, three of whom, Minnie L. Trepanier, L. E. O'Connor and John J. O'Connor, are the petitioners herein.

The court found: "8. Decedent died on September 28, 1949. He left a holographic will dated October 17, 1937, which bequeathed the residue of his estate as follows: 'Nineteenth: I direct that the residue of my estate shall be kept intact for a period of five years after my death and the income during the sixth year and each year thereafter shall be paid to my sister, Minnie L. Trepanier, my brothers, Thomas

J. O'Connor, L. E. O'Connor, Charles A. O'Connor and my cousin Annie Enright, share and share alike, during the life time of each. At death of any one his or her interest shall pass to the survivors named in this paragraph. Upon the decease of the last remaining beneficiary named in this paragraph, the remainder of my estate both real and personal shall be divided equally, share and share alike, among the University of North Dakota, St. James, St. Michaels and St. Mary's schools, provided that each institution shall raise a sum of money equal to the share under this paragraph provided which total sum shall be held by each institution in trust the income to be used for scholarship awards. The failure of one or more of the institutions named to comply with this provision within one year after such institution is entitled [*sic*] to the benefits named, then such share shall pass to the institutions complying with these terms. If no institution is found entitled to the benefits of this section, the residue of my estate shall be distributed to St. Michaels Hospital at Grand Forks, No. Dak.' A holographic codicil dated May 10, 1946, provided as follows regarding the residue: '(19) The name of Thomas J. O'Connor my brother, shall be stricken from paragraph (19). and the name of Annie Enright shall be stricken from the same paragraph 19 * * *.' Both of these documents were duly admitted to probate in this Court.

"9. (a) On November 23, 1953, Bank of America National Trust and Savings Association as executor of the will of J. F. T. O'Connor, deceased, filed in this Court and cause its Petition for Determination of Heirship, reciting, among other things, the provisions of Article Nineteenth of decedent's will and the provisions of the codicil amendatory thereof, and praying: 'Wherefore, your petitioner prays that the Court determine who is entitled to income accumulated during the said five-year period and to the distribution of the said Estate.' (b) On the same day, namely, November 23, 1953, Bank of America National Trust and Savings Association as such executor

filed an instrument entitled Petition to Appoint Trustee, which, among other things, recited the provisions of Paragraph Nineteenth quoted above, and prayed: 'Wherefore, your petitioner prays that it be appointed Trustee to receive the Estate from the Executor when the said Estate is ready to be closed, and thereafter to hold the Estate as Trustee for the testamentary purposes specified in the decedent's Will.' (c) On May 28, 1954, the above named Court made a decree entitled 'Decree Determining Heirship', which was reversed upon appeal by the life beneficiaries, Minnie L. Trepanier and L. E. O'Connor, by the District Court of Appeal in Re Estate of O'Connor, 130 Cal.App.2d 258, 278 P.2d 748, hearing denied by the Supreme Court of California March 16, 1955. Pursuant to such reversal a new decree was entered by the above named Court on April 1, 1955, providing in part as follows: '2. That the said beneficiaries, L. E. O'Connor and Minnie L. Trepanier, are entitled to the net income accrued during the period from the date of death of the testator to September 28, 1954; that the said net income shall be distributed by the Executor to the testamentary trustee and by it distributed to said beneficiaries, share and share alike. 3. That the income accruing from and after September 29, 1954 be distributed to said beneficiaries, L. E. O'Connor and Minnie L. Trepanier, share and share alike, in accordance with the terms of the decedent's Will and Codicil.' (d) On May 28, 1954, the above named Court made an order entitled Order Appointing Trustee, which, after reciting appearance of the various parties, the giving of due notice, and the fact that objections previously filed by certain beneficiaries were withdrawn, continues: 'It further appears, and the Court finds, * * * that the provisions of the Will are effective to create a trust, so that the appointment of a Trustee is necessary to receive the estate from the Executor when the estate is closed and to hold the same for the testamentary purposes specified in the decedent's Will; and It Is Hereby Ordered, Adjudged and Decreed that the Bank of America Na-

tional Trust and Savings Association be appointed Trustee to receive the estate from the Executor when the estate is ready to be closed and thereafter to hold the corpus of the estate for the testamentary purposes specified and in accordance with the provisions of the decedent's Will and Codicil.' No appeal was taken by anyone from the order of May 28, 1954, appointing a trustee of the estate, and it has never been modified or set aside.

"10. On November 22, 1954, Bank of America National Trust and Savings Association, executor of the will of decedent, filed herein its Third Account Current and Report and Petition (inter alia) for Preliminary Distribution, alleging in Paragraph XXIII thereof the terms of Article Nineteenth of the will of the decedent as modified by the codicil and praying for distribution of certain principal cash and assets (enumerated in the petition and amounting to \$730,945.22) in accordance with the terms of Article Nineteenth, set forth in Paragraph XXIV of the petition. On January 7, 1955, the Court ordered distribution of said principal cash and assets upon the following trusts: '[After providing for payment of income to income beneficiaries] Upon the death of the survivor of Minnie L. Trepanier and Lawrence E. O'Connor, also known as L. E. O'Connor, the remainder of the trust estate shall be divided equally share and share alike among the University of North Dakota, Academy of St. James (named in the Will as St. James School), St. Michael's Roman Catholic Church, Grand Forks, North Dakota (which operates the school named in the Will as St. Michaels school), and St. Mary's Church of Grand Forks, North Dakota (which operates the school named in the Will as St. Mary's school), each institution shall raise a sum of money equal to the share of the remainder provided for it under this paragraph, and the total of such share and of said sum so raised shall be held by each institution in trust, the income therefrom to be used for scholarship awards. Upon the failure of one or more of the insti-

tutions named to comply with this provision within one year after such institution is entitled to the benefits named, then such share shall pass to the institutions complying with these terms. If no institution is found entitled to the benefits of this section, then the entire remainder of the trust shall be distributed to St. Michael's Hospital at Grand Forks, North Dakota.'

"11. On May 20, 1955, the estate of the decedent filed herein its Fourth Account Current and Report and Petition (inter alia) for Preliminary Distribution, praying among other things for distribution of principal assets to the trustee under the will to be administered in accordance with the Order for (inter alia) Preliminary Distribution dated January 7, 1955. Thereafter on June 13, 1955, this Court ordered distribution of principal assets, valued at \$2,530.76 (inventory value), as well as income cash in the amount of \$95,000.00, to the trustee under the will as follows: '* * *', in trust, to be held, administered and distributed in accordance with the Decree Determining Heirship dated April 1, 1955, and the provisions set forth in the Order Approving Third Account Current and Report of Executor and Petition for Approval of Sales, for Approval of Elimination of parcel of Real Property Not Owned by Decedent, from Estate, for Allowance of Commission to Executor and Fee to Attorneys, for Construction of Will, and for Preliminary Distribution, dated January 7, 1955, * * *.'

"12. Each of the orders referred to in paragraphs 10 and 11 above contain recitals to the effect that notice had been regularly given in the respective proceedings as required by law. No appeal was taken by anyone from either of said orders and neither of said orders has ever been modified or set aside.

"13. Each of the foregoing persons and parties, enumerated in paragraphs 3 to 7, supra, claims an interest in the remainder of residue of the state of said decedent.

"14. The rights of all persons claiming any interest as heirs or devisees of said decedent in the trust estate distributable under the terms of decedent's will have been previously determined by the orders and decrees of this Court above enumerated. It is Therefore Ordered, Adjudged and Decreed by the Court that said J. F. T. O'Connor died testate on September 28, 1949, leaving a will which has been duly admitted to probate herein, and by the terms of said will the whole of the residue of said estate is devised and bequeathed and the interests of all parties determined as follows: (a) The Bank of America National Trust and Savings Association, as trustee under the will of the decedent, shall receive the entire residue and remainder of the estate from the executor to hold the corpus in trust for the testamentary purposes specified and in accordance with the provisions of the decedent's Will and codicil, all as provided in previous orders of this Court in this matter; (b) Petitioners Minnie L. Trepanier and L. E. O'Connor are entitled to the net income from said residue and remainder of the estate for their lives, all as provided by previous orders of this Court in this matter; (c) Upon the death of the survivor of Minnie L. Trepanier and L. E. O'Connor, the remainder of the trust estate shall be paid to respondents University of North Dakota, St. Mary's Catholic Church, St. Michael's Catholic Church, St. James' High School and St. Michael's Hospital, in the manner and under the conditions provided in previous orders of this Court in this matter; (d) The provisions for distribution of remainder interests in the corpus of said testamentary trust to the charitable respondents above enumerated are all valid, and no other person has any interest as heir or devisee in the trust estate distributable upon the death of the survivor of Minnie L. Trepanier and L. E. O'Connor."

[1] Petitioners contend that the court erred in its holding that the rights of all persons claiming any interest as heirs and devisees of said decedent in the trust estate distributable under the terms of de-

cedent's will have been determined by the previously made orders and decrees of the court.

Whatever may be the effect of the previously made order appointing a trustee for the estate, the two orders for partial distribution constitute an adjudication of the validity of the trust which is now being questioned. In each of these proceedings there was a finding that notice had been regularly given as required by law. "Proof of the giving of notice must be made at the hearing; and if it appears to the satisfaction of the court that said notice has been regularly given, the court shall so find in its order, and such order, when it becomes final, shall be conclusive upon all persons" (section 1200, Probate Code). In *re Estate of Wise*, 34 Cal.2d 376, 385, 210 P.2d 497. No appeal was taken by anyone from said orders (section 1240, Prob. Code), nor has any motion ever been made to modify or set them aside and they are now final. In *re Estate of Tymms*, 78 Cal. App. 79, 83, 247 P. 1091.

The petitions for preliminary distribution, on rendition of both the third and fourth accounts current, alleged the terms of Article Nineteenth of the will of the decedent as modified by the codicil and prayed for the approving order of the court to distribute some seven-tenths of the assets of the estate in accordance with the terms thereof. By its order of January 7, 1955, the court ordered distribution under the third account current specifically in the terms of Article Nineteenth as modified by the codicil. On June 13, 1955, a further distribution was ordered on the fourth account current in accordance with the provisions set forth in the order approving the third account.

[2] "The administration of a decedent's estate involves a series of separate proceedings, each of which is intended to be final (citations), not only as to the parties who appear therein, but also as to all persons 'interested in the estate' whose rights may be affected, although they did not appear therein. * * * It is settled * * *

that a decree of distribution that has become final is a conclusive determination of the terms and validity of a testamentary trust and of the rights of all parties thereunder. (Citations.)" In re Estate of Loring, 29 Cal.2d 423, 428, 427, 175 P.2d 524, 527. A decree of distribution which has become final is such a conclusive adjudication even though the provisions of the trust may have been erroneously construed. *Crew v. Pratt*, 119 Cal. 139, 151, 51 P. 38. See also *Wogman v. Wells Fargo Bank*, 123 Cal.App.2d 657, 663, 267 P.2d 423.

[3] Petitioners appear to concede the validity of the binding effect of an order of final distribution but challenge its applicability to orders of preliminary or partial distribution such as are here before us. Both reason and precedent oppose them in this regard. As hereinbefore noted, an order of partial distribution is appealable and when it becomes final it is conclusive as to all persons interested in the estate whose rights may be affected.

The law is well established in this state that an order of partial distribution, made after a hearing to which all the parties were cited by due and legal notice, and which has become final and wherein the terms of the will were construed and the validity of the trust established is an adjudication of the will binding upon all the parties. In re Estate of Hartenbower, 176 Cal. 400, 402, 168 P. 560; In re Estate of Carothers, 168 Cal. 691, 694, 144 P. 957; *Hardy v. Mayhew*, 158 Cal. 95, 110 P. 113; In re Estate of Tymms, supra, 78 Cal.App. 79, 82, 83, 247 P. 1091. See also In re Estate of Kearns, 129 Cal.App.2d 832, 839, 278 P.2d 85.

[4] Appellants additionally contend that the remainders created under the terms of the will in favor of the charitable beneficiaries violate the California Constitution and statutory provisions relating to restraints upon alienation: Cal.Const., art. XX, § 9; Civ.Code, §§ 715, 716, 771 and 772, as in effect at the date of death of the testator herein, 1949. We are unable to agree with this contention. Article

XX, section 9, of the Constitution of California provides: "No perpetuities shall be allowed except for eleemosynary purposes."

Section 715 provided: "Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows: 1. During the continuance of the lives of persons in being at the creation of the limitation or condition; or 2. For a period not to exceed twenty-five years from the time of the creation of the suspension." Section 716 provided: "Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed." Section 772 provided: "A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority." Section 771 made these prohibitions applicable to trusts.

By the terms of the will two of the petitioners are to receive the net income from the estate so long as they live, the remainder on their death to be paid to the four charitable institutions named, subject to their then qualifying as therein provided, but in any event on failure of all such institutions to qualify, the residue to be distributed to St. Michael's Hospital.

[5] These petitioners are "persons" in being at the time of the creation of the conditions. The named charitable institutions are "eleemosynary" as to their purposes and are specifically exempted by article XX, section 9, of the Constitution of California, from any prohibition of perpetuities. It is thoroughly settled in

this state that the code provisions respecting suspension of the power of alienation have no application to charities and charitable uses. In re Estate of Coleman, 167 Cal. 212, 214, 138 P. 992; In re Estate of Hinckley, 58 Cal. 457; People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L.R.A. 269; Collier v. Lindley, 203 Cal. 641, 266 P. 526; Dingwell v. Seymour, 91 Cal.App. 483, 267 P. 327.

The remainders created in the University of North Dakota, St. James, St. Michael's and St. Mary's schools are all vested remainders, subject to later divestment on the occurrence or nonoccurrence of the conditions subsequent specified in the will. Probate Code, section 143, defines condition subsequent as: "A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event. A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose."

[6] In construing the language of a bequest the primary common law rule in favor of early vesting of title in remaindermen and the preference for vested rather than contingent remainders is firmly established in this state. See In re Estate of Stanford, 49 Cal.2d 120, 315 P.2d 681, and cases therein cited. As said in the Stanford case at page 125 of 49 Cal.2d, at page 683 of 315 P.2d, "The conclusion that the remainder is vested, and not subject to any condition precedent, is regarded as being based upon the theory that there is a person in being to whom the seisin could pass. * * * This proposition can be stated in another way: the mere fact that the entire membership of the class cannot be determined until some later time when the interest becomes possessory does not mean that there is a condition precedent that the existing members of the class must survive until that time in order to partake of present ownership. *Only rarely does a court reach a contrary result.*"

[7] So here we find that under the will, upon the death of the last remaining of petitioners for whose benefit the residue of the estate has been held intact for purposes of their receiving its income, the remainder of the estate shall be divided, share and share alike among the four named charitable beneficiaries. As so worded it is clear that the testator intended that title should vest in each of them at his death leaving only the matter of division of the remainder to be made to them on the happening of the death of the survivor of such petitioners. There is nothing in the will to prevent the then immediate payment of its share to each such beneficiary excepting the provision that each shall, within one year, raise a sum of money equal to the share it is scheduled to receive, the total sum to be used for scholarship awards. In event of a failure to meet this condition subsequent within the prescribed period the beneficiary is divested of any further right thereto. In event all four of such beneficiaries so fail, the residue shall be distributed to the fifth named entity, St. Michael's Hospital at Grand Forks, North Dakota.

A somewhat analogous situation is found in Newlove v. Mercantile Trust Co., 156 Cal. 657, 105 P. 971. There a father willed his property to his six sons, share and share alike, and provided that no portion thereof should be sold until ten years after his death, and that, should any of his sons contract certain enumerated bad habits before such division his share should be forfeited. It was held that each of the sons acquired a vested interest at the time of the testator's death in the undivided share devised to him, subject to divestiture or termination upon the happening of the subsequent act or event specified in the will. See also Buttram v. Finley, 37 Cal. App.2d 459, 99 P.2d 1093.

The last-named beneficiary, St. Michael's Hospital, takes under the will upon a condition precedent in that it shall receive any benefits thereunder only in event of the failure of all of the four previously named charitable beneficiaries to qualify.

Accordingly, its interest in the residue could not vest until such failure had become final when taken with the lapse of the prescribed period. Until that time it has a mere expectancy in the estate bequeathed. In re Estate of Jameson, 93 Cal.App.2d 35, 40, 208 P.2d 54; Prob.Code, § 142. In the interim, title vested in the four beneficiaries subject to divestiture. In the event of divestiture the trust estate would become the property of St. Michael's Hospital. As to it no trust is established and it would take title with no restrictions upon its use. It is subject to no restraint on alienation and would be an absolute fee in possession. See In re Estate of Campbell, 149 Cal. 712, 718, 87 P. 573.

We have considered the other incidental points raised by appellants but deem further discussion as to them unnecessary.

The order on petition to determine heirship from which this appeal is taken is affirmed.

FOX, P. J., and ASHBURN, J., concur.



158 Cal.App.2d 419

Edith R. HUGHES, Plaintiff and Appellant,
v.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, Defendant
and Respondent.

No. 17756.

District Court of Appeal, First District,
Division 2, California.

March 17, 1958.

Action by woman against city for injuries received at intersection controlled by traffic lights, when city's trolley bus wheel ran over her leg, wherein bus driver testified as to his conduct before and at time of accident and only conflicting testi-

mony was as to whether signal was in favor of bus or woman. The Superior Court, City and County of San Francisco, Orla St. Clair, J., rendered judgment for city, and woman appealed. The District Court of Appeal, Kaufman, P. J., held that giving of instruction as to presumption of due care on part of city was prejudicial error and that woman, who did not testify, was entitled to such presumption.

Reversed.

1. Appeal and Error ⇐1064(1)

Street Railroads ⇐112(3), 118(2)

In action by woman against city for injuries received at intersection controlled by traffic lights, when city's trolley bus wheel ran over her leg, wherein bus driver testified as to his conduct before and at time of accident and only conflicting testimony was as to whether signal was in favor of bus or woman, giving of instruction as to presumption of due care on part of city was prejudicial error, and woman, who did not testify, was entitled to such presumption. West's Ann.Code Civ.Proc. § 1963, subd. 4.

2. Appeal and Error ⇐1064(1)

Whether error in giving instruction is prejudicial, depends on facts of particular case.

Hoberg & Finger, San Francisco, Applebaum, Mitchell & Bennett, Oakland, for appellant.

Dion R. Holm, City Atty., C. Wesley Davis, Deputy City Atty., San Francisco, for respondent.

KAUFMAN, Presiding Justice.

Plaintiff Edith Hughes, an incompetent, through her guardian Robert D. Harris, brought this action against the City and County of San Francisco to recover damages for personal injuries sustained in an accident involving a municipal trolley bus. The first trial in March 1956, resulted in a verdict in favor of the defendant. Plaintiff's motion for a new trial was granted

on several grounds. The second trial in December 1956, also resulted in a verdict in favor of the defendant. This appeal is taken from the judgment entered on such verdict.

The sole question on appeal is plaintiff's contention that the trial court, in giving and refusing to give certain instructions, committed prejudicial error. We have concluded that this contention must be sustained.

On the date of the accident, the plaintiff was 89 years old. Her general physical condition, eyesight and hearing were good. She was remarkably alert for a person of her years and capable of taking care of herself. She lived alone at the corner of Bush and Leavenworth Streets and was in the habit of walking downtown every day for lunch or a movie. There was conflicting testimony as to the extent of the injuries caused by the accident. While convalescing in a nursing home from the injuries to her right leg caused by the accident, she fell in January 1955, and broke her left hip. Surgery to correct this condition was unsuccessful. Her mental deterioration came on about the time of her second fall and may have been due to her physical condition or her age. She could not appear or testify by deposition at either trial.

The accident occurred on July 16, 1954, about 2:30 p. m. at the intersection of Grant Avenue and Sutter Streets in the City of San Francisco. Sutter Street runs east and west; Grant Avenue, north and south. There are red and green traffic signals on all four corners of the intersection. The plaintiff was walking south across Sutter Street in the east crosswalk. The trolley bus driven by an agent of the defendant, was proceeding westward along Sutter Street.

Various eye-witnesses testified about the circumstances of the accident. Henry Petrin was standing at the northwest corner of the intersection waiting for the red signal to turn green so that he could proceed eastward across Grant Avenue toward

Kearny Street. His attention was attracted by the noise of the motor of a bus which was about five feet from the east crosswalk on Sutter Street. He heard a scream and then noticed an elderly lady about ten to twelve feet from the curb, close to the bus. Then, " * * * the bus whizzed by her, and she apparently went backwards, and she lost her balance, and her two feet just went from under her, and one leg * * * the rear wheel of the bus ran over the lady's one leg, and I saw that too." He estimated that the speed of the bus was ten to twelve miles per hour. He did not know whether the woman was in the crosswalk when she was hit. On cross-examination, it was brought out that this witness had been convicted of a felony.

John Coletti, was working at his desk on the second floor of the building on the northwest corner of the intersection. He heard a loud scream, looked out the window and saw a woman in the street about two feet from a bus going ten to fifteen miles an hour in the inside lane of Sutter Street; the woman started to spin clockwise and fall to the right; the bus ran over her leg and came to a stop within eight or ten feet. After the accident, the woman lay in the street, with her head generally northeast, her feet southwest and a part of her legs on the crosswalk.

Mrs. Miller was standing at the northeast corner of the intersection, along with the plaintiff and about 35 other people. She wanted to walk south across Sutter Street, in the same direction as the plaintiff, but was waiting for the red light to turn green. At this time, the signal for east-west traffic on Sutter Street was red. She saw the plaintiff step off the curb and the bus enter the crosswalk simultaneously and she screamed. "Mrs. Hughes walked out into the street, and her left knee collapsed and she fell on the street, and the rear part of the bus ran over her." On cross-examination, it was brought out that in a prior statement to an independent investigator employed by the plaintiff's attorney, this witness had stated that the bus had been stopped to let stragglers across in the

west crosswalk, and ran over the plaintiff's leg just as it had started up again; that the bus swerved to the right upon crossing the east crosswalk; that she had been unable to see the traffic signals at the time of the accident; that the plaintiff had antagonized her by pushing ahead at the intersection.

Henry Webb, the driver of the bus, testified that as he left the passenger loading zone on the west side of Kearny Street and was proceeding westward along Sutter toward Grant, the traffic signals at Grant Avenue were red. He saw both the signals on the northwest and northeast corners change to green when his bus was about forty to fifty feet from the east line of the east crosswalk on Sutter Street. He had an unobstructed view of the east crosswalk. As he saw no pedestrians in the crosswalk, he continued to move across Grant Avenue. "In the intersection the back wheel seemed to have rolled over something * * * something had happened, and I stopped the coach immediately and climbed off of the coach to see what happened." He did not hear a scream or see the plaintiff before the impact.

Elva Washington, a passenger on the bus, testified that as the bus approached Grant Avenue and was about five feet from the east crosswalk, the signal was green and did not change until after the bus stopped after the accident. As the bus proceeded through the intersection, she felt a sort of a bump.

John F. Elb, the police officer who subsequently investigated the accident, testified that after the accident, the plaintiff first sat and then lay on the west line of the east crosswalk with her head and feet facing west about twelve feet from the north curb. The right edge of the bus was also twelve feet from the north curb line; the rear wheels of the coach were thirteen feet west of the plaintiff.

Plaintiff's principal contention is that the court committed reversible error in giving the jury an instruction which also extended to the defendant the disputable presumption

of due care. (Code Civil Proc. § 1963(4)) The court gave the following instruction on its own motion:

"At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption, and any evidence, that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to and be in accordance with my instructions on the burden of proof."

[1] Plaintiff argues that because the defendant offered evidence which disclosed his acts and conduct immediately before and at the time of the accident, it was error to give the defendant the benefit of the presumption. *Ford v. Chesley Transport Co.*, 101 Cal.App.2d 548, 225 P.2d 997; *Stout v. Southern Pacific R. Co.*, 127 Cal. App.2d 491, 274 P.2d 194; *Rozzen v. Blumenfeld*, 117 Cal.App.2d 285, 255 P.2d 850; *Nunnemaker v. Headlee*, 140 Cal.App. 2d 666, 295 P.2d 438; *Burns v. Churchill*, 152 Cal.App.2d 491, 313 P.2d 575. In *Rozzen v. Blumenfeld*, supra, 117 Cal.App. 2d at page 287, 255 P.2d at page 852, the court said that the giving of such an instruction "is error when thereby the benefit of the presumption of due care is extended to a party who by his testimony or by evidence introduced in his behalf had disclosed his acts and conduct immediately preceding and at the time of the accident." The defendant, here, by the testimony of Henry Webb has done so. There was, therefore, no room for the presumption of due care. *Mundy v. Marshall*, 8 Cal. 2d 294, 65 P.2d 65.

[2] Whether the error in giving the instruction is prejudicial, depends on the

facts of the particular case. *Speck v. Sarver*, 20 Cal.2d 585, 128 P.2d 16. As further pointed out in *Rozzen v. Blumenfeld*, supra, 117 Cal.App.2d at page 288, 255 P.2d at page 852:

"In determining whether prejudice resulted in a particular case, the vice of the criticized instruction should be kept in mind. The party against whom the presumption is invoked must not only overcome by a preponderance of the evidence the case presented by the opposing party, but must also overcome the presumption, for in the language of the instruction, conflicting evidence must be weighed 'against the presumption, and any evidence that supports the presumption, to determine which, if either preponderates.' In circumstances such as are here presented, paraphrasing the language in *Speck v. Sarver*, supra, 20 Cal.2d at page 588, 128 P.2d 16 (quoting from *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884), whether either of the defendants took ordinary care of his own concerns while operating his vehicle on the particular occasion in question was a matter of evidence established by such defendant and witnesses called by him, and 'in the face of this evidence, there was no room for any presumption.' * * * Or, as was said by Division Three of this court in an opinion prepared by Presiding Justice Shinn in *Ford v. Chesley Transportation Co.*, supra, 101 Cal.App.2d [548], at page 553, 225 P.2d [997], at page 1001, 'The effect of the instruction was to add strength to defendant's claim that it was free from negligence. The considerations pointing to negligence would have to overcome not only those pointing to a contrary conclusion, but also the presumption that defendant was not negligent.'" It is therefore necessary to analyze the quoted instruction and relate it to the evidence and certain other instructions given. In the instant case, there was only conflicting evidence on the crucial fact which would have been determinative of defendant's negligence or the plaintiff's contributory negligence, whether

the signal light was red or green. In *Cole v. Ridings*, 95 Cal.App.2d 136, 212 P.2d 597, the appellant, a minor, collided with a motorcycle operated by the respondent. The evidence relating to the circumstances of the collision was highly conflicting; in reversing the judgment for the respondent, the court pointed out at pages 139 and 140 of 95 Cal.App.2d, at page 600 of 212 P.2d:

"It is argued that in the circumstances presented herein, the jury might well have found the evidence of respondents' negligence to preponderate had the instruction not been given; but faced with the requirement laid down therein, the jury apparently concluded that the evidence of negligence, although sufficient to preponderate over conflicting evidence, was insufficient to preponderate over such conflicting evidence plus the presumption of due care.

"In *Clary v. Lindley*, 30 Cal.App. 2d 571, 573, 86 P.2d 920, the following appears:

"'A disputable presumption is a substitute for proof of facts. It is a species of evidence that may be accepted and acted upon when there is no other evidence to uphold the contention for which it stands,' *Noble v. Key System, Ltd.*, 10 Cal.App.2d 132, 137, 51 P.2d 887. It may be controverted by evidence. *Code Civ.Proc.*, § 1961. It is dispelled when evidence is produced by the party or his witnesses covering the subject of the presumption. *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884. When there is a conflict in the evidence introduced by opposing parties, there is no room for the presumption, *Kelly v. Fretz*, 19 Cal.App.2d 356, 65 P.2d 914, for the simple reason that one side or the other would be forced to introduce evidence to controvert other evidence plus a presumption. (*Paulsen v. McDuffie*, 4 Cal.2d 111, 47 P.2d 709; *Mundy v. Marshall*, 8 Cal.2d 294, 65 P.2d 65.)'

"In *Barker v. City of Los Angeles*, 57 Cal.App.2d 742, 749, 135 P.2d 573, 577, the court discussed an instruction similar to that here under review, to-wit: 'From apparently conflicting opinions of appellate courts of California, the following rules may be ad-duced:

"(1) It is error for the trial court to give an instruction such as that set forth above where the evidence in-troduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time of the accident. (*Speck v. Sarver*, 20 Cal.2d 585, 587, 588, 128 P.2d 16; *Campbell v. City of Los Angeles*, 28 Cal.App.2d 490, 491, 82 P.2d 720.)

"(2) Whether the giving of such an instruction when the evidence of the plaintiff discloses the acts and con-duct of the injured party at the time of the accident constitutes prejudicial error depends on the circumstances of each case. (*Speck v. Sarver*, supra.)"

We think in applying the above rules to this case, it was prejudicial error for the court to give the above quoted instruc-tion on the presumption of due care. In *Speck v. Sarver*, 20 Cal.2d 585, 128 P.2d 16, cited by the defendant here, the error in giving the instruction was mitigated by further instruction to the jury that they were to determine whether or not due care had been exercised.

There is merit in plaintiff's contention that under the circumstances of the ac-cident she is entitled to the presumption of due care. *Scott v. Burke*, 39 Cal.2d 388, 247 P.2d 313; *De Yo v. Umina*, 121 Cal. App.2d 505, 263 P.2d 623; *Powley v. Ap-pleby*, Cal.App., 318 P.2d 712.

In view of the foregoing the judgment must be reversed.

Judgment reversed.

DOOLING and DRAPER, JJ., concur.

Louis SOLK et al., Plaintiffs and Respondents,

v.

Robert POTTER et al., Defendants and Appellants.

Civ. A. 45.

Appellate Department, Superior Court,
San Bernardino County, California.

March 6, 1958.

Action on note executed in connection with debt for building materials. The Mu-nicipal Court of San Bernardino Judicial District, Wade E. Balcom, J., rendered judgment for plaintiffs and defendants appealed. The Appellate Department of Superior Court, County of San Bernardino, Mitchell, J., held that defendants were not entitled to order consolidating action on note with another action pending in same court, for conversion of defendants' truck.

Judgment sustained, and attempted ap-pel from order denying motion for new trial dismissed.

1. Set-Off and Counterclaim ⚡34(2)

Where plaintiffs brought action on note executed in connection with delivery of building materials, defendants were not en-titled to file cross-complaint alleging that after filing of plaintiffs' action, plaintiffs converted to their own use a truck owned by defendants. West's Ann.Code Civ. Proc. § 442.

2. Action ⚡57(1)

Where plaintiffs brought action on note executed in connection with debt for build-ing materials, defendants were not entitled to order consolidating action with another action pending in same court, for conver-sion of defendants' truck.

3. Pleading ⚡236(2)

Where defendants filed answer in Au-gust 1956 and on day of trial, in April 1957, made motion for leave to file an amendment to their answer, denial of mo-tion was not an abuse of discretion in ab-

sence of showing as to contents of proposed amendment or reason for delay.

4. Appeal and Error — 907(3)

Where neither statement on appeal nor appellants' brief afforded any help in determining what occurred in respect to alleged error, reviewing court would assume that there was no error.

Bayard R. Rountree, Twentynine Palms, for plaintiff.

J. Frederick Rosen, Coachella, for defendant.

MITCHELL, Judge.

This is an action on a promissory note for the sum of \$870.35 dated June 10, 1956, executed by the defendant and delivered to plaintiff.

On June 10, 1956, the defendant was indebted to the plaintiff in the sum of \$2,264.38 for building materials. On that day he delivered to the plaintiff a check for \$1,394.03 and the note for \$870.35 (the subject of this suit) making a total of \$2,264.38.

Defendant admits the execution and delivery of the promissory note but says that he gave the note "so that plaintiff could raise money at the bank".

Cross-complaint:

[1] Defendant sought to file a document entitled "cross-complaint" in which defendant alleged that after the filing of this suit, plaintiff converted to his own use a certain Dodge truck owned by defendant.

The trial court denied the motion to file this pleading on the ground that this alleged cause of action was in no way related to the suit on the note. C.C.P. § 442. This ruling obviously was correct.

Consolidation:

[2] Defendant also made a motion for an order consolidating this action with another action pending in the same court, to wit: Potter v. Solk, No. 13169, which was an action for conversion of a truck. This

motion was denied. This ruling obviously was correct.

Motion to Amend Answer:

[3] The complaint was filed July 17, 1956. The defendant answered on August 24, 1956.

On December 24, 1956, plaintiff served notice of trial which was then set for April 25, 1957.

On the day of the trial the defendant made a motion for leave to file an amendment to his answer. This motion was denied.

Appellant claims that the trial court erred in not permitting the amendment, but we are not advised as to the content of the proposed amendment nor the reason for the delay. We cannot say that the trial court abused its discretion.

Ambiguity:

Appellant also asserts that the trial court erred in refusing evidence "to show ambiguities" that would have nullified the note.

Assuming that this means that defendant was prevented from offering evidence to explain some alleged ambiguity in the note, we have examined the note. It does not appear to be ambiguous in any of its terms.

Appellant cites Williams v. Insurance Commissioner, 149 Cal.App.2d 140, 308 P.2d 52. This was an application for a writ of mandate to annul the Insurance Commissioner's decision revoking license to act as bail agent. Nothing in the opinion seems to bear on the case at bar.

Appellant also cites Oliver v. Nugen, 180 Kan. 823, 308 P.2d 132, 137. This was an opinion of the Supreme Court of Kansas in an action (for declaratory relief) to interpret a document which both sides treated as ambiguous in its terms. That court said:

"Since the case was tried in the lower court on the theory that the written contract was ambiguous, the trial court was justified in utilizing all possible aids to discover a fair and equita-

ble solution. * * * Where a contract is silent or ambiguous concerning a vital point incident thereto, parol evidence will be received to aid in its construction."

These cases seem to be of no help to appellant.

Cross-examination:

[4] Appellant charges that the trial court erred in refusing him the right to cross-examine plaintiff "as to * * * in-

voices for which note was given". Neither the Statement on Appeal nor appellant's briefs afford us any help in determining what occurred in this respect. Accordingly we must assume that there was no error.

The judgment is sustained, and the attempted appeal from the order denying defendant's motion for a new trial is dismissed.

COUGHLIN, P. J., and HILLIARD, J., concurring.

158 Cal.App.2d 572

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Harold Weston DEAN, Defendant and
Appellant.**

Cr. 6078.

District Court of Appeal, Second District,
Division 2, California.

March 20, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, Herbert V. Walker, J., for second degree robbery, and he appealed. The District Court of Appeal, Herndon, J., held that since same transaction which had been basis for commitment order provided elements of crime of robbery, trial court would not be put in error for allowing filing of amended information charging defendant (who had originally been accused of grand theft and violation of Vehicle Code) with crime of robbery, even though robbery had not been specified in order of commitment and even if committing magistrate had found that evidence presented at preliminary examination was insufficient to justify holding defendant for robbery.

Affirmed.

1. Indictment and Information $\S$ 41(1)

District attorney may charge by information commission of any offense disclosed by evidence taken at preliminary proceeding, and it is immaterial that offense charged was not specified in order of commitment if it is related to transaction which was basis for commitment order. West's Ann.Pen.Code, $\S$ 739.

2. Indictment and Information $\S$ 161(5)

Where same transaction which was basis for commitment order provided elements of crime of robbery, trial court would not be put in error for allowing filing of amended information charging defendant (who had originally been accused of grand theft and violation of Vehicle Code) with crime of robbery, even though robbery had not been specified in order of commitment

and even if committing magistrate had found that evidence presented at preliminary examination was insufficient to justify holding defendant for robbery. West's Ann.Vehicle Code, $\S$ 503.

3. Criminal Law $\S$ 1144(3)

Where record of preliminary proceeding is not before appellate court, it will not be presumed that trial court erred in allowing filing of amended information, but, on contrary, it will be presumed that evidence taken at preliminary examination was such as to show offense to have been committed as charged in amended information.

4. Robbery $\S$ 24(1)

Second degree robbery conviction was sustained by evidence. West's Ann.Pen. Code, $\S\S$ 211, 211a.

5. Criminal Law $\S$ 570(1, 2)

In robbery prosecution, defendant had burden of proving his insanity by preponderance of evidence; and, on record presented, it was not error to find that such burden had not been sustained.

6. Criminal Law $\S$ 1159(5)

Finding of trier of fact upon issue of insanity cannot be disturbed on appeal if there is any substantial and credible evidence in record to support such finding.

7. Criminal Law $\S$ 1040

Defendant who had not only failed to request a polling of jury but had expressly and unequivocally waived it could not successfully urge on appeal that trial court had erred in failing to poll jury. West's Ann.Code Civ.Proc. $\S$ 2061, subd. 2; West's Ann.Pen.Code, $\S$ 1163.

H. W. Dean, in pro. per.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

Convicted of second degree robbery and sentenced to state prison, defendant appeals from the judgment and from the order denying his motion for a new trial. His

contentions are: (1) that the trial court erred in allowing the filing of an amended information; (2) that there was no sufficient evidence of his guilt; (3) that the evidence does not support the jury's verdict that he was sane at the time the crime was committed; and (4) that the trial court erred in failing to poll the jury.

In the original information defendant was charged in one count with grand theft, a felony and, in an alternate count, with violation of section 503 of the Vehicle Code, a felony. Both counts charged the felonious taking of a certain automobile on January 30, 1957. At the time of arraignment, the public defender was appointed as counsel for defendant. Upon entry of pleas of not guilty and not guilty by reason of insanity, two doctors were appointed to examine defendant and report. The reports of these two doctors disclosing a difference of opinion, a third doctor was appointed.

At the time of trial, on motion of the district attorney, an amended information was filed charging appellant with the crime of robbery, in that on or about January 30, 1957, he did willfully, unlawfully, feloniously and by means of force and fear take from the person, possession and immediate presence of one Harold Burne, a 1953 Mercury automobile, of the value of one thousand five hundred dollars. At arraignment on the amended information, defendant entered a plea of not guilty.

In a jury trial, a verdict of guilty of second degree robbery was returned. With the court's permission, defendant thereupon entered the further plea of not guilty by reason of insanity. A trial of this issue resulted in a verdict that defendant was sane at the time the crime was committed. The judgment of conviction was entered and defendant was thereafter sentenced to state prison, the sentence to run consecutively to a sentence pronounced in another case in which probation was revoked.

[1-3] No error has been shown in the order allowing the filing of the amended

information. Section 739 of the Penal Code has been interpreted to authorize the district attorney to charge by information the commission of any offense disclosed by the evidence taken at the preliminary proceeding even though such offense is not specified in the order of commitment, provided the offense charged is related to the transaction which was the basis for the commitment order. *Parks v. Superior Court*, 38 Cal.2d 609, 611-613, 241 P.2d 521; *People v. Bird*, 212 Cal. 632, 636, 642-643, 300 P. 23; *People v. Malowitz*, 133 Cal App. 250, 260, 24 P.2d 177.

It is entirely clear from the record before us that precisely the same transaction which was the basis for the commitment order provided the elements of the crime of which defendant was convicted. While the transcript of the preliminary proceeding has not been included in the record on this appeal, enough of the testimony given in that proceeding is quoted in the reporter's transcript to demonstrate the correctness of the court's ruling.

Defendant asserts that the committing magistrate found the evidence presented at the preliminary examination insufficient to justify holding him for robbery. Although the record does not support this assertion, we may assume its truth for the purposes of this appeal. As stated in *Parks v. Superior Court*, supra, 38 Cal.2d 609, 613-614, 241 P.2d 521, 524, "the district attorney might include a related offense although the magistrate concluded impliedly or otherwise that the evidence did not show probable cause that such offense had been committed." To the same effect is *People v. Shuttler*, 15 Cal.App.2d 704, 709, 59 P.2d 1050. Where the record of the preliminary proceeding is not before the appellate court, it will not be presumed that the trial court erred in allowing the filing of an amended information, but on the contrary, it will be presumed that the evidence taken at the preliminary examination was such as to show the offense to have been committed as charged in the amended information. *People v. Cryder*, 90 Cal.App.2d 194, 200, 202

P.2d 765; *People v. Shutler*, supra, 15 Cal. App.2d 704, 709, 59 P.2d 1050; *People v. Thal*, 61 Cal.App. 48, 52, 214 P. 296.

The lack of merit in defendant's contention with respect to the sufficiency of the evidence will be demonstrated by a brief summary of the uncontradicted testimony. On the evening of January 30, 1957, Mr. Harold H. Burne, an automobile salesman, was attending his employer's used car lot at Figueroa Street in Los Angeles. At approximately 8:00 p. m. the defendant came to the lot and had a conversation with Mr. Burne regarding the automobiles on the lot. Defendant inquired about a certain 1953 Mercury automobile and asked for a demonstration. Mr. Burne said they never demonstrated at night. Defendant remained on the lot for a few minutes and just before leaving said he probably would return the next day for a demonstration. About a half hour later defendant returned. Mr. Burne was standing next to the 1953 Mercury automobile and defendant said, "Now let's take that ride." When Mr. Burne refused, defendant said, "Well, you will take a ride or get a slug in your guts." Defendant gave the appearance of having a gun. He had his hand in his coat pocket and pointed something at Mr. Burne. The latter, believing defendant had a gun in his pocket, ran around the automobile and across the street to his company's main store. There he had the police called and he observed the defendant drive the 1953 Mercury off the lot and out of sight.

Defendant was arrested by Sheriff's deputies at Vista, San Diego County, on February 7, 1957. He was standing six or eight feet from the 1953 Mercury automobile at the time. While transporting the defendant to jail in Oceanside, the deputies had a conversation with him during which he stated he took the car in a robbery in a Los Angeles used car lot.

Defendant was turned over to officers of the Los Angeles Police Department and transported to the Los Angeles Central Jail. While en route from San Diego to Los Angeles, defendant, in response to interrogation, stated he had taken a car from

a used car lot; he had not used a weapon; the used car salesman was scared and ran; he sold the car radio to buy some gasoline; he took the automobile in order to get picked up by the police because he needed some help and needed to be put in a hospital.

Penal Code section 211 defines robbery: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Penal Code section 211a provides: "All robbery which is perpetrated by torture or by a person being armed with a dangerous weapon is robbery in the first degree. All other kinds of robbery are of the second degree."

[4] The sufficiency of the evidence to prove the elements of second degree robbery is beyond reasonable question. Defendant's threat to shoot the salesman who was in charge of the premises and the pretended resort to a gun certainly were well calculated to produce fear. Thus when the salesman retreated in fear of serious bodily harm defendant was enabled to accomplish the unlawful taking. The finding of the jury that the robbery was of the second degree obviously reflected their doubt whether defendant was in fact armed with a dangerous weapon.

[5,6] The jury's verdict on the sanity issue is likewise well supported by the evidence. On the trial of the issue raised by the plea of not guilty by reason of insanity there is a rebuttable presumption that the accused was sane at the time the crime was committed. *People v. Chamberlain*, 7 Cal. 2d 257, 260, 60 P.2d 299; *People v. Leong Fook*, 206 Cal. 64, 67, 70, 273 P. 779; *People v. Hickman*, 204 Cal. 470, 477, 268 P. 909, 270 P. 1117. The accused has the burden of proving his insanity by a preponderance of the evidence. *People v. Daugherty*, 40 Cal.2d 876, 901, 256 P.2d 911; *People v. McLachlan*, 13 Cal.2d 45, 55, 87 P.2d 825. The evidence of insanity presented by the accused must outweigh the prosecution's evidence (including the presumption of sanity) not in number of witnesses or quantity of evidence, but in its effect on the jury.

People v. Williams, 184 Cal. 590, 593-594, 194 P. 1019; *People v. Miller*, 171 Cal. 649, 652, 154 P. 468; Code Civil Procedure, § 2061, subd. 2. The finding of the trier of fact upon the issue of insanity cannot be disturbed on appeal if there is any substantial and credible evidence in the record to support such finding. *People v. Greig*, 14 Cal.2d 548, 553, 557, 95 P.2d 936.

As to the question whether defendant was sane at the time the crime was committed, the opinion of the psychiatrist called by defendant was opposite to that of the qualified expert called by the prosecution. As indicated by the authorities cited above, the jury's finding, supported both by the presumption and other substantial evidence, is immune from successful attack.

[7] The final contention that the court erred in failing to poll the jury is without merit because defendant not only failed to request a polling of the jury, but expressly and unequivocally waived it. Penal Code, § 1163.

The judgment and order are affirmed.

FOX, P. J., and KINCAID, J. pro tem., concur.



158 Cal.App.2d 551

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Woodrow PORTER, Defendant and
Appellant.
Cr. 1217.

District Court of Appeal, Fourth District,
California.

March 19, 1958.

Prosecution for armed robbery. From adverse judgment of the Superior Court, Fresno County, Edward L. Kellas, J., the defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evi-

dence was sufficient to sustain the conviction.

Judgment affirmed.

Robbery $\S$ 24(1)

Evidence was sufficient to sustain a conviction for armed robbery.

A. A. George, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The appellant and one Dennis were jointly charged with armed robbery in that on October 29, 1955, while armed with a shotgun and a pistol, they robbed one Albert Walker. The appellant was also charged with a prior conviction of a felony. Each pleaded not guilty and the appellant admitted the prior conviction. A jury found each of them guilty of robbery in the first degree, and a notice of appeal from the judgment was filed by this appellant.

The attorney who represented the appellant at the trial was appointed by this court to represent him on this appeal. With the permission of the court he has filed a report in lieu of a brief, in which he states that the appellant has not suggested any grounds of appeal, although requested several times to do so, and that after carefully examining the entire record he has been unable to find any meritorious ground for argument. The report contains a full and fair review of the evidence, of the rulings on the admission of evidence, and of the instructions to the jury.

After reading the entire record we agree with counsel's conclusion that no reversible error appears, and that the evidence was sufficient to support the judgment. It appears from the undisputed evidence that Mr. Walker, a labor contractor, was employed on the O'Neill ranch; that on the day in question, a pay day, he picked up the payroll including over \$1000 in cash at the ranch office; that he put a paper bag

containing this money under the seat of his pickup truck, and started for a camp to pay the workers waiting there; that he stopped at a store on the way, and there the codefendant Dennis asked him for a ride; that Dennis got into the truck, sitting on the right side, and Walker drove toward the camp; and that as they neared the camp the appellant walked out of some trees and Dennis slammed his foot on the brake, almost causing a wreck. As the truck came to a halt Dennis pointed a pistol at Walker, and at the same time the appellant opened the truck door and put a shotgun against Walker. Dennis said, "Don't shoot him. I've got him covered". The appellant then told Walker to move over, and he got behind the wheel. Dennis kept the pistol on Walker while the appellant drove about a mile and then off the road and behind a thick clump of trees. The appellant then told Walker to get out, and proceeded to tie him to a tree. The appellant took Walker's wallet, Dennis found and took the bag containing the money, and the two then ran away. Walker got himself untied in about thirty minutes, the matter was at once reported, and a deputy sheriff immediately investigated.

Walker positively identified the appellant as one of the men who robbed him. Another witness testified that on his way to this store he saw a man, sufficiently identified as the appellant, pacing up and down the road; that as he was leaving the store Dennis asked him for a ride and got in his car; that Dennis then saw Walker drive up to the store, and got out saying that Walker was the man he wanted to see; and that as he was driving back to camp he saw the same man waiting at the same place. The appellant did not take the stand, and no evidence was introduced in his behalf except the testimony of four alibi witnesses who testified to the effect that the appellant was in Los Angeles on the afternoon of October 29. Not only did this present merely a question of fact, but the testimony of these witnesses fully discloses why it was not accepted by the jury.

The evidence was amply sufficient to support the verdict and judgment, the jury was fully and fairly instructed as to the law, and neither error nor prejudice appears in the record.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



158 Cal.App.2d 517

Beatrice GOMBOS and Alex Gombos,
Plaintiffs and Appellants,

v.

John R. ASHE, Defendant and Respondent.

Civ. 17541.

District Court of Appeal, First District,
Division 1, California.

March 19, 1958.

Rehearing Denied April 18, 1958.

Hearing Denied May 14, 1958.

Action for compensatory and punitive damages for injuries suffered in automobile collision. The Superior Court of San Mateo County, Aylett R. Cotton, J., dismissed the complaint as to third cause of action for punitive damages, and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that complaint alleging that defendant wilfully, wrongfully, recklessly and unlawfully drove automobile with absolute disregard and callous indifference to rights of persons on highway in that he was then and there knowingly and wilfully intoxicated, was insufficient to plead a cause of action for punitive damages, since it did not charge malice, express or implied.

Motion to dismiss appeal denied and portion of amended judgment dismissing the third cause of action affirmed.

I. Appeal and Error $\S$ 80(6)

Where demurrer was overruled as to first and second causes of action for compensatory damages but sustained as to third cause of action for punitive damages, judg-

ment of dismissal as to third cause of action was not an appealable "final judgment or order". West's Ann.Code Civ. Proc. § 963.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment or Order".

2. Appeal and Error ⇨80(6), 428(2)

Where demurrer was overruled as to first and second causes of action for compensatory damages but sustained as to third cause of action for punitive damages, judgment on verdicts for plaintiffs, as to first and second causes of action, was not complete or final because it did not dispose of third cause of action, and hence reviewing court would itself amend the judgment by adding a paragraph dismissing the third cause of action and would treat plaintiffs' notice of appeal from dismissal of the third cause of action as a timely notice of appeal from the judgment as thus amended. West's Ann.Code Civ.Proc. § 963; West's Ann.Rules on Appeal, rule 2(c).

3. Appeal and Error ⇨80(6)

Amended judgment awarding compensatory damages to plaintiffs but dismissing cause of action for punitive damages would be severable, so as to permit appeal from the portion dismissing cause of action for punitive damages, because based on different substantive rights.

4. Automobiles ⇨238(7)

Complaint alleging that defendant wilfully, wrongfully, recklessly and unlawfully drove automobile with absolute disregard and callous indifference to rights of persons on highway in that he was then and there knowingly and wilfully intoxicated was insufficient to plead a cause of action for punitive damages, since it did not charge malice, express or implied. West's Ann.Civ.Code, § 3294.

5. Damages ⇨87(1)

Punitive damages, allowed in certain cases as a punishment of defendant, are not a favorite of the law and should be granted with the greatest caution and allowed only in clearest of cases. West's Ann.Civ.Code, § 3294.

6. Damages ⇨91(1)

To warrant allowance of punitive damages, act must not only be wilful in the sense of intentional but must be accompanied by some aggravating circumstance amounting to malice. West's Ann.Civ. Code, § 3294.

7. Damages ⇨91(1)

"Malice" as basis for award of punitive damages implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others, and there must be intent to vex, annoy or injure; mere spite or ill will or negligence, even gross negligence, not being sufficient. West's Ann.Civ.Code. § 3294.

See publication Words and Phrases, for other judicial constructions and definitions of "Malice".

8. Automobiles ⇨249

One who becomes intoxicated, knowing that he intends to drive automobile on highway, is negligent and perhaps grossly negligent, but not guilty of "malice" as basis for punitive damages. West's Ann. Civ.Code, § 3294.

9. Statutes ⇨220

Even though reason given for opinion of appellate court construing punitive damages statute was probably not sound, fact that Legislature had met many times since such decision and had not seen fit to change the statute was entitled to weight and court would not change the rule. West's Ann. Civ.Code, § 3294.

10. Damages ⇨151

Mere characterization of conduct as wilful, reckless, wrongful and unlawful is insufficient to charge malice in fact as ground for punitive damages. West's Ann. Civ.Code, § 3294.

William A. Sullivan, San Mateo, for appellants.

Daniel C. Miller, San Francisco, for respondent.

PETERS, Presiding Justice.

Appellant, Beatrice Gombos, was injured by an automobile driven by respondent, John R. Ashe. She and her husband sued Ashe. In the original complaint, Mrs. Gombos, in the first cause of action, asked for compensatory damages for her injuries, and her husband, in a second cause of action, prayed for compensatory damages to his automobile, for loss of use of the car and for loss of consortium. Later a first amended complaint was filed adding a third cause of action for punitive damages, it being alleged that Ashe was drunk when he hit Mrs. Gombos. Ashe demurred to the first amended complaint. The trial court overruled the demurrer as to the first and second causes of action, but sustained it as to the third cause of action for punitive damages. The minute order so providing was entered on June 28, 1956. On August 1, 1956, the clerk entered a judgment of dismissal as to the third cause of action. On August 20, 1956, Mr. and Mrs. Gombos filed a notice of appeal from this judgment of dismissal.

Thereafter, the case proceeded to trial upon the first and second causes of action. In that trial the defendant admitted liability. The jury awarded Mrs. Gombos \$6,000, and Mr. Gombos \$1,000. Judgment on these verdicts was entered November 28, 1956. Satisfaction of the "judgment rendered and entered * * * on the First and Second Causes of Action" was entered January 15, 1957. Neither the judgment nor the satisfaction made any reference to the third cause of action. No appeal from this judgment was taken.

In the meantime Mr. and Mrs. Gombos filed briefs in their appeal from the judgment on the third cause of action. The defendant has moved to dismiss that appeal on the ground that the judgment of dismissal was not a final judgment and not appealable. On the February, 1957, calendar of the court this motion was "denied without prejudice to raising the point of appealability in the briefs of the cause on its merits." The cause has now been fully

briefed on its merits and on the issue of appealability of the judgment of dismissal.

[1] It would appear that the judgment of dismissal as to the third cause of action was not a final judgment or order within the meaning of section 963 of the Code of Civil Procedure. The cases seem to hold that, for purposes of appeal under section 963, *supra*, there cannot be piecemeal disposition of several counts in a complaint which are all addressed against the same defendants. That this rule applies to the instant case is established by the case of *Mather v. Mather*, 5 Cal.2d 617, 55 P.2d 1174. In that case the complaint alleged three causes of action by the same plaintiff against the same defendants. A demurrer was interposed and sustained as to the third cause of action. A formal judgment was entered on this third cause of action. Plaintiff appealed, and defendants moved to dismiss. Subsequently the case proceeded to trial upon the first two causes of action, resulting in a judgment for defendants. The Supreme Court held that the appeal from the judgment dismissing the third cause of action was premature, and granted the motion to dismiss. At page 618 of 5 Cal.2d, at page 1174 of 55 P.2d the court stated:

"It is evident that the cause was attempted to be disposed of piecemeal—that a single object, although stated in several counts, was sought to be attained by the action, and that this single and unseverable object was arbitrarily attempted to be split up as the basis for two distinct judgments.

"It is at once apparent that no *final* judgment was entered in the action until March 14, 1935.

"The judgment of January 4, 1935, was not a final judgment and is not appealable under the terms of section 963 of the Code of Civil Procedure, or otherwise. Our conclusion is fully supported by the leading case of *Gunder v. Gunder*, 208 Cal. 559, 282 P. 794, and the many cases which follow it, notably *De Vally v. Kendall De Vally*, etc. Co., 220 Cal. 742, 32 P.2d 638, *Middleton v. Finney*, 214 Cal. 523, 6 P.2d 938, 78

A.L.R. 1104, and *Potvin v. Pacific Greyhound Lines*, 130 Cal.App. 510, 20 P.2d 129."

In a later opinion in the same litigation the court held that neither judgment was a final judgment, and that the cause of action on count three was still pending. In *Greenfield v. Mather*, 14 Cal.2d 228, 233, 93 P.2d 100, 103; the Supreme Court stated:

"The fact that the judgment of March 14 was the second judgment to be entered did not cloak it with finality because it did not purport to embrace a final disposition of the entire cause. By express terms it was confined to only counts 1 and 2, and erroneously failed to include a recital with respect to the disposition of count 3. It did not affect count 3. The appeal from the purported judgment on that count was pending; that purported judgment, being void, was in effect no judgment. Therefore, if count 3 in fact stated a cause of action, that cause remained pending in the trial court after the entry of the judgment on counts 1 and 2.

"The erroneous procedure adopted in attempting to make piecemeal disposition of the prior cause was not of appellant's instigation, and he should not be penalized for it. He at no time waived his right to object to the splitting of the action. He contended throughout that he was entitled to test the sufficiency of his third cause of action before an appellate court. To permit a litigant to deprive his adversary of an opportunity for full appeal by erroneously procuring the entry of successive purported partial judgment[s], and then having appeals from all save the last of said judgments dismissed on the ground that the cause should not have been split, would be unfair."

The rule quoted above from *Mather v. Mather*, supra, to the effect that there cannot be a piecemeal disposition of several counts of a complaint has frequently been announced by the courts. In *Bank of America, etc., v. Superior Court*, 20 Cal.2d 697, 701, 128 P.2d 357, 360, the court stated:

"These arguments are all predicated upon a fundamental fallacy. They assume that there can be a piecemeal disposition of the several counts of a complaint. They assume, when there is more than one count in a complaint, and a demurrer is interposed and sustained, and a judgment of dismissal entered, that there are as many separate judgments as there are counts in the complaint. That is not the law. There cannot be a separate judgment as to one count in a complaint containing several counts. On the contrary, there can be but one judgment in an action no matter how many counts the complaint contains. [Citations.]" The court then quoted from a number of opinions and concluded the discussion on the point (20 Cal.2d at page 702, 128 P.2d at page 360) by quoting from *Potvin v. Pacific Greyhound Lines, Inc.*, 130 Cal.App. 510, 512, 20 P.2d 129, as follows:

"'Since a final judgment in an action contemplates a complete adjudication of the rights of the parties and a final determination of the matter in controversy, it is apparent that the so-called judgment rendered upon the sustaining of a demurrer to one cause of action of a complaint without leave to amend, leaving five other causes of action unimpaired presenting matters to be litigated during a trial of the issues of fact, cannot be regarded as a final determination and disposal of the cause.'"

The same result has been reached in many other cases. See *Daniels v. Daniels*, 136 Cal.App.2d 224, 288 P.2d 910; *Kennedy v. Kennedy*, 130 Cal.App.2d 785, 279 P.2d 759; *Murphy v. Fong Shuck*, 151 Cal.App.2d 64, 311 P.2d 80.

The contention of appellants that the rule of the above cases does not apply where the multiple causes of action are based upon different substantive rights, was specifically rejected in *Wilson v. Wilson*, 96 Cal.App.2d 589, 216 P.2d 104. There the court held that a difference in subject matter between the various counts of a complaint does not prevent the rule from applying that no final judgment can be

given until final disposition of all of the counts is made. At page 596, of 96 Cal. App.2d, at page 109 of 216 P.2d the court stated:

"There are certain exceptions to the rule that there can be but one final judgment in an action *Nicholson v. Henderson*, 25 Cal.2d 375, 379, 153 P.2d 945; 14 Cal.Jur. 951, Judgments, sec. 52, but in this jurisdiction we know of no exception which could be applicable to this case. It is true that the purported final judgment appealed from finally disposed of the second and third count and that the claims for relief stated in these counts differed and were based on a different factual basis from the one in the first count which was still pending. In some jurisdictions a separate final and appealable judgment may be entered, which finally disposes of one separate claim for relief, although more than one such claim is presented in the action, see *Reeves v. Beardall*, 316 U.S. 283, 62 S.Ct. 1085, 86 L.Ed. 1478, for civil procedure under Federal Rules, 28 U.S.C.A. In no California decision, however, has such exception been recognized. In *Mather v. Mather*, supra, and *Provident Land Corp. v. Bartlett*, supra [53 Cal.App.2d 383, 127 P.2d 928] there are statements to the effect that the several counts contained only a single unseverable object, which statements might conceivably be considered to give some recognition to the rule later declared in *Reeves v. Beardall*, supra, 31 Cal.L.Rev., 90, 95. However in *De Vally v. Kendall De Vally O. Co. Ltd.*, supra, the leading case on this specific subject, the difference in subject matter between the several counts is equal to that in the present case and the sweeping expression of the rule in *Bank of America v. Superior Court*, supra, does not seem consistent with the acceptance of this rather extensive exception. Although *Nicholson v. Henderson*, supra, 25 Cal.2d at page 380,

153 P.2d at page 947, mentions the possibility that there may be other exceptions to the general rule in addition to the two discussed in that case, which are not applicable here, we find here no unusual situation in which postponement of the appeal until the final judgment as to all causes of action would cause so serious hardship or inconvenience as to require us to augment the number of existing exceptions."

[2,3] Where do these rules leave us in the instant case? We know that the judgment on the third cause of action was not a final judgment, and that the appeal therefrom was premature. For precisely the same reasons, we also know that the judgment on the first two causes of action was not a complete judgment because it did not, as it should have, dispose of the third cause of action. There never has been a final judgment rendered in this case. The appellants are entitled, of course, at some stage of the proceedings, to a determination by an appellate court of the validity of the third cause of action. This could be accomplished by dismissing the present appeal with instructions to the trial court to amend the interlocutory judgment on the first two causes of action by including a disposition of the third cause of action. Appellant could then appeal from the portion of the amended judgment disposing of the third cause of action.¹ That would then require the parties to rebrief the question as to whether the third cause of action stated a cause of action—the very point that is fully briefed in the briefs now on file. This seems to be an unnecessarily dilatory and circuitous method of reaching a proper result. It should not be adopted unless it is the only proper method of reaching a fair result. We think there is another method of arriving at a result that is fair to both the parties to this appeal. Instead of instructing the trial court to amend its

1. The amended judgment would be severable for the purpose of appealing from a portion thereof because the right asserted in the third cause of action is based on a different substantive right than the rights asserted in the first two

causes of action. For a discussion of the test of whether a judgment is severable so as to permit a partial appeal see *American Enterprise, Inc. v. Van Winkel*, 39 Cal.2d 210, 246 P.2d 935.

judgment on the first two causes of action by adding to it the dismissal of the third cause of action, there would seem to be no legal reason why that result should not be reached directly by this court. All of the pertinent documents are now before this court. Therefore, in the interests of justice and to prevent unnecessary delay we order that the judgment of November 28, 1956, be and it is amended by adding thereto a paragraph dismissing the third cause of action based on the sustaining of the demurrer without leave to amend.

This having been accomplished, the notice of appeal filed on August 20, 1956, may properly be treated as a notice of appeal from the judgment as thus amended. When the *Mather v. Mather* case, 5 Cal.2d 617, 55 P.2d 1174, was decided in 1936, and when many of the other cases were decided in which appeals were dismissed because of a premature filing of the notices of appeal, there was no relief provided for by the rules for a premature filing of a notice of appeal. That defect has been remedied by the adoption of the new Rules on Appeal in 1943, and particularly by certain amendments adopted in 1951. Rule 2(c) as amended in 1951 now provides: "A notice of appeal filed prior to entry of the judgment, but after its rendition, shall be valid and shall be deemed to have been filed immediately after entry. A notice of appeal filed prior to rendition of the judgment, but after the judge has announced his intended ruling, may, in the discretion of the reviewing court for good cause, be treated as filed immediately after entry of the judgment." The 1951 amendment consisted of adding the second sentence above quoted. The present case would seem to fall squarely within that second sentence. On June 28, 1956, the trial court sustained the demurrer to the third cause of action, and entered its judgment of dismissal as to that cause of action on August 1, 1956. Certainly the notice of appeal filed August 20, 1956, was "after the judge has announced his intended ruling." Since the only appealable judgment is the one entered pursuant to the order heretofore made, this

court, under the rule, has discretion "for good cause" to treat the notice of appeal as having been filed immediately after the entry of such judgment. See *Larrus v. First National Bank*, 122 Cal.App.2d 884, 266 P.2d 143. Certainly, "good cause" exists to so treat the notice of appeal. The defendant secured an order sustaining a demurrer to the third cause of action, and then a "judgment" of dismissal was entered. Then the first two causes of action were tried, the defendant admitted liability, and then satisfied the resulting judgment as to the first two causes of action. He did this with full knowledge that plaintiff had an appeal pending as to the judgment of dismissal on the third cause of action. Defendant knew, or should have known, that neither of these judgments was a final one. In fact, the satisfaction of the judgment on the first two causes of action was entered January 15, 1957, and almost immediately defendant moved to dismiss the appeal from the judgment of dismissal. That appeal had been pending since August 20, 1956, but no steps were taken to dismiss it until after the satisfaction had been entered on the other two causes of action, when it appeared to be too late to correct the situation by including a disposition of the third cause of action on the other judgment. Fortunately a way exists to permit appellants to challenge the ruling on the demurrer. Fair play requires that they be permitted to do so.

Thus, we come to the appeal on the merits. The third cause of action presents the question as to whether a person, injured by an intoxicated driver under the circumstances here alleged, may recover punitive damages. The trial court ruled, as a matter of law, that the injured plaintiff could recover compensatory damages only.

The original complaint, as already pointed out, contained but two causes of action, one by Mrs. Gombos for compensatory damages, and one by her husband for his compensatory damages. Both causes of action alleged negligence on the part of defendant. In the first amended complaint the first two causes of action were repeat-

ed, and the plaintiffs added a third cause of action for punitive damages. It is therein alleged that Ashe "wilfully, wrongfully, recklessly and unlawfully [did] maintain, control and operate" his automobile "in a grossly negligent, and highly reckless manner with absolute disregard and callous indifference to the rights and safety of all persons on said highway at said time, including the plaintiffs, in that said defendant was then and there knowingly and wilfully intoxicated, having had overindulged in alcoholic refreshments, well knowing that at said time and place the excessive alcoholic refreshments consumed by him rendered him physically unfit to operate a motor vehicle upon said public highway, and that he knew the combination of alcohol and fatigue made him a menace to all persons using said highway, including the plaintiffs."

[4] Did this sufficiently plead a cause of action for punitive damages? We think not.

Section 3294 of the Civil Code is the governing statute. It provides:

"In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Since oppression or fraud are not here alleged, the question is whether the third cause of action sufficiently alleges express or implied malice. It will be noted that, although the pleader uses such adverbs as "wilfully," "wrongfully," "recklessly" and "unlawfully," when the allegation is read as a whole it amounts to the claim that because the defendant got intoxicated knowing that he was going to drive on the public highway the actions of defendant became wrongful, wilful, reckless and unlawful. In our opinion such allegations do not charge malice, express or implied.

[5-7] There are certain fundamental principles that must be kept in mind. Punitive damages are allowed in certain cases as

a punishment of the defendant. They are not a favorite of the law and the granting of them should be done with the greatest caution. They are only allowed in the clearest of cases. In order to warrant the allowance of such damages the act complained of must not only be wilful, in the sense of intentional, but it must be accompanied by some aggravating circumstance, amounting to malice. Malice implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. There must be an intent to vex, annoy or injure. Mere spite or ill will is not sufficient. Mere negligence, even gross negligence, is not sufficient to justify such an award. (See discussion and cases commented on in 15 Am.Jur. p. 698, § 265 et seq.)

In 14 Cal.Jur.2d, p. 810, § 176, appears the following statement of the applicable principles, supported by many cases:

"An award of exemplary damages, in an action for damages for injuries inflicted by the defendant's malicious act, can be made only if the plaintiff can show that malice in fact, as distinguished from malice in law, existed with respect to the defendant's act. The distinction between malice in fact and malice in law is substantial. Malice in fact, or actual malice, denotes ill will on the part of the defendant, or his desire to do harm for the mere satisfaction of doing it. Malice in law, on the other hand, is merely a legal fiction; it is that form of malice which the law presumes, either conclusively or disputably, to exist on the production of certain designated evidence. Malice in fact cannot be presumed; * * * While the element of malice which is essential to a recovery of exemplary, or punitive, damages is sometimes called 'express malice,' 'actual malice,' 'real malice,' or 'true malice,' it is always, in the last analysis, malice of only one kind—the malice of evil motive."

And on page 812, § 180, of 14 Cal.Jur. 2d appears the following:

"Since ordinary or simple negligence necessarily implies an absence of intent or

purpose; it cannot form the basis of an award of exemplary damages. Even an act of gross carelessness will not, of necessity, warrant the imposition of exemplary damages."

[8] When these principles are applied to the facts here alleged, it is quite apparent that such facts fall short of alleging malice in fact, express or implied. One who becomes intoxicated, knowing that he intends to drive his automobile on the highway, is of course negligent, and perhaps grossly negligent. It is a reckless and wrongful and illegal thing to do. But it is not a malicious act.

California has already ruled that punitive damages may not be recovered because of the intoxication of an automobile driver. In *Strauss v. Buckley*, 20 Cal.App. 2d 7, 65 P.2d 1352, the court reversed a verdict as excessive, and held that the verdict could not be upheld as an award of punitive damages. At page 8 of 20 Cal. App.2d, at page 1353, of 65 P.2d the court said: "The damages recoverable in a case of this kind are to be compensatory only; punitive damages are not recoverable because of the drunkenness of the defendant. That is an offense in itself for which punishment may be imposed in the ordinary course of law. Evidence of the drunkenness may be offered, of course, to show the negligence of the driver, but it may not be used to enhance the award of damages beyond that which will fairly compensate the plaintiff for the injuries suffered."

[9] The reason given by the appellate court to deny punitive damages—because the wrongful act was punishable criminally—is probably not a sound reason. Although there is some authority to support such a view, it is contrary to the weight of authority (see cases collected 15 Am. Jur. p. 711, § 275), and very likely contrary to the California cases. See cases collected 14 Cal.Jur.2d p. 820, § 188; see also *Vaughn v. Jonas*, 31 Cal.2d 586, 191 P.2d 432. But the *Strauss* case was decided in 1937. The rule of that case, hold-

ing intoxication not a basis for punitive damages, is referred to in many encyclopedias and articles and texts as aligning California with those states that deny recovery for punitive damages in such cases. For 21 years this rule has remained unchallenged. The Legislature has met many times since the rule was first announced and has not seen fit to change the law. This is entitled to some weight. It is particularly significant when the results that would follow from the announcement of a contrary rule are considered. If, by allegations similar to those here involved, a plaintiff can put into issue his right to punitive damages, it means that contributory negligence cannot be urged as a defense to the punitive damage charge, and, because punitive damages are based on the defendant's ability to pay, it also means that the plaintiffs can offer evidence of the financial status of the defendant. This would convert personal injury cases where intoxication or wilful misconduct are involved from the trial of a negligence case into a field day in which the financial standing of the defendant would become a major issue. For 21 years at least it has been the announced rule in this state that such could not be done. If such a radical change in policy is to be accomplished, it should be accomplished by the Legislature and not by the courts.

[10] Certainly the mere characterization of the conduct challenged as wilful, reckless, wrongful and unlawful is not of itself sufficient to charge the malice in fact required to sustain a cause of action for punitive damages. This was pointed out by Mr. Justice Wood of this court in *McDonell v. American Trust Co.*, 130 Cal. App.2d 296, 279 P.2d 138. In that case a tenant sued his landlord for failing to repair a building after notice of the defect, knowing of the danger of injury to the tenant. The plaintiff, in a separate count, charged that defendant was aware of the defects and knew that they could cause damage, and claimed that this constituted a cause of action for an intentional tort

and entitled him to punitive damages. The court disposed of this contention with the following language (130 Cal.App.2d at page 298, 279 P.2d at page 140):

"'In wilfully failing to repair' said defective condition of the premises with reference to the roof and roof drains 'after having received due notice of the dangerous condition thereof,' and 'having knowledge of the fact that said defective conditions could cause damage and injury to the property and persons of the tenants,' defendants were 'guilty of wilful misconduct in their wilful and wanton neglect for the safety and health of the plaintiffs,' and were also 'guilty of a conscious disregard to the persons, rights and property of the plaintiffs by continually failing and refusing to repair the defective conditions as aforesaid,' and Irene demands punitive damages in the sum of \$1,500.

"Plaintiffs in their opening brief interpret these allegations as stating that 'the landlord wilfully, consciously, intentionally and deliberately failed to keep the roof and drain wells in working condition, and failed and affirmatively refused to repair the same after notice of the defects' with 'a conscious, wilful and deliberate intention to injure and harm appellants'; tantamount to oppression and malice in fact, justifying punitive in addition to actual damages.

"We do not so read the second count. The gist of the first part of the count (that which deals with actual damages) is that defendant, aware of the defective condition of the roof and drains and knowing they could cause damage, refused to repair them. Those facts do not spell an intentional tort (a conscious, deliberate intent to injure the plaintiffs) or conduct so recklessly disregarding of the rights of others (sometimes characterized as wanton or wilful misconduct) as would show the 'malice' *in fact* which the statute, Civ.Code, § 3294, requires as a predicate for punitive in addition to actual damages."

For the very same reasons the complaint here involved does not state a cause of action for punitive damages.

The cases outside of California are in conflict as to whether intoxication may constitute a basis for an award of punitive damages. In *Giddings v. Zellan*, 82 U.S.App.D.C. 92, 160 F.2d 585, the United States Court of Appeals for the District of Columbia, held that under Maryland law, there involved, drunkenness was not a predicate for the allowance of punitive damages. It held that to justify such an award there must be an element of fraud, or malice or evil intent or oppression, and that injuring another while drunk did not involve any of these.

There are cases, six in fact, that have held that intoxication of an automobile driver will support a cause of action for punitive damages. *Sebastian v. Wood*, 246 Iowa 94, 66 N.W.2d 841; *Southland Broadcasting Co. v. Tracy*, 210 Miss. 836, 50 So.2d 572; *Bush v. Watkins*, Miss., 80 So.2d 19—not involving intoxication but involving wanton and reckless conduct; *Miller v. Blanton*, 213 Ark. 246, 210 S.W.2d 293, 3 A.L.R.2d 203; *Ross v. Clark*, 35 Ariz. 60, 274 P. 639; *Falls v. Mortensen*, 207 Or. 130, 295 P.2d 182; see also annotation 3 A.L.R.2d 212.

These cases were apparently decided under common-law principles. At any rate, they did not involve a statutory limitation on the right to recover punitive damages such as is to be found in section 3294 of the Civil Code. As already pointed out, that section requires malice in fact to be pleaded and proved before recovery for punitive damages may be allowed. In several of the above cases it was held that malice, under the law of the states there involved, was not an integral part of such a cause of action. In several of the others, gross negligence was held to be a sufficient basis for such a requirement. Reckless conduct in several of the cases was held all that is required. As already pointed out, that is not the law of California.

It is ordered that the judgment of November 28, 1956, be and it is hereby amended by adding thereto a paragraph dismissing the third cause of action. In the interests of justice, and exercising the discretion conferred by Rule 2(c) of the Rules on Appeal, the notice of appeal of August 20, 1956, is declared to be a notice of appeal from that portion of the judgment as so amended that dismissed the third cause of action. The motion to dismiss the appeal is denied.

The portion of the amended judgment dismissing the third cause of action is affirmed. Respondent to recover costs on appeal.

BRAY and FRED B. WOOD, JJ., concur.



158 Cal.App.2d 500

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

James David HUNTER, Defendant and
Appellant.

Cr. 6003.

District Court of Appeal, Second District,
Division 3, California.

March 18, 1958.

Prosecution for violating sections 288 and 288a of the Penal Code. The Superior Court of Los Angeles County, Beach Vasey, J., entered a judgment convicting defendant on both counts, and he appealed from order denying his motions for new trial. The District Court of Appeal, Parker Wood, J., held that testimony that defendant had placed his mouth upon genital organ of prosecutrix was sufficient to support conviction of violating section 288a without proof of copulation.

Affirmed.

1. Criminal Law ⇨553

Testimony is not "inherently improbable" unless it appears that what was related or described could not have occurred.

See publication Words and Phrases, for other judicial constructions and definitions of "Inherently Improbable".

2. Criminal Law ⇨260(11)

To warrant rejection of statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

3. Criminal Law ⇨553

Inherent improbability only exists when no reasonable person could believe the testimony.

4. Infants ⇨20

Sodomy ⇨6

Testimony of nine-year-old prosecutrix was not inherently improbable, so as to be insufficient as matter of law to support verdicts finding defendant guilty of violating sections 288 and 288a of Penal Code. West's Ann.Pen.Code, §§ 288, 288a.

5. Sodomy ⇨6

Testimony that defendant placed his mouth upon genital organ of prosecutrix was sufficient to support conviction of violating section 288a without proof of copulation. West's Ann.Pen.Code, § 288a.

Ward Sullivan, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was accused of violating sections 288 and 288a of the Penal Code. In a trial by jury he was convicted on both counts. Proceedings were suspended and probation was granted. He appeals from the order denying his motion for a new trial.

Appellant contends that the testimony of the prosecutrix was inherently improbable

and was insufficient as a matter of law to support the verdicts.

In October, 1956, Jo Anne, the prosecutrix, 9 years of age, lived on Graywood Street with her mother, stepfather, and two younger sisters. Defendant lived on the opposite side of that street and three houses farther down the street. He lived with his wife and 6-year-old son. On Saturday morning, October 27, 1956, Jo Anne, her sister, another little girl, and defendant's son were playing on the front lawn at defendant's home. On that morning defendant cut the lawn.

Jo Anne testified that about noon of that Saturday defendant talked to her in the garage about going for a ride and he told her to meet him in front of a school (which was around the corner and about half a block away); he also said he would give her some money if she would "play nasty"; then she left her bicycle in the driveway of her home, and walked to the front of the school; defendant drove a blue automobile to the school, and she got into the automobile; he drove to a drive-in restaurant where he bought a hamburger and a malt for her; after she finished eating, he drove to a place near a ditch where there were bushes; they walked along the bank of the ditch and then got back into the automobile; then her clothes were pulled down, and he licked and rubbed her between her legs; while he was doing that he gave her some money; they got out of the automobile and went behind bushes; he told her to lick him between his legs; she did what he told her to do; he drove the automobile to a place which was about half a block from Jo Anne's home, and she got out of the automobile; at that place she saw Gary, a 9-year-old neighbor, and she talked with him about two minutes; she arrived home about 1:30 p. m. and told her mother what had happened, and she gave her mother the \$1.75 which defendant had given to her; sometime after that day she went with Deputy Sheriff Wagnon, in an automobile, and she pointed out the streets and places where, according to her understanding, she had gone with defendant.

Gary, the 9-year-old neighbor, testified that he lived about four houses from Jo Anne; he did not know defendant; on October 27, 1956, about five or ten minutes before 1:30 p. m., he saw Jo Anne get out of a blue automobile about two houses from his home; she told him that she had \$1.75, and she showed the money to him; he thought that the money was all silver; he did not see the driver of the automobile. On cross-examination he said he was going to have a birthday party at his home on October 27 at 1:30 p. m., and that before the party started he was riding a bicycle when he saw Jo Anne coming down the street in the automobile; after he talked to her for one or two minutes he went home; he thought it was about 1:30 p. m. when he got home, because his party friends began to arrive soon after he was at home.

The mother of Jo Anne testified that on Saturday, October 27, 1956, about noon, Jo Anne made a complaint to her about defendant; at that time Jo Anne handed \$1.75 to her; she (witness) put the money in a cup and then she put the cup and money (coins) in the cupboard and kept it there until she brought it to court; she notified the sheriff on the following day (Sunday). On cross-examination she said that on Saturday afternoon (after the complaint by Jo Anne) she and her husband and their three children went to a carnival; she saw defendant and his wife at a carnival booth, where the defendant and the husband of the witness tossed coins, trying to win prizes; at that time there was a friendly atmosphere among them; at that time the husband of the witness did not know "anything."

Deputy Sheriff Wagnon testified that, in the course of investigating the case, he went with Jo Anne to places which she pointed out, including a drive-in restaurant, a levee by a river, and bushes; he had a conversation with defendant on October 30 and at that time the deputy read a report to defendant wherein it was stated that the girl had \$1.75; nothing further was said about money at that time; in another conversation with defendant on November 1,

defendant said that he could not have given the girl the money—that his money was in bills and he did not have any 50 cent pieces; the deputy replied that he (deputy) had not said anything about 50 cent pieces; defendant said that the deputy or another deputy had mentioned it at the other conversation, and he (defendant) assumed there would be some 50 cent pieces in \$1.75; on October 30 and November 1 when defendant was asked by telephone to come to the sheriff's office, he came there in response to those requests; he was not arrested until approximately two weeks after October 27.

Defendant testified he is head of the general ledger section of the accounting division of a shipyard; he was at home during the morning of October 27, 1956, and he cut the lawn; Jo Anne, other neighbor children, and his son were playing in the yard while he was cutting the lawn; he saw Jo Anne leave and go across the street about noon; he did not have any conversation with her to the effect that he told her to meet him in front of the school and he would take her for a ride; he left his house about noon of that day, and before he left he received \$2.00 in bills from his wife; he did not have any other money with him except a few cents, probably 7 cents; he went to the store of the Pep Boys in Bellflower to buy a handle for the door of his car; he did not make the purchase, because the clerks were busy waiting on other customers and he lost his patience and went home; he arrived home about 12:30 p. m. and began reading the newspaper; he had lunch at home that day and remained there from approximately 12:30 p. m. to 3 p. m. when he, his wife, and son went to a carnival; he saw Jo Anne and her parents at a carnival booth where he pitched coins trying to win a prize; he spoke to her parents, and the general atmosphere there was one of friendliness; he returned home about 5 p. m.; after he returned home, Jo Anne's sister came to his home and stayed there about an hour; he did not take Jo Anne anywhere in his automobile on October 27, 1956; he did not perform any of the acts

upon the body of Jo Anne, which she testified he performed; when he was asked on October 30 and November 1 to go to the sheriff's office, he went there voluntarily; when one of the officers said that he (defendant) had given the girl \$1.75, he replied that he did not give her any money.

Mr. Kasczuk, called by defendant, testified that on October 27 he was setting tile in defendant's home from approximately 8 a. m. until approximately 12:30 p. m.; he (witness) was of the belief that when he left defendant's home, between 12:30 and 12:45 p. m., defendant was at home reading a paper.

Mrs. Smith, called by defendant, testified that she was a neighbor of Jo Anne and defendant; that Jo Anne's general reputation for truth is bad. Two witnesses, called by defendant, testified that defendant's general reputation for morality is excellent.

[1-4] Appellant asserts that the testimony of Jo Anne was inherently improbable for the following reasons: appellant was of good moral reputation; he was employed in a responsible position; a friendly atmosphere prevailed between appellant and Jo Anne's parents at the carnival, which was after Jo Anne had complained to her mother; Jo Anne's sister was allowed to go to defendant's home on Saturday after the carnival; on two occasions defendant voluntarily went to the sheriff's office as requested; he was not arrested until several days after the alleged incident; it is improbable that the alleged acts would have been committed in broad daylight; appellant's testimony as to his whereabouts on Saturday between 12 and 1:30 p. m. was corroborated by his wife and by the man who set tile in defendant's home; Jo Anne's reputation for truth was bad. "Testimony is not inherently improbable unless it appears that what was related or described could not have occurred. [Citation.] 'To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or

deductions.” People v. Thomas, 103 Cal. App.2d 669, 672, 229 P.2d 836, 838. “Inherent improbability only exists when no reasonable person could believe the testimony.” Tamble v. Downey, 104 Cal.App.2d 810, 812, 232 P.2d 543, 544. The testimony of Jo Anne was not inherently improbable.

[5] Appellant asserts further that the evidence was insufficient as a matter of law to support the verdict as to violation of section 288a of the Penal Code. That section provides: “Any persons participating in an act of copulating the mouth of one person with the sexual organ of another is punishable * * *.” Appellant argues that the testimony of Jo Anne, above stated, with reference to that charge, even if believed, did not prove copulation. He cites People v. Angier, 44 Cal.App.2d 417, at page 419, 112 P.2d 659, at page 660, wherein it was said that a “lick of the private organ, even though lewdly done (Pen.Code, sec. 288), is not a copulation.” The opinion in People v. Harris, 108 Cal.App.2d 84, 238 P.2d 158, was written by the same Justice who wrote People v. Angier, supra. In People v. Harris, 108 Cal.App.2d at page 88, 238 P.2d at page 160, it was said: “He [appellant] seeks refuge behind People v. Angier * * *. This court [in the Angier case] was impressed that the mouth of the accused could not have touched the bodies of the children. * * * On reaching that conclusion we were led into a discussion of the significance of the word ‘copulate.’ While that discourse was philologically correct it was calculated to lead to the erroneous doctrine that the use of the word in section 288a signifies a legislative intent that an offender of the statute is guilty only when he has committed the repulsive act of sex perversion. Such was not the purpose of the lawmakers or the intention of this court. A person is guilty of violating the statute when he has placed his mouth upon the genital organ of another. * * * The Angier decision is not pertinent unless the factual situation under judicial consideration is in all essential details identical with those there adjudicated.” In the present case, the evidence was legally sufficient to

support the verdict as to violation of section 288a.

Whether or not the testimony of Jo Anne and other prosecution witnesses should be believed was a question for the determination of the jury. That testimony, if believed, was sufficient to support the verdicts.

The order denying the motion for a new trial is affirmed.

VALLÉE, J., concurs.

SHINN, P. J., concurs in the judgment.



CALIFORNIA GASOLINE RETAILERS, a corporation, and Phillip M. Hudson, Plaintiffs and Respondents,
v.
REGAL PETROLEUM CORPORATION OF FRESNO, Inc., a corporation, et al., Defendants and Appellants.*
Civ. 5391.

District Court of Appeal,
Fourth District, California.
March 12, 1958.

Hearing Granted May 7, 1958.

Action to enjoin operation of alleged lottery by oil companies whose dealers distributed tickets for drawings at which holders of winning tickets were awarded prizes. The Superior Court of Fresno County, George M. DeWolf, J., granted injunction, and defendants appealed. The District Court of Appeal, Mussell, J., held that evidence established that a number of free tickets distributed by defendants was relatively small in comparison to those which were distributed to patrons of various stations and that giveaway program operated by defendants constituted a lottery.

Affirmed.

* Opinion vacated 330 P.2d 778.

1. Lotteries ⚡3

In action to enjoin giveaway programs operated by oil companies whose dealers distributed tickets for drawings at which holders of winning tickets were awarded prizes, evidence established that number of free tickets distributed was relatively small in comparison to those which were distributed to patrons of various stations and sustained finding that each program constituted a "lottery". West's Ann.Pen.Code, § 319.

See publication Words and Phrases, for other judicial constructions and definitions of "Lottery".

2. Injunction ⚡114(2)

Nonprofit corporation, which had members engaged in operation of gasoline stations was proper party plaintiff in action to enjoin lottery operated by other oil companies, in view of fact that class was ascertainable and each member of plaintiff corporation would be required to show same basic facts concerning operation of lottery. West's Ann.Code Civ.Proc. § 382; West's Ann.Pen.Code, § 319.

3. Injunction ⚡103

In absence of a special injury, an injunction will not be granted on application of a private individual merely to prevent violation of a penal statute, but where property rights are endangered, fact that acts are criminal will not prevent a court of equity from exercising its jurisdiction. West's Ann.Code Civ.Proc. § 526, subs. 5, 6.

4. Injunction ⚡103

Where nonprofit corporation, which had members engaged in operation of gasoline stations, corporation's president, and corporation's members, brought action to enjoin operation of lotteries by oil companies in violation of Penal Code, it would have been extremely difficult to ascertain amount of compensation which would afford relief to plaintiffs, and all plaintiffs had interests of pecuniary nature in businesses which they conducted, injunctive relief was proper. West's Ann.Pen.Code, § 319.

5. Parties ⚡51(4)

Where nonprofit corporation, which had members engaged in operation of gasoline stations, brought action against other oil companies to enjoin operation of lottery, allowing complaint to be amended to add name of corporation's president, who was an individual retailer, as party plaintiff was not improper where no new cause of action was stated by amendment, and no new facts were alleged as ground of recovery. West's Ann.Pen.Code, § 319; West's Ann.Code Civ.Proc. § 473.

A. E. Stebbings, C. Neil Ash, James D. Garibaldi, Los Angeles, Frank C. Lerrigo, Eckhart A. Thompson, Fresno, Martin J. Weil, Brewster L. Arms, Los Angeles, Robert R. Rosson, and A. Hugo Pearson, Hanford, for appellants.

Rowell, Lamberson & Thomas, Milo E. Rowell, Richard Z. Lamberson, and Breckinridge Thomas, Fresno, for respondents.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for amicus curiae.

MUSSELL, Justice.

The original plaintiff in this action for injunctive relief is the California Gasoline Retailers, a nonprofit California corporation, which has sixty-four members engaged in the operation of gasoline stations in the Fresno area, the area covered in the complaint. The corporation members distribute the products of Standard Oil, Shell Oil, Union Oil and other major oil companies. The defendants are the Regal Petroleum Corporation of Fresno, Inc., Regal Stations of Fresno, Inc., and approximately seventy corporations, partnerships and individual independent service station operators. The various defendants were divided into three groups at the time of trial, depending upon the products they handle, and are referred to in the briefs as the "Regal", "Beacon" and "Norwalk" groups. The Regal defendants handle Regal products and the other defendants handle Beacon and Norwalk products. The third cause of action in the

complaint herein involves the Regal group. The sixth cause of action involves the Norwalk group and the ninth involves the Beacon defendants. It is alleged in these causes of action that the defendants were engaged in a scheme for the disposal of property by chance among persons who had paid or promised to pay valuable consideration for the chance of obtaining such property in violation of section 319 of the Penal Code.

The trial court held that the acts of the defendants described in the third, sixth and ninth causes of action constituted a lottery within the meaning of the provisions of said section 319 of the Penal Code. Judgment was entered in accordance with this holding and defendants appeal from this portion of the judgment and from the portion thereof decreeing that plaintiffs are entitled to an injunction restraining the defendants from directly or indirectly operating a lottery or furnishing tickets or chances thereon.

The principle contention of all the appellants is that their respective advertising, merchandising and give-away programs did not constitute a lottery.

Regal Stations

The record shows that the Regal defendants operate three gasoline stations in the Fresno area. These stations conduct what is generally known as a give-away program. During the first ten months of 1955, 1,690,000 tickets were distributed to the Regal stations in Fresno for redistribution to the public. Anyone entering a Regal station was given four tickets. Tickets were distributed at four drive-in theatres in Fresno and were given away at baseball games and from house to house. Whenever tickets were given away at locations away from the stations, they were distributed with the stubs attached, so that the recipient was required to go to a Regal station to deposit the stub in order to participate in the drawing. One station, in September, 1955, distributed about 6,000 tickets away from the station, and the tickets distributed at locations other than the gasoline stations

amounted to less than 6,000 per month. The Regal give-away was conducted under a set of rules posted in each service station and the first of these rules provided that any person over eighteen years of age would be given free an officially numbered ticket for the drawing under the program. Tickets were given away at the stations irrespective of any purchase and those who purchased products received their tickets before any purchases were made. The rules provided that the winner would not have to be present at the time of the drawing and the winning numbers were posted at the Regal stations for seven days. Periodic drawings were held at which the holder of the winning ticket was awarded the prize, an automobile, cash, or other personal property.

Norwalk Stations

The operation conducted by the Norwalk defendants was similar to the program initiated by Regal and consisted of newspaper, radio, and billboard advertising to the effect that each month, commencing with May, 1955, Norwalk stations would give away three new Buicks, together with eighteen household appliances. When the Norwalk program was started, the distributors, to defray the cost of the tickets, advertising and expenses, increased the price of gasoline to the retailers one cent per gallon. This raise commenced May 1st, simultaneously with the commencement of the give-away program. Norwalk dealers who chose not to participate in the give-away program were not charged the extra one cent per gallon by the distributor and did not raise their retail price to the public. The number of tickets furnished to all Norwalk dealers in the Fresno area for distribution to the public was about 110,000 per month. In the month of May, 150,000 tickets were distributed by Norwalk to each station in the Fresno area, the greater part of which was redistributed to the public.

William Kim, a student at Fresno State College, distributed 5,000 Norwalk tickets at the Fresno County Fair grounds by placing them under the windshield wipers of automobiles, one ticket to each car. The

stubs were attached to these tickets and each had Norwalk advertising attached to it. Recipients of these tickets were required to go to a Norwalk station to deposit the stub in order to participate in the drawing.

Sample testimony of Norwalk dealers was taken to show the typical operation of the program. In this connection, Frank Tashima, a Norwalk service station dealer, stated that he was told by the Norwalk distributors that he was to give a ticket to anyone who came in and asked for one. When asked how many tickets he gave to persons who did not purchase any products, he replied, "not very much". He distributed between 8,000 and 15,000 tickets per month from May through August, 1955, and did not distribute any away from the station. He gave a larger number of tickets for larger purchases and passed along the one cent per gallon price raise to the public.

Appellant Donald McKelvey, a Norwalk service station dealer, stated that he distributed some 34,000 tickets in May, 1955, when the program started, and up to 65,500 in August; that Norwalk dealers are arbitrarily issued four tickets to the customer; that he probably distributed less than 1,000 tickets per month at the station to non-customers and that he averaged between 3,500 and 4,000 tickets distributed per month away from the premises.

Conrad Herzog, a Norwalk service station dealer, stated that at his station tickets were given to persons when they drove into the station and after a purchase, a person was given more tickets, the greater the purchase the more tickets he received; that he gave approximately 1,000 tickets each month away from the station and distributed about 2,500 tickets at the station each month to persons who made no purchase. The record of Currie Bros. shows that Herzog received for distribution at his station 24,000 tickets in May, 42,300 in June, 35,700 in July and 52,000 in August.

Beacon Stations

The secretary of the United Stations, Inc., an association of gasoline stations

formed by the operators for the purpose of operating give-away programs, stated in his deposition that the United Stations distributed 500,000 tickets per month and that they were distributed to retailers on the basis of one ticket for each two gallons of gasoline the dealer had sold the previous month; that the purpose of the United Stations in conducting this program was to induce more persons to patronize the stations and thus secure financial gain to the members of the United Stations.

Roger C. Ingraham, vice-president in charge of sales of Caminol Company, stated in his deposition that when the Beacon and Caminol give-away, which was integrated with the United Stations give-away program April 1, 1955, was commenced, the service station dealers increased the price of gasoline to the consuming public one cent per gallon. Caminol did not raise the price of gasoline to the dealers on the invoices, but the dealers remitted to Caminol the extra one cent per gallon which they received from the customer by raising the retail price. This extra one cent was used to pay for prizes, advertising and similar expenses incidental to the give-away program.

Peter Seibert, a Beacon distributor, stated in his deposition that it was generally understood at the commencement of the give-away program that the dealers would raise the price of gasoline one cent per gallon if they desired to participate in the program; that if, for example, a dealer sold 10,000 gallons, he (Seibert) gave him a receipt for \$100 to apply on the United Stations and this receipt represented the one cent per gallon used to pay for the prize; that originally the Beacon dealers received for distribution two tickets for each gallon of gasoline sold the previous month and that all the tickets, except a very small amount, were distributed at the dealer's station.

In this connection, a letter was introduced in evidence from Mr. Rouda to the dealers, dated July 18, 1955, advising them of a new system, and stating that they should give away two tickets when a person drove into the station, and "at least

once each month" they should give a "small quantity of tickets to purchasers away from the station".

Fred Gabel, a Beacon service station dealer, testified that he gave away 8,000 chance tickets in May and another 8,000 in April, of which 390 were distributed away from the station. These tickets still had the stubs attached so that the persons holding them would have to come to the station to deposit the stubs in order to participate in the drawing. Gabel further stated that he distributed a maximum of 90 tickets to persons at the station who made no purchase; that he distributed about 200 tickets away from the station each month, or two or three a day at the station, so that approximately 400 to 500 tickets out of the 9,000 tickets distributed each month were given away.

Joseph Foristiere, a Beacon dealer, testified that he gave away approximately 35,000 tickets per month, of which approximately 15,000 were given to persons who made no purchase; that at the commencement of the give-away program he increased his price per gallon to the buying public and that on the average he gave away 3,000 tickets away from the station and that he gave another 1,000 to persons who did not purchase anything.

Article IV, Section 26, of the California Constitution provides in part:

"The Legislature shall have no power to authorize lotteries or gift enterprises for any purpose and shall pass laws to prohibit the sale in this State of lottery or gift enterprise tickets or tickets in any scheme in the nature of a lottery. * * *

A lottery is defined in section 319 of the Penal Code as

"* * * (a)ny scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be dis-

tributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known."

It is conceded by all of the appellants herein that the elements necessary to constitute a lottery are (1) Disposition of property (2) upon a contingency determined by chance (3) to a person who has paid a valuable consideration for the chance of winning a prize. Appellants further concede that the first two elements are present in the instant case. However, they claim that the third element is not present and that therefore no lottery existed. It is further stated by appellants that the question here to be determined is whether under the evidence and the law of this state the third element, to wit, consideration, is present.

The precise question here involved apparently has not been passed upon by the courts of this state. However, there are four California decisions to which our attention has been directed. The first is that of *People v. Cardas*, 137 Cal.App.Supp. 788, 28 P.2d 99, decided by the Appellate Department of the Superior Court of Los Angeles County. This case involved the question whether the defendant was conducting a lottery as defined by section 319 of the Penal Code. The defendant therein was the operator of a motion picture theatre. He advertised by means of theatre programs, newspapers, placards, and on the screen that the theatre would give away a prize consisting of two fully paid round trip tickets to Santa Catalina Island to the holders of the lucky tickets. The tickets were placed in the hands of the public by the distribution in the vicinity of the theatre of 5,000 theatre programs, each containing one of the tickets, and by handing 2,000 tickets to passing motorists. Also, an employee of the theatre was stationed between the street and the entrance to the theatre, who gave prize tickets to all who asked for them, and offered them to any person who approached her. No charge was made for any of these prize tickets, nor was it necessary that an admission to the theatre be

purchased. The cashier in the box office sold only admission tickets and did not have any prize tickets in her possession. A receptacle was placed outside the theatre in which were deposited the stubs from the prize tickets. The stubs were placed therein by persons who purchased admission tickets, by those who were admitted to the theatre free, and by others who did not attend the show. The drawing was held on the theatre stage and any one who held the winning prize number was entitled to enter the theatre without charge for the purpose of claiming the prize. The winner of one of the prizes was a patron who had not purchased an admission ticket. The court said (137 Cal.App.Supp. at page 791, 28 P.2d at page 100):

"The question is: Did the holders of prize tickets pay a valuable consideration for the chance? Certainly those who received prize tickets without buying an admission ticket did not pay anything for the chance of getting the prize. They did not hazard anything of value. It would then seem to follow that those who purchased admission tickets and received prize tickets, not at the box office, but from another employee, could not be said to have paid a consideration for the prize tickets since they could have received them free."

The court then stated that the principles set forth in *Cross v. People*, 18 Colo. 321, 32 P. 821, 822, 36 Am.St.Rep. 292, were sound and were, in general, applicable. In the *Cross* case the proprietors of a Denver shoe store distributed numbered cards which carried advertisements of their goods and information about drawings for prizes. Anyone, including noncustomers, could get one card upon request, either by personal call or by mail. A card was given with any purchase of \$1 or under and additional cards in proportion on larger purchases. Winners were not required to be present at the drawing. It was held therein that "The element of gambling that is necessary to constitute this a lottery within the purview of the statute, to wit, the paying

of money, directly or indirectly, for the chance of drawing the piano, is lacking, and the transaction did not constitute a violation of the statute." The court therein further stated that the fact that such cards or chances were given away to induce persons to visit the store with the expectation that they might purchase goods, and thereby increase their trade, is a benefit too remote to constitute a consideration for the chances.

In the *Cardas* case it was further said, 137 Cal.App.Supp. at page 792, 28 P.2d at page 101:

"An examination of the cases holding certain schemes, apparently somewhat similar to the one here in question, to be lotteries, discloses vital points of distinction. In general they fall into two groups. In one group it will be found that the prize tickets were only furnished to customers—those who purchased something. The payment made by the customer was for both the articles purchased and the prize ticket—part of the consideration was for the ticket."

In *People v. Gonzales*, 62 Cal.App.2d 274, 144 P.2d 605, the court held that a valuable consideration was paid for the chance of obtaining property upon an understanding that it was to be distributed by chance. In that case "cash night" tickets were given to each patron of a theatre at the time he paid the regular admission price and another ticket was delivered to each patron as he was leaving the theatre. The record did not show that any ticket was delivered by the theatre to any person or "customer" for the asking or at all, who did not pay admission. There was no announcement by the theatre employees that drawing tickets would be given gratuitously to "customers" or other persons if they would ask for them, or that such tickets would be given gratuitously, or at all. There was no general or indiscriminate distribution of drawing tickets to persons, irrespective of whether they paid admission and the court held that (62 Cal.App.2d at page 281, 144 P.2d at page 608)

"Even if the evidence had shown that drawing tickets were distributed to 'persons' gratuitously in accordance with the qualifying statement of that witness, it would not have presented a conflict in the evidence which would have supported a finding that there was an indiscriminate distribution of tickets to persons irrespective of whether they paid admission, unless such distribution to non-customers was of a substantial number of tickets in relation to the 180,000 tickets issued to customers for each six weeks period. The distribution of a negligible number of tickets to non-customers would not have presented a substantial conflict in the evidence."

In discussing the case of *People v. Cardas*, supra, the court (in the *Gonzales* case) said (62 Cal.App.2d at page 281, 144 P.2d at page 609): "That decision was based upon the fact that there was a general and indiscriminate distribution of the drawing tickets irrespective of whether admission was paid; that attendance inside the theater was not a prerequisite to participation in the drawing; and announcement was made outside the theater for the benefit of non-customers. The method of distributing the prize tickets in that case was different very materially from the method of distribution herein." The court further pointed out that in the case of *Cross v. People*, cited in the *Cardas* case, it was stated that the tickets or chances were given indiscriminately to persons whether they purchased goods of the plaintiff in error or not—to those who registered their names at their shoe store, and to those, who, from a distance, sent the return postage. The court also cited *State v. Danz*, 140 Wash. 546, 250 P. 37, 48 A.L.R. 1109, which involved a lottery statute substantially the same as section 319 of the Penal Code of this state. In that case the defendant, who operated the motion picture theatre, distributed groceries and other articles from the stage of the theatre to the holders of winning tickets. The articles distributed did

not cost the defendant anything but were obtained from various merchants whose names were mentioned as the articles were distributed. On the night of each drawing each adult patron, upon paying the admission charge, received a drawing ticket. There was a sign at the front of the theatre stating that the drawing tickets were free and it was not necessary to purchase tickets to the theatre. Announcement of the winning number was made outside the theatre, and anyone outside who held a winning ticket had the right to enter the theatre without charge to claim the prize. The court (in *State v. Danz*, supra) said, 140 Wash. at page 548, 250 P. at page 38:

"Manifestly, it was the plan and purpose of the appellants to get additional money by putting on the chance drawing. The testimony shows it was put on as an additional drawing card. The patrons knew it was "country store" night. They paid a valuable consideration to participate. The fact that they paid the same price charged on other nights when the theater was running a more popular play without an added attraction is not conclusive or controlling in favor of the appellants. A valuable consideration was paid. What did the purchaser get? Not simply a ticket for the screen show, but a ticket to that, and to the chance drawing. The appellants and their patrons so understood and intended it. That was the plan and purpose for which the consideration was paid. Nor is the fact that free tickets were offered to outsiders material in any controlling sense. None such was given out as a matter of fact, and, if there had been, it would not of itself have made any difference.'"

In commenting on the quoted language, the court in the *Gonzales* case said:

"Apparently the explanation of the last statement just quoted, to the effect that if free tickets had been given to non-customers it would *not of itself* have made any difference, was that if

the free distribution to non-customers was negligible as opposed to a general free distribution of a substantial number of tickets to non-customers it would not have made any difference."

In the Gonzales case the court held that the three elements of lottery were present. Citing *Darlington Theatres, Inc. v. Coker*, 190 S.C. 282, 291, 2 S.E.2d 782, and the annotation in 103 A.L.R. 866-872.

In *Holmes v. Saunders*, 114 Cal.App.2d 389, 250 P.2d 269, the defendants offered to subscribers to the *Associated Bulletin*, during its circulation drive, for a consideration of \$1 paid for a six months subscription thereto, said subscription being evidenced by numbered ticket delivered to the subscriber, and entitling the holder and subscriber of the numbered ticket to participate in a drawing in which the prize was a Buick automobile. It was held that the transaction was a lottery and that the consideration to make such a transaction a lottery need not be paid exclusively for the chance to win the prize; that it was sufficient that the consideration be paid for something else and the chance to win the prize; that under the pleadings and findings there was no element of gratuity so that cases such as *People v. Cardas*, supra, where free chances were widely given away without consideration, were not in point. The court further quoted from 34 *American Jurisprudence, Lotteries*, Section 7, page 650, where it is said that "(n)o sooner is the term 'lottery' defined by a court, than ingenuity evolves some scheme within the mischief discussed, although not quite within the letter of the definition given; but an examination of the many cases on the subject will show that it is very difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of a gratuitous distribution of property, which has not been held by the courts of this country to be in violation of the lottery laws * * *. The court will inquire, not into the name, but into the game, however skilfully disguised, in order to ascertain if it is prohibited. * * *"

People v. Carpenter, 141 Cal.App.2d 884, 297 P.2d 498, is a case relied upon strongly by the appellants herein. In that case the appellant was convicted of conspiracy to cheat and defraud and of the crime of grand theft. The case arose out of a bank night drawing at the Lakewood Theatre at Lakewood, California. The operators of the theatre solicited registrations from house to house and gave registration blanks to people in the theatre asking them whether they would like to register for a bank night. This continued until several thousand names had been registered before bank nights were started. Thereafter registration blanks were kept at the snack bar and sometimes at the box office and given to anyone who asked for them. It was not necessary to buy a ticket in order to register for bank night. Drawings were held once a week and the name of the winner was announced over the microphone within and without the theatre. The winner was given two minutes to reach the stage where he was required to identify himself. It was not necessary to pay admission to be present for the drawing or to claim the reward. Persons who wished to do so were permitted to enter the theatre free for the purpose of seeing and hearing the drawing and announcement. The record in that case shows that defendants Jones and Landon entered into a scheme to win at one of the drawings. Jones told Landon that somebody working for the theatre had entered his name in the book and that it was all set up. Landon was to be present at the drawing on a certain date when his name would be called and he would win the money. Thereafter, at one of the bank night drawings, the appellant contacted the manager of the theatre and asked questions about how he handled the drawing. The manager felt from appellant's conversation that he was not satisfied that the management was handling the drawing right. As a consequence, appellant was asked to draw the ticket that night. Jones gave appellant a ticket which contained a number corresponding to Landon's name, which had

been added to the registration book, and appellant, pretending to draw a ticket from the drum, palmed the ticket he had received from Jones. Landon's name was called and he was announced as the winner. He later called at the theatre and was given a check for \$4,000. This money was later divided between Jones, Landon and appellant. The court held that the appellant could not successfully maintain that the game in which he and his co-conspirators secured the bank night award was a lottery, inasmuch as he, by his own acts, eliminated the element of chance in the determination of the winner. The court further held, on the basis of the Cardas case, *supra*, that the element of consideration was lacking, and stated that there was nothing in the case of *People v. Gonzales*, *supra*, inconsistent with the decision in the Carpenter case. A petition for a hearing by the Supreme Court was denied in this case. However, it appears that the evidence therein was amply sufficient to sustain the judgment without passing upon the question of whether a lottery was being conducted by the theatre.

The foregoing California decisions seem to indicate (1) That where, as in the case of *People v. Cardas*, *supra*, all tickets were distributed free, outside the theatre, none were in the box office or delivered with the admission tickets, the element of consideration is lacking and there is no lottery; (2) That where, as in the case of *People v. Gonzales*, *supra*, tickets were given to each paying customer with the price of admission and also an additional ticket as the patron left the theatre, and more if he asked for them, the element of consideration was present; and (3) Where, as in the case of *People v. Carpenter*, *supra*, there were several thousand registration blanks solicited from house to house and registration blanks were given to all who asked for them and none were sold with the admission tickets, there was no lottery.

It is apparent in the instant case that the holders of free tickets did not pay a consideration for the chance of winning a prize, and that the purchasers of gasoline at the various stations operated by the defendants

did pay a consideration for such chances. This is so, because the funds derived from the sale of gasoline were used to pay for the prizes, and in the sales of Norwalk and Beacon gasoline, the price per gallon was increased to pay for the give-away program.

Under the California decisions cited it appears that if there were no free drawing tickets distributed, the program conducted by the appellants would constitute a lottery as defined by section 319 of the Penal Code. The question is whether free tickets sufficient in number were distributed and given away to prevent the court from holding that the give-away program was a lottery.

In *General Theatres v. Metro-Goldwyn Mayer Distributing Corp.*, D.C., 9 F.Supp. 546, a bank night case in Colorado, it was held that the wholly free distribution of 180,000 tickets as against 354,000 actually given to paying patrons did not eliminate consideration. In *State ex rel. Hunter v. Fox Beatrice Theatre Corporation*, 133 Neb. 392, 275 N.W. 605, it was held that registered buyers of admission tickets made a contribution to increased income out of which a prize could be paid; that this contribution, under the practical operation of bank night, is the consideration actually paid by the registered ticket holders for a chance for a prize and it is no less effective for that purpose because larger numbers of registrants do not pay for theatre tickets or occupy seats at the drawing.

Knox Industries Corp. v. State, Okl., 258 P.2d 910, involved the giving of an automobile by chance to the holder of a lucky number on a ticket which he had received at one of defendant's service stations. These tickets could be secured at such service stations without charge and no purchase was required. However, the court held that since the participants were required to visit the station to secure tickets and all prospective participants were subjected to the sales appeal of the merchandise offered for sale at defendant's stores, and since a winning participant was required to claim the prize at defendant's

main office, a sufficient consideration moved from the participant to the defendant.

In *Featherstone v. Independent Service Station Ass'n*, Tex.Civ.App., 10 S.W.2d 124, 127, tickets entitling the holders to a chance on an automobile were distributed indiscriminately to customers and noncustomers for the purpose of promoting good will and the court held that while some tickets were distributed to noncustomers, the tickets were "in the main" still distributed to customers; that the giving of the tickets, the drawings, and the distribution of the prizes were successful inducements to obtain patronage, and that this patronage constituted consideration, making this game a lottery.

In *Lucky Calendar Co. v. Cohen*, 19 N.J. 399, 117 A.2d 487, 496, the court, in discussing the element of consideration required in a lottery, stated:

"Viewing the element of consideration in the aspect most favorable here to the plaintiff—that the participant need not come to the Acme Stores; that he need purchase nothing; and that he need pay nothing for the Lucky Calendar—still, sufficient consideration exists in the form of completing the coupon and arranging for the deposit of it in the box 'just inside the door of his nearest Acme Supermarket.'

"Quite apart from having obtained from the promisee something to which the promisor had no previous right, thereby obtaining a benefit, *Willison*, supra, 102, 102A, it is transparently clear that the real benefit which the plaintiff and its customer, American Stores Company, were seeking—and in fact has been obtaining—is an increase in volume of business. The whole advertising scheme is artfully directed to enticing customers to the Acme Supermarkets to the resultant benefit of American Stores Company and incidentally of the plaintiff. The motives of the plaintiff and its customer, American Stores Company, are in nowise altruistic. Somebody must pay for the pro-

gram and the prizes—and the ultimate bearer of the burden is of course the 'lucky' calendar holder."

In *McFadden v. Bain*, 162 Or. 250, 91 P. 2d 292, 295, theatre tickets for drawings were given to patrons of the theatre and were also distributed throughout the neighborhood. The tickets were placed in a receptacle outside the theatre. The court held that

"To constitute a lottery, it is not necessary for all participants to pay for their chances, but it is sufficient if some do though many do not pay a valuable consideration. The legal effect of the transaction is not changed by the fact that some do not pay. If it is a lottery as to those who do pay, it necessarily is a lottery as to those who do not pay for their chances.

"As was said in *Commonwealth v. Wall*, supra, 295 Mass. 70 (3 N.E.2d [28] 30), '* * * a game does not cease to be a lottery because some, or even many, of the players are admitted to play free, so long as others continue to pay for their chances. (Citing authorities.) So here the test is not whether it was possible to win without paying for admission to the theatre. The test is whether that group who did pay for admission were paying in part for the chance of a prize.' See also *Glover v. Malloska*, 238 Mich. 216, 219, 213 N.W. 107, 52 A.L.R. 77, where the above was quoted with approval."

In *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699, it is said that when the question of whether schemes devised to circumvent the lottery laws reached the courts, the decision of necessity usually turned on whether the scheme, on its own peculiar facts, constituted a lottery. And in *Central States Theatre Corporation v. Patz*, D.C., 11 F.Supp. 566, 568, the court held that "The question whether or not there is a paid consideration for the opportunity to win a prize necessary to constitute a lottery is a question of fact

which must be determined from the facts and reasonable deductions and inferences to be drawn therefrom in each case."

[1] In the instant case, the record shows that the number of free tickets distributed by the appellants was relatively small in comparison to those which were distributed to patrons of the various stations, and the trial court found, in effect, that the give-away program operated by the appellants constituted a lottery as defined in section 319 of the Penal Code. We cannot here hold as a matter of law that this finding is unsupported by substantial evidence.

[2] Appellants argue that plaintiff corporation is not a proper party plaintiff. We are not in accord with this contention. Section 382 of the Code of Civil Procedure provides that when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. *Agricultural Prorate Commission of California v. Superior Court*, 31 Cal.App.2d 518, 524, 88 P.2d 253; *Jellen v. O'Brien*, 89 Cal.App. 505, 509, 264 P. 1115. In *Rosicrucian Fellowship v. Rosicrucian, etc., Church*, 39 Cal.2d 121, 139, 245 P.2d 481, it was held that one or more members of a church may prosecute an action for the benefit of all if sufficient facts are pleaded to make it a representative suit. In the instant case the record shows that there is a community of interest in the questions of law and facts presented. There is an ascertainable class and each member of plaintiff corporation would be required to show the same basic facts concerning the activities of appellants. Under these circumstances the plaintiff corporation was a proper party plaintiff. *Fanucchi v. Coberly-West Co.*, 151 Cal.App.2d 72, 81, 311 P.2d 33.

[3] Appellants contend that injunctive relief is not a proper remedy for alleged violation of criminal laws. It is true that in the absence of special injury an injunction will not be granted on the application

of a private individual merely to prevent violation of a penal statute. *Carter v. Chotiner*, 210 Cal. 288, 291, 291 P. 577. However, section 526, Subdivisions 5 and 6, of the Code of Civil Procedure provides that an injunction may be granted where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief and where the restraint is necessary to prevent a multiplicity of judicial proceedings. In *In re Wood*, 194 Cal. 49, 55, 227 P. 908, 910, the court said: "It is true, as a general rule, that an injunction will not be granted to restrain an act *merely criminal*, where no property rights are endangered thereby, but, where property rights are endangered, the fact that the acts are criminal will not prevent a court of equity from exercising its jurisdiction." In *Orloff v. Los Angeles Turf Club*, 30 Cal.2d 110, 116, 180 P.2d 321, 171 A.L.R. 913, it was held that equity will protect by injunction not only property rights but, in a proper case, personal rights; that business rights are valuable rights of economic value, and the reasons for protecting them are identical with the reasons for protecting property rights in lands or chattels.

[4] In the instant case, it is apparent that it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief to plaintiffs. However, the members of plaintiff corporation, the corporation itself, and plaintiff Hudson have an interest of a pecuniary nature and rights of substance and economic value in the businesses which they conduct.

In *Featherstone v. Independent Service Station Ass'n*, supra, injunctive relief was held to be proper, and the court, quoting from *Glover v. Malloska*, 238 Mich. 216, 213 N.W. 107, said:

"No one should be permitted to employ criminal means in trade rivalry. The law proscribes a lottery, and those injured thereby in their rights of property are not required to suffer successive inflictions of pecuniary injury until a criminal prosecution is launched. Courts do not depart from the rule that

equity may not interfere, except to protect property rights of a pecuniary nature, in enjoining criminal acts exercised by one dealer to enhance his sales to the calculated pecuniary injury of a law-abiding competitor. Defendant Malloska adopted the lottery scheme for profit, admits its employment increased his sales, and plaintiffs established the fact that such increase was directly traceable to their loss of customers." [10 S.W.2d 128.]

[5] Appellants further contend that the court erred in allowing plaintiff to amend the complaint by adding the name Philip M. Hudson, president of plaintiff corporation and an individual retailer, as a party plaintiff. This argument is without merit, for the court, in furtherance of justice may allow a party to amend any pleading by adding the name of a party. Code Civ. Proc. Sec. 473. In *Klopstock v. Superior Court*, 17 Cal.2d 13, 19, 108 P.2d 906, 135 A.L.R. 318, it is said that this statutory provision giving the courts the power to permit amendments in furtherance of justice has received a very liberal interpretation by the courts of this state. No new cause of action was stated by the amendment adding Hudson as a party plaintiff. No new facts were alleged and no new facts were alleged as a ground of recovery. No prejudicial error appears from the order allowing the amendment.

All reasonable inferences must be indulged herein to support the judgment (*Memorial Hospital Ass'n of Stanislaus County v. Pacific Grape, etc., Co.*, 45 Cal. 2d 634, 635, 290 P.2d 481, 50 A.L.R.2d 442) and we cannot here hold, as a matter of law, that the findings of the trial court are unsupported by substantial evidence, under the circumstances shown by the record, or that the trial court erroneously concluded that the acts of the appellants constituted a lottery.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.

**In the Matter of the ESTATE of Fred H.
BIXBY, Deceased.**

**Fred H. BIXBY, Jr., Contestant and
Appellant,**

v.

**Allen L. CHICKERING, Petitioner and
Respondent,**

**Katherine B. Hotchkis, Elizabeth B. Jane-
way and Deborah B. Green, Legatees and
Respondents,**

**Security-First National Bank of Los Angeles,
Guardian of the Estate of Florence G.
Bixby,**

**Security-First National Bank of Los Angeles,
Respondent.**

Civ. 22685.

**District Court of Appeal, Second District,
Division 3, California.**

March 12, 1958.

Hearing Denied May 7, 1958.

Proceedings in the matter of a decedent's estate. From portions of an order of the Superior Court of Los Angeles County, Clyde C. Triplett, J., settling third and final account, and from decree of final distribution, an appeal was taken. The District Court of Appeal, Patrosso, J. pro tem., held that discretionary power of testamentary trustees to determine what is capital and what is income of trust estate extends to income accumulated after decedent's death and before distribution thereof to trustees; and held that, in making distribution of residuary assets to testamentary trustees vested with discretionary power to determine what constitutes income and what constitutes principal, probate court properly may and should reserve any determination as to that issue and commit determination thereof to trustees in exercise of discretionary power conferred upon them.

Affirmed.

I. Executors and Administrators ⇨314(12)

Determination, that it was not necessary to decide what part of assets distributable to testamentary trustees constituted

principal and what part constituted income and that discretionary power of testamentary trustees to determine what was capital and what was income of trust estate extended to income accumulated after decedent's death and before distribution thereof to said trustees was, in essence, an adjudication, rather than a finding of fact; and even though it appeared among findings of fact rather than among adjudicatory provisions of decree, appeal could be taken therefrom.

2. Appeal and Error Ⓒ417(1)

Notices of appeal are to be liberally construed to permit, if possible, a hearing on merits.

3. Executors and Administrators Ⓒ314(12)

Liberally construed, appeal notice, stating that appeal was from that portion of order, settling final account and decree of distribution, which held that it was not necessary for court to determine what part of assets distributable to testamentary trustees constituted principal and what part constituted income, made reasonably certain that part of order and decree from which appellant intended to appeal, and respondents could not have been misled thereby.

4. Executors and Administrators Ⓒ314(12)

If it was in fact duty of court (1) to make determination as to what portion of distributable estate constituted income and what portion constituted corpus and (2) to require additional information from executor to enable it to do so, court's refusal so to do constituted error reviewable even though appellant, in his objections, had not specifically requested that court determine what portion of distributable estate constituted income and what portion constituted corpus.

5. Wills Ⓒ684(10)

Testator may, by terms of his will creating trust, confer upon his trustees discretionary power to determine what is income and what is principal and what shall be charged against or credited to either.

6. Executors and Administrators Ⓒ303(2)

Residuary assets available for distribution, under will creating residuary trusts,

were distributable in their entirety to testamentary trustees, not to income beneficiaries.

7. Executors and Administrators Ⓒ314(11) Trusts Ⓒ282

Discretionary power of testamentary trustees to determine what is capital and what is income of trust estate extends to income accumulated after decedent's death and before distribution thereof to trustees; and in making distribution of residuary assets to testamentary trustees vested with discretionary power to determine what constitutes income and what constitutes principal, probate court properly may and should reserve any determination as to that issue and commit determination thereof to trustees in exercise of discretionary power conferred upon them.

Blau, Shaw & Miller, Beverly Hills, for contestant and appellant.

Lawler, Felix and Hall, Los Angeles, for petitioner and respondent.

Sherman Anderson, Los Angeles, for legatees and respondents.

PATROSSO, Justice pro tem.

This is an appeal by Fred H. Bixby, Jr. from portions of the order settling the third and final account and Decree of Final Distribution in the above named estate.

The decedent Fred H. Bixby died testate May 17, 1952. He left an estate of the appraised value of \$4,567,493.56, the principal asset thereof being 38,775 shares of the capital stock of the Fred H. Bixby Company, appraised at \$4,340,560. The deceased was survived by his spouse Florence G. Bixby and by four children, Katherine Bixby Hotchkis, Florence Elizabeth Bixby Janeway, Deborah Bixby Green and Fred H. Bixby, Jr. and by a number of grandchildren.

By the terms of his will the decedent bequeathed his automobiles, personal effects and 19,000 shares of Fred H. Bixby Company stock to his wife. The residue of his estate was devised and bequeathed in equal

shares to four separate trusts designated as the first, second, third and fourth trusts respectively. The three daughters above named are collectively the trustees of the first three trusts and are respectively the primary income beneficiaries of the first, second and third trusts. The Security-First National Bank is the trustee of the fourth trust and the appellant is the primary income beneficiary thereof. Among the other powers conferred upon the trustees are the following:

"(f) To determine what is principal and what is income of the trust estate and what items should be charged or credited to either; to accumulate the income of the trust estate to such extent as the Trustees or Trustee, in their absolute discretion, think necessary or advisable to provide for the maintenance, protection or improvement of the trust estate, or any part thereof, or to discharge any lien or encumbrance to which the trust estate, or any part thereof, may be subject, or to repay any advances made by the Trustees or Trustee or any loan which the Trustees or Trustee may negotiate."

During the course of the administration of the estate the 19,000 shares of Fred H. Bixby Company stock bequeathed to decedent's widow were distributed to her pursuant to a decree of partial distribution. Of the remaining shares of the Fred H. Bixby Company stock owned by decedent, 5,395 shares were sold during the course of administration. Thereafter the Fred H. Bixby Company was liquidated and the executor received distribution of assets in kind based upon the number of shares of stock of that company remaining in his hands. The principal assets so received in liquidation consisted of 14,360 shares of the capital stock of the Fred H. Bixby Ranch Company and royalty interests under certain oil and gas leases.

During the course of the administration and prior to the filing of his third and final

account, the executor filed two accounts current, both of which were duly settled by orders which have long since become final. In each of these, as in his final account, the executor set forth in detail the date, nature and amount of each item of receipt and disbursement, and in his schedule of receipts set forth the allocation he deemed proper as between income and corpus. He did not undertake, however, to specify which, if any, disbursements were chargeable to corpus and which were chargeable to income, nor did he in his schedule of property on hand undertake to designate what was corpus and what was income.

Appellant filed objections to the final account upon the grounds (1) that the executor "failed to segregate the principal from the income accumulated during probate administration;" (2) that he "failed to determine the respective portions of the undistributed income accumulated during probate administration to which each of the beneficiaries of said 'Fourth Trust' would be entitled;" (3) that he failed to discharge his "duty of allocating the receipts during probate administration between income and principal, and allocating the disbursements made during probate administration to principal and income respectively;" and (4) that he "failed to request the court to determine the interest payable to the income beneficiaries of the Fourth Trust, for income undistributed after the expiration of one year from the date of death" in accordance with section 162 of the Probate Code.¹

The objections concluded with the prayer "that the executor be directed to file a new account segregating the receipts during probate administration between principal and income" and "that the amount of interest due the income beneficiaries for legacies not distributed within one year following the decedent's death be determined."

1. Appellant also objected to one item of credit claimed by the executor in his account which objection was disallowed by the court, but no mention is made there-

of in appellant's brief and we therefore assume that this objection has been abandoned.

The bank as trustee of the fourth trust filed no objections to the final account but did file what it denominated a response in which it requested that the court determine what portion of the sums or items distributable to it as trustee constitutes principal and what portion constituted income during the period of probate administration.

As stated in his brief, the executor's position below was and on this appeal is that he fully discharged his duty to account by setting forth as he did the date, nature and amount of each item of receipt and disbursement and in his schedule of receipts the segregation he believed to be proper as between income and principal; that the trustees of each of the four trusts having been granted the power and discretion to determine what constitutes income and what constitutes principal and what items should be charged or credited to either, it was not within the province of the court to undertake to make such determination but that this was a question to be resolved by the trustees in the exercise of the discretion conferred upon them. The position of the executor is likewise that of the trustees of the first, second and third trusts.

While the matter was pending in the trial court and before it made any ruling as to whether the determination as to what constituted income and what corpus should be made by the executor or by the court or by the testamentary trustees, all of the parties entered into stipulations of fact on the basis of the executor's receipts and disbursements showing two of the permissible conclusions which might be drawn respecting what allocation could and should be made of the assets available for distribution as between income and principal.

By its order approving the final account and decree of final distribution the trial court sustained the position of the respondents, overruled the appellant's objections and denied the bank's request that it determine what constituted income and what constituted corpus. Among the findings made by the trial court and incorporated

in the decree of final distribution are the following:

"15. That under the terms of each of said four trusts as declared in the First Decree of Preliminary Distribution the Trustees or Trustee has the power and discretion to determine what is principal and what is income of the trust estate and what items should be charged or credited to either and has the further power and discretion to determine what part of the net income is available for distribution; that said powers and discretions extend to income accumulated after Decedent's death and prior to the distribution thereof to the Trustees or Trustee;

"16. That the allegations made in the Report and Petition accompanying said Third and Final Account are true, excepting that the Court makes no finding as to what portion of the funds and assets in the hands of said Executor constitutes principal and what portion constitutes income and excepting in so far as the allegations contained therein are at variance with the facts found herein; that it is not necessary for the Court to determine what part of the funds and assets distributable to the Trustees or Trustee of each of said four trusts constitutes principal and what part constitutes income in order that the Trustees or Trustee may properly perform their or its duties as such; that said Executor is not bound to determine what part of the funds and assets now in his hands is distributable or payable to the respective income beneficiaries of said trusts."

The bank as trustee of the fourth trust did not appeal, and, as previously stated, we are confronted only with the appeal of Fred H. Bixby, Jr., the primary income beneficiary of the fourth trust.

It will have been noted from the statement of the objections filed by the appellant that he did not therein specifically request the court to make a determination as to what constituted income and what constituted principal but rather that such determination be made by the executor. Upon this appeal, however, it is his position that the court should have made such deter-

mination and that in failing to do so it committed error.

[1-4] At the outset respondents urge that the appellant is not in a position to raise this question because in his notice of appeal he states that he is appealing only from that portion of the order settling the final account and decree of distribution "wherein it is held that it was not necessary for the Court to determine what part of the funds and assets distributable to the Trustees or Trustee of each of the four trusts constitutes principal and what part constitutes income, that the discretionary powers of the testamentary trustees to determine what is capital and what is income of the trust estate extends to income accumulated after decedent's death and before distribution thereof to said trustees." Respondents' argument is that the determination therein referred to is but a finding of fact and not an adjudication and that an appeal may not be taken from a finding of fact but only from a matter adjudged. While it is true that the determination referred to in the notice of appeal appears among the findings of fact rather than among the adjudicatory provisions of the decree, it is in essence an adjudication rather than a finding of fact, for thereby the court determined as a matter of law that the power to determine what portion of the distributable estate is principal and what part income is vested in the testamentary trustees. Moreover, notices of appeal are to be liberally construed to permit, if possible, a hearing on the merits. *Collins v. City and County of San Francisco*, 1952, 112 Cal.App.2d 719, 732, 247 P.2d 362. And so construed we think the notice here makes reasonably certain the part of the order and decree from which the appellant intends to appeal and that respondents could not have been misled thereby. *Harrelson v. Miller & Lux Inc.*, 1920, 182 Cal. 408, 414, 188 P. 800. Also while it is true that in appellant's objections he did not specifically request that the court determine what portion of the distributable

estate constituted income and what portion constituted corpus, if it was in fact the duty of the court to make such determination, and if necessary, require additional information from the executor² to enable it to do so, the court's refusal so to do constituted error reviewable under a liberal interpretation of appellant's notice of appeal.

Thus we pass to a consideration of the merits of the appeal. Briefly stated the question presented is this: in decreeing distribution of an estate under a will bequeathing property in trust with power in the trustees to determine what is principal and what is income of the trust and what items should be charged or credited to either, may or should the probate court by its decree determine what portion thereof consists of income accumulated during probate and what constitutes corpus?

It is conceded by all parties that each of the primary income beneficiaries is entitled to receive from the trustee or trustees (subject to the right of such trustee or trustees to retain and accumulate income for the purposes stated in the provisions of the will creating the trusts), after the same comes into their hands, the income, if any, accumulated during the probate administration. As previously indicated however, the parties differ as to who possesses the power to determine what portion of the funds and property distributed to the trustees constitutes principal and what constitutes income; the appellant asserting that such determination should be made by the probate court in and by its decree of distribution and the respondents contending that the right to make such determination is vested exclusively in the trustees under the terms of the decedent's will.

Neither the research of counsel nor our own has brought to light any authority discussing the precise question which we have before us. The nearest in point are the cases in this State which have had occasion to consider the effect of a decree

2. As previously indicated the account of the executor and the supplementary stipulations of the parties set forth all of

the data necessary to enable the court to make such determination.

distributing assets to a trustee where no mention is made therein as to what, if any, part thereof constitutes predistribution income and what part is corpus, and these are not harmonious.

In *Re Estate of Hill*, 1957, 149 Cal.App. 2d 779, 309 P.2d 39, 40, hearing in Supreme Court denied, the will of the decedent named her husband John G. Hill as executor and trustee of a testamentary trust of which he was the principal income beneficiary during his lifetime. The first and final account and petition for distribution filed by the executor made no reference to the allocation or distribution of the probate income to the income beneficiaries designated by the will, and the decree of distribution made no specific reference to probate income, merely distributing all of the assets of the estate to Mr. Hill as trustee "in pursuance of and according to the provisions of the last will of said deceased." Following the distribution of the estate to himself as trustee Mr. Hill filed 13 annual accounts and although he was entitled to receive 90 percent of the income of the trust he made no claim to the probate income nor did he ask the court to distribute any part of it to the income beneficiaries including himself. Following his death his executrix filed the 14th account current on behalf of the deceased trustee and for the first time she allocated probate income accruing during the probate administration to the income account of the trust. Objections were filed to the 14th account and the trial court held, in effect, that the decree of distribution, not having segregated principal from probate income, operated as a final adjudication that the entire estate distributed to the trustee constituted principal or corpus and precluded any claim to any part thereof as income. In reversing the trial court's ruling the court said (149 Cal.App.2d at page 784, 309 P.2d at page 42):

"The decree of distribution did not determine the issue. The decree should not do so, for the allocation is to be made by the trustee, not the executor, even

though they be the same person. In *re Estate of Dare*, 196 Cal. 29, 35, 235 P. 725. * * * The decree of distribution did not make an allocation between the corpus and the income. It merely distributed the probate income and other property to the trustee as an aggregate. Thereupon the trustee became obligated to make the appropriate allocation. In *re Estate of Dare*, supra, 196 Cal. 29, 36, 235 P. 725; In *re Estate of Marre*, 18 Cal.2d 184, 190, 114 P.2d 586."

The holding that the decree of distribution, being silent as to predistribution income, did not operate as an adjudication as to what portion of the assets distributed to the trustee was income and what principal is, as we shall see, supported by the cited cases of *In re Estate of Dare* and *In re Estate of Marre*. However, the further statement that the decree should not undertake to make an allocation between principal and income because such "allocation is to be made by the trustee, not the executor," can hardly be said to find support in the authorities cited unless by the word "allocation" the court had reference to the payment of the distributable income after it came into the hands of the trustee. While not appearing from the opinion, an examination of the record in this case discloses that neither the will nor the decree of distribution vested any discretion in the trustee to determine what constituted income and what principal. Moreover, in view of the court's conclusion that the failure of the decree to make mention of the predistribution income did not operate as an adjudication that no part of the estate distributed to the trustee constituted predistribution income, the latter statement that the decree should not undertake to make any adjudication with respect thereto is, strictly speaking, dicta.

In *Re Estate of Dare*, 1925, 196 Cal. 29, 235 P. 725, 727, neither the final account and petition for distribution nor the decree by which the residue of the estate was distributed to a testamentary trustee, made any mention of what portion thereof constituted principal and what income.

Following the receipt thereof by the trustee, he filed his first account to which objections were filed by the income beneficiary. The probate court sustained the objections and ordered the trustee to file a new account "showing the corpus of said estate and the income therefrom separately from the date of death of testatrix until the receipt of said trust fund by said trustee." The trustee appealed from this order claiming that it was erroneous because it in effect constituted a modification of the decree of distribution which had become final. In rejecting this contention the Supreme Court held that the decree of distribution by failing to provide that the income beneficiary was entitled to income accumulated during the probate administration did not preclude such beneficiary from making claim to such income after the distribution thereof to the trustee, saying (196 Cal. at page 35, 235 P. at page 727):

"All the rest and residue of said estate was by the decedent devised to Frank W. Sponable as trustee under the trusts created by the terms of the decedent's said will. That said Frank W. Sponable was also the executor of the decedent's said will and of her estate is an immaterial incident, since in his capacity as executor he was invested with the title to none of the property nor with none of the powers and duties which were to devolve upon him upon the distribution to him of the entire residue of said estate in the capacity of such trustee. *This being so, no issue was presented or presentable as to what portion of the income derived from the property of said estate the primary beneficiary of said trust would be entitled to receive from the trustee thereof, nor as to what date the right to such income or any portion thereof was to take its beginning*, for the reason that no such trust had been cast upon Frank W. Sponable until the making and the entry of the decree of distribution of said estate to him in the capacity of such trustee. * * * It follows necessarily that nothing material to the questions here under consideration was concluded by the

terms of the decree of distribution except the correctness of the executor's approved account and the amount of the residue of the estate to be distributed to said trustee." [Emphasis added.]

In *Re Estate of Marre*, 1941, 18 Cal.2d 184, 114 P.2d 586, 588, pursuant to the terms of the decedent's will the residue of the estate was distributed to trustees who were authorized and directed to pay out of the net income of the trust estate such part thereof as the trustees in their discretion should deem advisable to or for the proper care, maintenance, support and education of a named minor beneficiary. The decree of distribution did not segregate income from principal. Some two years or more after the entry of the decree of distribution the minor beneficiary filed a petition asking that the court direct the trustees to make certain payments to reimburse him for expenses incurred for support, maintenance and education during the period prior to the entry of the decree of distribution. This petition was granted by the probate court and the trustees were ordered to make payments totaling \$650 for expenses incurred by the beneficiary during the period between the date of decedent's death and the entry of the decree of distribution. No question was there raised as to whether the decree of distribution in failing to make mention of the predistribution income constituted an adjudication that the entire estate distributed to the trustees was principal. However, upon appeal, the Supreme Court necessarily assumed that the decree of distribution was not res judicata of the right of the minor beneficiary to receive income from the date of death, for it affirmed the probate court's order insofar as it recognized his right to receive such income. It, however, modified the order insofar as the probate court undertook to fix the amount of such income which the trustees should pay to the beneficiary inasmuch as the will expressly provided that he was to receive only so much of the income "as said trustees shall in their sole judgment deem advisable."

In *Re Estate of Tynan*,³ 1954, 129 Cal. App.2d 364, 276 P.2d 809, on the contrary, it is squarely held that a decree distributing the residue of an estate to the testamentary trustee which failed to specify what portion of such residue is principal and what portion is income constituted an adjudication that the whole thereof was principal and that after distribution to the trustee an income beneficiary could not claim that any portion thereof was pre-distribution income. The court there said (129 Cal.App.2d at pages 366-367, 276 P.2d at page 811):

"It is true, as appellant contends, that he was not entitled to compel payment of income during probate. * * * That did not preclude the probate court from determining, in its decree of distribution, what was corpus and what was not, under its duty to 'name the persons and the proportions or parts to which each is entitled'. Prob.Code, § 1021. Appellant was a 'person interested in the estate' and as such entitled to appear and 'resist the application' for distribution. Prob.Code, § 1020. He was one of the 'heirs, devisees and legatees' as to whose 'rights' the decree became conclusive. Prob.Code, § 1021. Thus, it has been held that an issue concerning income which accrued during probate administration may be raised upon appeal from a decree of distribution, In *re Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825; In *re Estate of Dasher*, 53 Cal.App.2d 721, 128 P.2d 380; In *re Estate of Schiffmann*, 86 Cal.App.2d 638, 195 P.2d 484."

The reason assigned for the conclusion that the probate court was required by its decree of distribution to determine what was corpus and what was not, namely, because of "its duty to 'name the persons and the proportions or parts to which each is entitled'" is not persuasive in view of the fact that where property is bequeathed to a trustee, he and he alone is the person "entitled" thereto, and the court is with-

out power to make distribution to the beneficiary or beneficiaries of the trust. In *re Estate of Hardy*, 1943, 62 Cal.App.2d 958, 961-962, 145 P.2d 910.

Subsequent to its decision in *Re Estate of Tynan* the same court had occasion to again consider the same question in *Re Estate of De Laveaga*, Cal.App., 317 P.2d 147, and reached the same result. However, a petition for hearing was granted by the Supreme Court and the cause is now pending therein.

In *Re Estate of Platt*, 1942, 21 Cal.2d 343, 131 P.2d 825, by the petition for final distribution the probate court was asked to interpret the terms of the trust created by decedent's will concerning the date from which the trustee should commence payments to the decedent's widow, an income beneficiary, and to instruct the trustee as to its duties regarding the priority of payments of income between herself and the decedent's son, the other income beneficiary. Seemingly no question was raised as to the right of the probate court to consider these questions and the opinion is devoid of any discussion with respect thereto. And it is to be noted that the probate court was not there requested to, and did not undertake to determine what portion of the estate distributable to the trustees was corpus and what portion was income, but simply to interpret the terms of the trust with respect to (1) the widow's right to receive income from the date of decedent's death and (2) the allocation of the income between herself and the other income beneficiary in the event that it proved insufficient to pay the widow \$3,000 in any one year. Neither does it appear from the opinion that the will there vested in the trustees' discretion to determine what constituted income and what principal. This decision therefore, is not of too much assistance to us here as it goes no further than to declare that upon a hearing of a final account and distribution the court may determine the ques-

3. Although this case was cited in the briefs filed in *Re Estate of Hill*, *supra*, no mention thereof appears in the opinion in the latter case. It was likewise cited in the

petition for hearing in *Hill* which, as previously noted, the petition was denied by the Supreme Court.

tion whether or not income beneficiaries are entitled to receive from the trustee after distribution, income accrued during the period of probate administration. No such question was or is raised here.

In *Re Estate of Dasher*, 1942, 53 Cal. App.2d 721, 128 P.2d 380, an appeal was taken from a decree of distribution which distributed income accrued during the period of probate administration, directly to the life beneficiary, the appellant contending that, under the terms of the will there, the beneficiary was not entitled to income until after distribution of the trust estate to the trustees and also that the court was without power to determine the amount of net income from the trust and to order payment of the same to the beneficiary prior to the distribution to the trustees. The order was affirmed but it does not appear that the trustees there were vested with any discretion to determine what constituted principal and what constituted income. Insofar as the opinion approves distribution of income directly to the beneficiary rather than to the trustee, it is contrary to the established rule of decision in this state (*In re Mackay's Estate*, 107 Cal. 303, 40 P. 558; *In re Estate of Dare*, 196 Cal. 29, 235 P. 725; *In re Estate of Marre*, 18 Cal.2d 184, 114 P.2d 586; *In re Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825; *In re Estate of Hardy*, 62 Cal.App.2d 958, 145 P.2d 910); but the court was apparently of the view that under the circumstances, there being no dispute as to the amount of the income nor the beneficiary's right to receive the same, no prejudice resulted.

In *Re Estate of Schiffmann*, 1948, 86 Cal. App.2d 638, 195 P.2d 484, 486, by the final account and petition for distribution the executor petitioned the court for instructions as to whether the trustee, under the provisions of the trust created by the will, was entitled to income accrued from the date of death for distribution to the income beneficiary. In accordance with the rule announced in *Re Estate of Platt*, *supra*, the executor was instructed that the trustee was entitled to such income, which by the decree was defined to be gross income and

interest thereon from date of receipt by the executor, without deductions for "costs of administration, estate taxes, inheritance taxes and income taxes." An examination of the record discloses that the will there did not confer upon the trustee discretionary power to determine what constituted income and what principal, and upon appeal no question was raised as to the power of the probate court to determine by its decree the right of the trustee to income from the date of death or to determine what constituted such income.

We do not find it necessary to choose between the divergent views expressed in the foregoing cases for insofar as we have been able to ascertain, none involved a testamentary trust wherein the power to determine what constituted income and what principal, was conferred upon the trustees, and none of these cases undertake to consider or discuss the effect of such a provision upon the question here presented. Nor is there here any necessity to consider the effect of a decree distributing the residue of the estate to trustees which decree is silent with respect to predistribution income, for the decree here not only expressly declares that nothing therein contained is to be deemed as constituting a determination as to what part of the estate distributed to the trustees of the respective trusts constitutes corpus and what part income, but further provides that this question is to be determined by the trustees pursuant to the discretionary power vested in them by the terms of the decedent's will. Therefore there is no possibility that it could ever be construed as constituting an adjudication upon this issue. And that the probate court is not required by its decree to determine what portion of the distributable estate is income and what is principal is recognized in *Re Estate of Tynan*, *supra*, 129 Cal.App.2d at page 367, 276 P.2d at page 812 where it said:

"There have been cases in which the decree of distribution did not determine the issue of income received during probate, leaving that open, hence not precluding

later litigation concerning it. See *In re Estate of Dare*, 196 Cal. 29, 36, 235 P. 725; *In re Estate of Marre*, supra, 18 Cal. 2d 184, 114 P.2d 586; *In re Estate of Markham*, 28 Cal.2d 69, 168 P.2d 669. Such are the cases which appellant invokes. They are not this case."

[5] It is unquestionable that a testator may, by the terms of his will creating a trust, confer upon his trustees discretionary power to determine what is income and what is principal and what shall be charged against or credited to either. In *re Estate of Jacks*, 1947, 80 Cal.App.2d 562, 182 P.2d 605. In the cited case the appellant income beneficiary of a testamentary trust undertook to challenge the propriety of the trustees charging certain expenditures against income, contending that if the items were normally chargeable against corpus, the discretion conferred upon the trustees did not permit them to charge the items against income. In rejecting this argument, the court said (80 Cal.App.2d at pages 567-568, 182 P.2d at page 608):

"Appellant has misconceived the legal effect of the clause conferring discretion on the trustees in determining whether particular items should be charged against income or corpus. If appellant's first argument above mentioned were sound, the clause in question might just as well have been omitted from the will and decree. Both reason and authority compel the conclusion that where such discretion is conferred upon trustees the exercise of such power will not be interfered with by the courts, even if the court would have exercised the power conferred differently, in the absence of a showing that the trustees acted dishonestly or from an improper motive, or acted beyond the bounds of a reasonable judgment.

"That this is the law is demonstrated by the provisions of our California Principal and Income Act of 1941. Stats.1941, p. 2476, Ch. 898 [West's Ann.Civ.Code, § 730 et seq.]; [3 Deering's Gen.Laws, Act 8696.] Section 2 of that Act provides: 'This act shall govern the ascertainment of income and principal, and the appor-

tionment of receipts and expenses between tenants and remaindermen, in all cases where a principal has been established with * * * the interposition of a trust; except that in the establishment of the principal provision may be made touching all matters covered by this act, and *the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so*, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this act. *The exercise by the trustee or other designated person, of such discretionary power if in good faith and according to his best judgment, shall be conclusive, irrespective of whether it may be in accordance with the determination which the court having jurisdiction would have made.'*" (Emphasis the Court's.)

[6] While recognizing the power of the testator to vest such discretion in his trustees, the appellant argues that this extends only to income earned or accrued subsequent to the distribution of the estate to the trustees. No reason is assigned in support of this contention and we see none. If it is to be assumed that the testator, when creating a testamentary trust, and absent any provisions in the will indicating otherwise, intends that the right of the beneficiary to income shall accrue as of the date of death (*In re Estate of Platt*, supra), it seems equally logical to assume, absent a provision in the will to the contrary, that when conferring discretionary power upon his trustees to determine what constitutes income and what principal he intended such power to extend to income accruing both before and after distribution of the estate to the trustees. The residuary assets available for distribution, regardless of what part is or may be classified as income and what part principal, are in any event distributable in their entirety to the testamentary trustees, not to the income beneficiaries. In *re Estate of Peterson*, 1949, 92 Cal.App.2d 677, 207 P.2d 607. In that case the income beneficiary of a testamentary

trust appealed from an order which distributed a fund to the trustee, contending that part of the fund was income received by the executor and that such part should be distributed to her. In rejecting this contention, the court said (92 Cal.App.2d at pages 682-683, 207 P.2d at page 610):

"The question as to whether the disputed fund should be distributed to the trustee or to appellant does not involve in any way a determination of whether the fund is income or corpus. That is so because whether or not that fund is income or corpus, it had to be distributed to the trustee. It has long been the law of this state that income accruing prior to distribution is distributable along with the corpus in the hands of the executor to the trustee regardless of whether or not the life beneficiary may be entitled to receive that income from the trustee. In *re Mackay's Estate*, 107 Cal. 303, 40 P. 558; In *re Estate of Dare*, 196 Cal. 29, 235 P. 725; In *re Estate of Marre*, 18 Cal.2d 184, 114 P.2d 586; In *re Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825; In *re Estate of Hardy*, 62 Cal.App.2d 958, 145 P.2d 910. It therefore follows that the questioned fund was properly distributed to the trustee whether or not it was income."

Moreover, as pointed out in respondents' brief, the issue as to what portion of the estate distributed to the trustees constitutes income is of concern only to the income beneficiaries upon the one hand, and the remaindermen on the other. It is of no concern to the executor for, regardless of how it may ultimately be resolved, his sole duty is to account for and deliver to the trustees all of the funds and assets available for distribution to them.

The foregoing aside, we fail to see how the appellant is or can be prejudiced by the decree appealed from. On the one hand it safeguards him against any possibility that at some future time it may be contended that the decree constitutes an adjudication as to the amount of, or his right to receive predistribution income distributed to the trustee, and on the other hand it recognizes and gives effect to the discre-

tionary power vested in the trustees by the terms of decedent's will to determine this question. If the trustee should abuse his discretion in making such determination or fail or refuse to pay over to appellant such portion of such income to which he is rightfully entitled, he has a ready and effective remedy.

[7] While not prepared to say, as did the court in *Re Estate of Hill*, *supra*, that the probate court may not in any instance, when distributing residuary assets to a trustee, determine what portion thereof constitutes income, we conclude that in making such distribution of residuary assets to a testamentary trustee vested with discretionary power to determine what constitutes income and what principal, the probate court properly may and should reserve any determination as to this issue, and commit the determination thereof to the trustee in the exercise of the discretionary power conferred upon him.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., *concur*.

Hearing denied; SCHAUER and SPENCE, JJ., *dissenting*.



158 Cal.App.2d 553

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Gale H. WILSON, Defendant and
Appellant.**

Cr. 3450.

**District Court of Appeal, First District,
Division 2, California.**

March 20, 1958.

Defendant was convicted in the Superior Court, Santa Clara County, William F. James, J., of burglary in the second degree, and he appealed. The District Court of Appeal, Draper, J., held that since no

intent to commit a felony other than larceny had been charged or shown, it had been incumbent upon prosecution to prove beyond a reasonable doubt that defendant had entered store with intent to commit larceny.

Affirmed.

1. Burglary $\S$ 41(3)

Where no intent to commit a felony other than larceny was charged or shown, in burglary prosecution, it was incumbent upon prosecution to prove beyond a reasonable doubt that defendant had entered store with intent to commit larceny. West's Ann. Pen.Code, $\S$ 459.

2. Criminal Law $\S$ 829(1)

In burglary prosecution, it was not error to refuse requested instruction which would have been merely cumulative. West's Ann.Pen.Code, $\S$ 459.

Douglas H. Pendleton, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

A jury found defendant guilty of burglary of the second degree, he was committed to the Youth Authority, and now appeals from the judgment. Appellant concedes that he unlawfully entered the store in question. His entire defense is that he did so without any intent to commit larceny, and thus is not guilty of burglary as defined in Penal Code Section 459. He testified that he had an argument that evening with his fiancée, that he was "mad at the world" and entered the store only to "tear the place apart, to wreck it, destroy it."

Appellant requested the following instruction:

"You are instructed that, before you would be warranted in convicting the defendant for burglary, you must believe beyond a reasonable doubt that he broke and entered the Grossman's Cal.Rep. 321-322 P.2d-53

Office Equipment Supply Store with the specific intent at the time to commit the crime of theft. If he broke and entered such store building with any other intent or purpose, he would not be guilty of burglary, and in this connection you are instructed that if you should find beyond a reasonable doubt that if defendant broke and entered said store, but if you further believe such breaking and entry, if any, was for the purpose of injuring, disarranging, or destroying property therein or for any other purpose than theft, then you will find the defendant not guilty."

This instruction was refused. The court did instruct that burglary consists of only two elements, and read the relevant portions of Penal Code Section 459. Then the jury was told: "The offense of burglary consists of two elements, an unlawful entry into a building and an intent to commit larceny or any felony on the entry. * * * So that all the People have to prove is that the defendant made an unlawful entry into this building as one; second, that he had the intent to commit larceny. * * * There is no evidence of any felonies. Of course, if the entry in a building is made with the intent to commit any felony, any other felony, then that is burglary of course. But there's no evidence of any such thing in this case. All you have to do is determine did the defendant make an unlawful entry in this building. Well, he admits he did. * * * So that leaves only one thing for the jury to decide, what was the intent of the defendant when he entered." Full instructions were given upon reasonable doubt and upon the means of determining intent.

[1,2] In the case at bar, no intent to commit a felony other than larceny was charged or shown. Thus it was incumbent upon the prosecution to prove beyond a reasonable doubt that defendant entered the store with intent to commit larceny (People v. Mulkey, 65 Cal. 501, 4 P. 507; People v. Graham, 156 Cal.App.2d 525, 319 P.2d 677). It follows that the instruction requested by defendant was proper in

substance, although the form of the second sentence is marred by at least one surplus "if." But the court did fully instruct upon the specific intent required. The instruction requested would have been cumulative. Thus its refusal was not error (*People v. Tallman*, 27 Cal.2d 209, 215, 163 P.2d 857; *People v. Nagle*, 25 Cal.2d 216, 225, 153 P.2d 344).

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J.,
concur.



158 Cal.App.2d 425

**COUNTY OF LOS ANGELES, Petitioner
and Respondent,**

v.

**STATE DEPARTMENT OF PUBLIC
HEALTH et al., Respondents
and Appellants.**

**COUNTY OF LOS ANGELES, Plaintiff
and Respondent,**

v.

**STATE DEPARTMENT OF PUBLIC
HEALTH et al., Defendants
and Appellants.**

Civ. 22242, 22243.

District Court of Appeal, Second District,
Division 2, California.

March 17, 1958.

Rehearing Denied April 11, 1958.

Hearing Denied May 16, 1958.

Action by county against department of public health and certain state officials to compel defendants to pay county subsidies for partial-pay patients in county tuberculosis hospitals and action for declaratory relief. The cases were consolidated for trial and from adverse judgment of the Superior Court, Los Angeles County, Herbert V. Walker, J., the defendants appealed. The District Court of Appeal, Ashburn, J., held that under statute providing for establishment of hospitals for care of persons suffering from tubercu-

losis and for payment by state to county of certain sum per patient per day for persons' care therein at public expense who were unable to pay for their support and providing that county was not entitled to receive state aid unless hospitals conformed to regulations of department of public health, county was entitled to state subsidy from state without reduction by amount that a partial paying patient contributed to his keep, even though county hospitals did not conform to regulations prescribed by department of public health as to keeping of records and statistics.

Judgment in each case affirmed.

1. Hospitals ⇨2

Statute providing that counties may establish and maintain a tuberculosis hospital for treatment of persons suffering from tuberculosis is permissive with respect to county assuming state's burden of caring for indigent persons, but is mandatory in its declaration that for such facility it shall receive from state a sum prescribed. West's Ann.Health & Safety Code, § 3300.

2. Hospitals ⇨2

Under statute providing for establishment by counties of hospitals for care of persons suffering from tuberculosis and for payment by state of certain sum per patient per day for treatment of persons unable to pay for their support and providing that county was not entitled to receive state aid unless hospitals conformed to regulations of Department of Public Health, county was entitled to subsidy from state without reduction by amount that partial paying patient contributed to his keep even though county hospital did not conform to regulations prescribed by department of public health as to keeping of records and statistics. West's Ann. Health & Safety Code, §§ 102, 410-414, 3099-3342, 3300, 3301.5; West's Ann.Gov. Code, §§ 11373, 11374.

3. Health ⇨20

Department of Public Health must confine itself to reasonable interpretation in adopting regulations for administra-

tion of its governing statutes and if it goes beyond that the legislative area has been invaded and the regulations count for nought West's Ann.Health & Safety Code, §§ 410-414, 3099-3342, 3300.

4. Administrative Law and Procedure ⇨416

Laws passed by Legislature under its general police power will prevail over regulations made by an agency with regard to matters which are not exclusively that agency's affairs.

5. Statutes ⇨219

While interpretative regulations, especially those of long standing, are entitled to considerable weight in determining meaning of a statute, ultimate responsibility rests upon courts, and they are obligated to strike down an administrative rule which attempts to add to or subtract from statute.

6. Hospitals ⇨2

Under statute authorizing county to maintain tuberculosis hospital and providing for payment of subsidy by state for care of persons unable to pay for their support, administrative regulation providing that any patient who pays any amount toward his support or in whose behalf contributions are received or anticipated is not eligible for subsidy, unless it is agreed that such contributions will be used to reimburse state up to total amount of subsidy paid in behalf of patient, was an attempt to extend rule-making power of Department of Public Health beyond its legitimate function, and such regulation was void. West's Ann.Health & Safety Code, §§ 3300, 3301.5, 3301.7.

7. Administrative Law and Procedure ⇨414

Mere re-enactment of statute without change does not necessarily constitute a legislative approval of an existing regulation.

8. Estoppel ⇨62(3)

Mandamus ⇨143(2)

Where county refused to comply with regulations of Department of Public Health providing that patient in county tuberculosis hospital who pays any amount

toward his support is not eligible for subsidy unless such contributions are used to reimburse state up to total amount of subsidy paid in behalf of patient, and county did not furnish necessary information and resisted enforcement of regulation and county brought actions to compel payment of subsidy within less than two years after state refused to pay subsidy, claims of acquiescence and laches on part of county and estoppel against it were not available to state. West's Ann.Health & Safety Code, §§ 410-414, 3099-3342, 3300.

9. States ⇨191(2)

Mandamus action against state officers in their official capacity and against state board, seeking primarily to correct disbursement of funds appropriated by legislature for tuberculosis subsidies and action for declaratory relief were not actions against state within purview of constitutional provision stating that suit may be brought against state in such manner and in such courts as may be directed by law, and Superior Court had jurisdiction of actions. West's Ann.Const. art. 20, § 6; West's Ann.Health & Safety Code, § 3300; West's Ann.Gov.Code, § 11440.

10. States ⇨191(2), 197

Actions by county for declaratory relief and to compel state officers to disburse funds specifically appropriated for tuberculosis subsidies in manner provided by statute did not involve claims against state, and county was not barred from recovery by failure to exhaust administrative remedies through filing of claims with controller as required by statutes relating to claims against state. West's Ann.Gov. Code, §§ 16021, 16041-16054; West's Ann. Health & Safety Code, §§ 3300, 3301.5, 3301.6.

11. Declaratory Judgment ⇨366

It is duty of court hearing an action for declaratory relief to make a complete determination of the controversy. West's Ann.Gov.Code, § 11440.

12. Declaratory Judgment ⇨201

No specific consent is requisite to suit for declaratory relief brought against

public officials and designed to adjudge and declare obligations of their office with respect to a given factual situation. West's Ann.Gov.Code, § 11440.

13. Declaratory Judgment ⇨387

Mandamus ⇨176

In actions by county to compel Department of Public Health and certain state officials to pay subsidies to county for partial-pay patients in county tuberculosis hospitals and for declaratory relief, trial court did not err in including in each judgment an injunctive provision ordering defendants to cease and desist from any action whereby there was withheld all or any portion of tuberculosis subsidy claims of county for tuberculosis care furnished to eligible individuals. West's Ann.Health & Safety Code, §§ 3300, 3301.5, 3301.6; West's Ann.Gov.Code, § 11440; West's Ann.Code Civ.Proc. § 526, subd. 7, par. 4; West's Ann.Civ.Code, § 3423, subd. 4.

14. Declaratory Judgment ⇨387

Injunctive relief may be granted in a declaratory relief action.

15. Limitation of Actions ⇨34(2)

Actions by county for declaratory relief and to compel department of public health and certain state officials to pay county subsidies for partial-pay patients in county tuberculosis hospitals, which defendants refused to pay because of county's noncompliance with regulation was governed by three-year statute of limitations, and actions were not barred when they were commenced within three years after county's subsidy claim was reduced by application of regulation, even though regulation was adopted in 1946. West's Ann.Health & Safety Code, §§ 3300, 3301.5, 3301.6; West's Ann.Code Civ.Proc. §§ 338.1, 343.

16. Mandamus ⇨3(4)

Fact that action by county against Department of Public Health and certain state officials for declaratory relief was broad enough to afford county all necessary and appropriate relief was not fatal to mandamus judgment to compel pay-

ment of subsidies by Department of Public Health to county for partial-pay patients in county tuberculosis hospitals. West's Ann.Gov.Code, § 11440; West's Ann.Health & Safety Code, §§ 3300, 3301.5, 3301.6.

17. Mandamus ⇨3(2)

Fact that action in declaratory relief lies does not prevent the use of mandate.

18. Declaratory Judgment ⇨393

Where action by county against Department of Public Health and certain state officials to compel payment of subsidies to county and action by county against same defendants for declaratory relief were consolidated for purposes of trial, defendants were not prejudiced by existence of mandamus judgment which granted same relief as other judgment.

19. Judgment ⇨891

Where two judgments have been obtained for same cause of action, payment or satisfaction of one operates as satisfaction of other, except as to costs.

Edmund G. Brown, Atty. Gen., Henry A. Dietz, Asst. Atty. Gen., Lee B. Stanton, Deputy Atty. Gen., for appellants.

Harold W. Kennedy, County Counsel, Robert C. Lynch, Deputy County Counsel, Los Angeles, for respondent.

ASHBURN, Justice.

This is a controversy over certain tuberculosis subsidy payments claimed by the County of Los Angeles to be payable to it under the Tuberculosis Subsidy Law but withheld by the State Department of Public Health. The trial court ruled that such payments, in an aggregate amount of \$330,715.69, had been improperly withheld from the county, should be paid over to it, and that future subsidies payable under the statute (§§ 410-414, 3099-3342, Health & Safety Code) must be computed in accordance with the claim of the county. The application of the statute to partial-pay patients in county hospitals is the focal point of the dispute. The State

Department of Public Health and other defendants have appealed.

The above mentioned sections of the Health & Safety Code are a codification of the Tuberculosis Subsidy Law first enacted in 1915 (Stats.1915, Ch. 766, p. 1530). It provided for a state subsidy to any city or county maintaining a tuberculosis ward or hospital of \$3 a week "for each person in the active stages of tuberculosis cared for therein at public expense who is unable to pay for his support" etc. An administrative construction was placed upon this language to the effect that it included no one who could pay all or part of the expense of his keep. The Attorney General so ruled (No. 8471 (2-14-33)) and the law was so applied.¹ In 1919 the statute was amended by inserting in § 3 (which later became § 3300, Health & Safety Code) the sentence: "Said hospitals shall be allowed to receive pay patients." Stats.1919, Ch. 464, p. 853. When codification took place in 1939 that sentence remained in the principal section, No. 3300, Health & Safety Code, which now reads: "Each city, county, city and county, or group of counties may establish and maintain a tuberculosis ward, hospitals, or sanatorium for the treatment of persons suffering from tuberculosis. Each city, county, or city and county that establishes and maintains a tuberculosis ward, hospital, or sanatorium shall receive from the State the sum provided in Section 3301.5, and each county that participates jointly with one or more other counties in the establishment and maintenance of a tuberculosis hospital, ward, or sanatorium shall receive from the State the sum specified in Section 3301.6, for persons suffering from tuber-

culosis, cared for therein at public expense, who are unable to pay for their support and who have no relatives legally liable and financially able to pay for their support; except that the city, county, or city and county is not entitled to receive this state aid unless the tuberculosis ward, sanatorium, or hospital conforms to the regulations of and is approved by the State Department of Public Health. The hospitals shall be allowed to receive pay patients." Section 3301.5 has been amended from time to time by making increases in the subsidy. It now is graduated according to the number of patient days of care per year, ranging from \$1.75 to \$2.60 per patient day.

The question of whether subsidy should be paid for a part-pay patient remained an uncertain one until the department, under the guidance of the Attorney General (7 Op.Cal.Atty.Gen. 224), undertook to solve it by adopting in August, 1946, a regulation No. 5175, which was renumbered 5198 and became a part of Title 17, California Administrative Code. It reads: "A patient who pays any amount toward his support or in whose behalf contributions are received or anticipated, is not eligible for subsidy, unless it is agreed that such contributions will be used to reimburse the state up to the total amount of subsidy paid in behalf of the patient." In 1949 the Los Angeles County Counsel advised the Board of Supervisors that the regulation is at variance with § 3300 of the statute and hence void; also, that the county is entitled to subsidy payments on the following basis: "Full subsidy shall be claimed in every case, including partial pay patients, where the amount of subsidy plus the amount paid for care does not

1. See 24th Biennial Report of California State Board of Health, pp. 9, 165; 35th Biennial Report, p. 178. These are proper matters for judicial notice (Code Civ. Proc. § 1875(3)); *Sheehan v. Vedder*, 108 Cal.App. 419, 425-426, 292 P. 175; *Livermore v. Beal*, 18 Cal.App.2d 535, 540-542, 64 P.2d 987; *Wood v. Kennedy*, 117 Cal.App. 53, 58, 62, 3 P.2d 366; *ABC Acceptance v. Delby*, 150 Cal.App.2d

Supp. 826, 828, 310 P.2d 712; 18 Cal. Jur.2d, § 24, p. 447), and it is the duty of an appellate court to treat them as such regardless of failure or refusal of the trial judge so to do. *Varcoe v. Lee*, 180 Cal. 338, 343, 181 P. 223; *Rogers v. Cady*, 104 Cal. 288, 290, 38 P. 81; *Ward Mfg. Co. v. Miley*, 131 Cal.App.2d 603, 609, 281 P.2d 343.

exceed the cost of care. Should payments and subsidy exceed the cost of care, refund to the State of the difference shall be made on subsequent claims." Thereafter, claims for subsidy submitted by the county to the Department failed to show all amounts collected from patients. The court found upon the basis of stipulated facts: "[T]hat in the preparation and submission of claims for tuberculosis subsidy, the County of Los Angeles has not, since July 1, 1951, complied with Section 5198 * * * and that in the tuberculosis subsidy claims submitted by the County of Los Angeles for the semiannual periods from July 1, 1947, through June 30, 1951, one hospital prepared its claims in the manner prescribed by Section 5198 * * * while the other three hospitals did not comply with Section 5198 * *." This text implies, and it seems not to be disputed, that none of the Los Angeles County hospitals complied with § 5198 after July 1, 1951.

Thus it appears that the Board of Health claims all support moneys paid by part-pay patients and refuses to include them in the subsidy calculation unless the county agrees to pay and actually pays over those moneys to the state; failure to do so precludes any subsidy with respect to a part-pay patient. "The position of the appellants, based upon the opinions of the Attorney General over a period of many years, has been that the actual cost to the County has no bearing whatsoever on the amount of the subsidy to be paid to the County; that any amount contributed by the patient must be deducted from the amount of the subsidy, and only the balance paid to the County as State tuberculosis subsidy." Opening Br. pp. 15-16. On the other hand the county, conceding there can be no subsidy to the extent that the statutory aid plus the patient's contribution exceeds the actual cost of his keep, contends that the payment of the subsidy is mandatory and that it is entitled to keep the same in addition to the amount paid by the patient unless the sum of the two items exceeds the actual expense to the county of supporting that patient.

The Attorney General rendered an opinion in July, 1951 (18 Op.Cal.Atty.Gen. 29) upholding the validity of the regulation. The county never made any agreement such as the regulation prescribes and did not comply with the same, but its claims for subsidy were paid in full for the period from July 1, 1947, to June 30, 1951. A post-audit of such claims was made by the controller over a period extending from October, 1952, to July, 1953; it disclosed the county's failure to report on part-pay patients in the manner contemplated by regulation No. 5198, and the discrepancy amounted to \$224,540.57 for the period covering July 1, 1947, to December 31, 1951, inclusive. This amount (plus \$2,969.89 representing deductions made by reason of matters other than the application of § 5198) was deducted from the county's claim for the six months period of January 1 to June 30, 1953. The appellants currently disallowed a portion of each subsidy claim filed by the county for each semiannual period from July 1, 1951, through December 31, 1953, in the total sum of \$106,175.12, making a grand total deduction of \$330,715.69, the amount of the judgment rendered herein. Though these figures seem large, they amount to approximately four per cent of the \$7,634,202.71 subsidy apportioned to the County of Los Angeles for the period from July 1, 1947, to December 31, 1953, inclusive.

On August 7, 1953, the county sought a writ of mandate to compel payment of said sum of \$330,715.69 to it, but the writ was denied without opinion in the District Court of Appeal. Thereupon two suits (now under review) were filed, one seeking mandate and the other declaratory relief. Judgment favorable to the county was entered in each and the instant appeals were taken therefrom.

The controlling question is whether regulation 5198 is a valid administrative implementation of the statute. Initially it is to be observed that the statute provides a true subsidy, payable to the county, not the patient, the amount being computed according to the number of patient-hours

of care provided to tuberculosis patients at public expense. The generally accepted definition of the term "subsidy" is stated in 83 C.J.S. p. 760 as follows: "Something, usually money, donated or given or appropriated by the government through its proper agencies; a grant of funds or property from a government, as of the state or a municipal corporation, to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public; a subvention." The title to an amending act of 1939 characterizes § 3300 as "relating to grants in aid for the support and care of persons afflicted with tuberculosis." Stats.1939, Ch. 1070, p. 2996. Section 3300 itself refers to the payments as "state aid." The title to the amending statute of 1947 (Stats.1947, Ch. 1000, p. 2266) refers to the subsidy payments as "state grants-in-aid to counties * * * for the treatment and care of persons suffering from tuberculosis."

Counsel for both sides concede, as they must, that one who pays in full for his care is not hospitalized at public expense, and hence cannot be included in the basis for computing the subsidy. It seems evident that the insertion in § 3 of the original statute of the sentence "the hospital shall be allowed to receive pay patients" must have been intended to refer to those who can provide only part of the cost of the keep. Its inclusion in the particular section which commands payment of a subsidy is significant. In said § 3 the quoted sentence follows the provision that the county shall receive \$3 a week for each person cared for at public expense, and immediately precedes a requirement that the medical superintendent render semiannual statements covering the subject matter. "The medical superintendent of each hospital receiving state aid under this act shall render semi-annually to the state bureau of tuberculosis a report under oath showing, for the period covered by the report, (1) the number of patients suffering from tuberculosis cared for therein at public expense, unable to pay therefor, and (2) the number of weeks of treatment of each such patient." Stats.

1919, Ch. 464, p. 853. In the process of codification this medical report requirement was carried into § 3301.

Ours is but a problem in statutory interpretation, which "has been characterized as a search after the legislative intent as expressed in the language of the statute." 23 Cal.Jur. § 101, p. 719.

Precedents concerning the meaning of "cared for therein at public expense" and "unable to pay for their support" favor respondent's position rather than that of appellants. See *People ex rel. Caldwell v. Board of Supervisors*, 45 App.Div. 42, 60 N.Y.S. 1122, 1127, and *In re Hooker's Estate*, 173 Misc. 515, 18 N.Y.S.2d 107, 113, which hold that the word "expense" connotes money actually paid out or necessarily to be spent. In *Madison v. City & County of San Francisco*, 106 Cal.App.2d 232, 234 P.2d 995, 1002, 236 P.2d 141, the court construed a city ordinance providing inter alia for admission to the San Francisco hospital of "(i) An expectant mother who is unable to pay for her care and the cost of her maintenance." At page 247 of 106 Cal.App.2d, at page 1005 of 234 P.2d the court said: "An expectant mother need not be a pauper to be 'unable to pay for her care,' within the meaning of that expression as used in the state and local codes. * * * The word 'indigent,' when used in connection with admissions to county hospitals, was defined by the court in the Goodall case [*Goodall v. Brite*, 11 Cal.App.2d 540, 54 P. 2d 510] as including a person 'who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support.' 11 Cal.App.2d at page 550, 54 P.2d at page 515. That, we believe, is the meaning of the expression 'unable to pay for her necessary care' as used by the Legislature in section 204 of the Welfare and Institutions Code." These authorities support the proposition that one is cared for at the public expense to the extent to which the public pays for his support, no more and no less.

It is difficult to discern a legislative intent to exclude part-pay patients from the basis of computation of the subsidy, especially

as the pertinent sentence concerning the receiving of pay patients was inserted in the statute for their benefit. It is doubtful whether the provision that the "hospitals shall be allowed to receive pay patients" would be valid if held to apply to those who are able to pay the full cost of their support. Under the ruling in *Goodall v. Brite*, 11 Cal. App.2d 540, 545, 548-550, 552, 54 P.2d 510, the affording of hospital facilities to the latter class of patients would amount to a gift of public funds unless limited to emergency cases. At page 551 of 11 Cal. App.2d, at page 515 of 54 P.2d, the court pertinently remarked: "In the administration of public funds the supervisors are acting as trustees and they should so administer those funds as to lighten the taxpayers' burden as much as possible."

[1, 2] To the extent that patients do not pay for their own keep they are manifestly supported at public expense. Counsel for both sides recognize this fact, but appellants claim a right to receive from the county such partial payments as those patients make,—something which the statute does not suggest. Section 3300 is permissive with respect to a county assuming the state's burden of caring for the indigent (*County of Sacramento v. Chambers*, 33 Cal.App. 142, 147, 164 P. 613; in this case indigent tuberculosis patients),—"may establish and maintain a tuberculosis ward, hospital, or sanatorium"—but it is mandatory in its declaration that for such facility it "shall receive from the State the sum provided in Section 3301.5." The use of "may" and "shall" in the same section cannot be deemed inadvertent. Section 3301.5 is likewise mandatory, "the amount of the tuberculosis subsidy * * * shall be the following," specifying flat amounts per patient day. We see in this no opening for a construction to the effect that the county will receive only part or none of the subsidy in case the patient pays a portion of his keep or that the state in any event is entitled to receive or take a credit for any of the patients' payments unless they are substantial enough to take him out of the part payment category.

Counsel for appellants place considerable reliance upon this portion of § 3300, "except that the city, county, or city and county is not entitled to receive this state aid unless the tuberculosis ward, sanatorium, or hospital conforms to the regulations of and is approved by the State Department of Public Health." It was stipulated and the court found that Los Angeles County's "wards and hospitals conform to the regulations of and are approved for tuberculosis subsidy by the State Department of Public Health, except that in the preparation and submission of claims for tuberculosis subsidy the County of Los Angeles has not complied with Section 5198 * * *." Respondent argues "that by the language 'regulations of * * * the State Department of Public Health,' the Legislature contemplated that these regulations would cover such matters as adequate physical facilities, including such things as buildings, wards, bed space, laboratory facilities, qualifications and training standards of personnel, and the keeping of records and statistics at these hospitals.

"The specific language of Section 3300 provides that the 'ward, sanitarium or hospital' must conform to the rules in order to qualify for subsidy, clearly contemplating that it is the facilities of these installations which must conform to the rules in order that the institution qualify for subsidy, and does not refer to fiscal matters between the counties and the State." This impresses us as sound doctrine. The quoted exception plainly carries the inference which respondent attaches to it and it gives no hint of any right in the Department of Public Health or the controller or anyone else to revise, reduce or offset the subsidy which §§ 3300 and 3301.5 specifically direct to be paid in prescribed amounts.

[3, 4] This statutory language assumes an existing right of administrative interpretation through the adoption of regulations, but the right springs from the same statute. Section 102, Health & Safety Code, provides: "It shall have power to adopt, promulgate, repeal and amend rules and regulations consistent with law for the

protection of the public health." It is in *pari materia* with the following sections of the Government Code. Section 11373 provides: "* * * Each regulation adopted, to be effective, must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." Section 11374: "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute. * * *" The administrative agency must confine itself to reasonable interpretation in adopting regulations for administration of its governing statute; if it goes beyond that, the legislative area has been invaded and the regulation counts for nought. See *Boone v. Kingsbury*, 206 Cal. 148, 161, 273 P. 797; *Whitcomb Hotel, Inc., v. California Employment Commission*, 24 Cal.2d 753, 759, 151 P.2d 233, 155 A.L.R. 405; *First Industrial Loan Co. of California v. Daugherty*, 26 Cal.2d 545, 550, 159 P.2d 921; *Williamson v. United States*, 207 U.S. 425, 461-462, 28 S.Ct. 163, 52 L.Ed. 278; *United States v. United Verde Copper Co.*, 196 U.S. 207, 215-216, 25 S.Ct. 222, 49 L.Ed. 449; *United States v. George*, 228 U.S. 14, 20, 33 S.Ct. 412, 57 L.Ed. 712. The effect of these statutes and authorities is summarized in *Tolman v. Underhill*, 39 Cal.2d 708, 712, 249 P.2d 280, 282: "It is well settled, however, that laws passed by the Legislature under its general police power will prevail over regulations made by [an agency] with regard to matters which are not exclusively [that agency's] affairs." That is the case here. The legislature has occupied the field which the regulation attempts to invade (cf. *Department of Social Welfare v. Kern County*, 29 Cal.2d 873, 877, 180 P.2d 1).

[5,6] While interpretive regulations, especially those of long standing, are entitled to considerable weight in determining the meaning of a statute, the ultimate

responsibility rests upon the courts, and they are obligated to strike down an administrative rule which attempts to add to or subtract from the statute. "Whatever the force of administrative construction, however, final responsibility for the interpretation of the law rests with the courts. 'At most administrative practice is a weight in the scale, to be considered, but not to be inevitably followed. * * * While we are of course bound to weigh seriously such rulings, they are never conclusive.'" [Citation.] An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment. [Citations.] Moreover, an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change. [Citations.]" *Whitcomb Hotel, Inc., v. California Employment Commission*, supra, 24 Cal.2d 753, 757-758, 151 P.2d 233, 235. Regulation 5198 was an attempt to extend the rule-making power beyond its legitimate function, a trespass upon the legislative field.

Appellants also argue that the cost to the county of maintaining tuberculosis patients has no relation to the statute, that this is shown by § 3301.7, enacted in 1953, which provides: "It is the intention of the Legislature to adjust from time to time state participation in the care of persons suffering from tuberculosis in accordance with changes in the cost of caring for such patients." Counsel say in their opening brief: "This clearly indicates that the cost of care to the counties is not a matter to be considered in *claiming* the subsidy, but rather is a matter which the Legislature will consider from time to time in fixing the *amount* of the subsidy per patient day." The section was passed as part of a measure increasing the flat subsidy payable to the county and evinces an intent to increase the subsidy to the county as the cost of care goes up, or vice versa. (Since 1915 the amount has been increased from \$3 per patient per week to \$2.60 per patient per day in some instances.) We agree that § 3301.7 does not reflect an intention to

have the specified amount of aid altered by the county or the state. But this aids appellants' position in no respect. If it throws any light upon our problem it merely serves to illuminate the fact that the subsidy is a fixed amount which can be changed directly or indirectly by the legislature only.

[7] But, say appellants, this regulation has had legislative approval, for §§ 3300 to 3301.6 have been amended in 1947, 1949 and 1953.² Stats.1947, Ch. 1000, p. 2266; Stats.1949, Ch. 1091, p. 1990; Stats.1949, Ch. 1242, p. 2195; Stats.1953, Ch. 28, p. 632, Ch. 331, p. 1600, Ch. 550, p. 1810, Ch. 1513, p. 3175. Counsel cite *Universal Engineering Co. v. State Board of Equalization*, 118 Cal.App.2d 36, 43, 256 P.2d 1059, 1063, to the effect that: "It has been held that where an administrative officer or board has adopted a regulation * * * and the legislature subsequently reenacts the statute without amendment in this regard, the reenactment amounts to a legislative confirmation of the prior existing rules of interpretation." After making this statement the court also said: "In resolving a question as to the import of a statute, a court attaches probative weight to the administrative agency's conclusion as to the meaning of the law, and a court will not ordinarily adopt another construction unless the determination of the agency or board is shown to have been clearly erroneous or unauthorized." The actual decision was that the administrative ruling in question was a reasonable interpretation of the statute. The true rule seems to be that the mere reenactment of the statute without change does not necessarily constitute a legislative approval of an existing regulation. In *Pacific Greyhound Lines v. Johnson*, 54 Cal.App.2d 297, 302, 129 P.2d 32, 34, it is said: "Nor does it follow from the fact that the Legislature has amended the act without expressing disapproval of the practice of the board of excluding bridge and ferry tolls from 'gross receipts,' subject to the tax, that it has given legis-

lative approval of such practice. The presumption that a Legislature, in amending or reenacting a statute, is familiar with the construction which the courts have put upon terms used therein, is well recognized; but such presumption does not necessarily apply to all constructions or practices adopted by administrative boards, and should not be too generally indulged in the absence of a showing that such construction or practice has been brought to the attention of the Legislature. [Citations.] The rules contended for by appellant are only aids in statutory construction of a legislative enactment which is so general in its terms as to render an interpretative rule or regulation appropriate. They are not conclusive upon the courts." To the same effect, see *In re Estate of Madison*, 26 Cal. 2d 453, 463, 159 P.2d 630; *Trabue Pittman Corporation v. County of Los Angeles*, 29 Cal.2d 385, 399, 175 P.2d 512; *Saso v. Furtado*, 104 Cal.App.2d 759, 769, 232 P.2d 583; *Dahlbeck v. Industrial Accident Commission*, 135 Cal.App.2d 394, 402, 287 P.2d 353. The *Universal Engineering* case, *supra*, is not deemed controlling here for the reason, among others, that the present dispute did not rise to the surface until 1953 when the post-audit was made, and there is nothing to indicate that it did or could have come to the notice of the legislature or of legislative counsel prior to the 1953 amendments. (The last amendment of § 3300 (prior to 1957) was made in 1947. The reenactment and renumbering of these sections in 1957³ can throw no light upon this case, for that occurred after the decision in the lower court.)

[8] Appellants' claims of acquiescence and laches on the part of the county and of estoppel against it were ruled adversely to them below and, as the pertinent findings rest upon sufficient substantial evidence, those contentions are not now available to appellants. They require but brief comment.

2. None of said amendments affects § 3300 except that of 1947.

3. See Statutes 1957, Chapter 205, page 861.

As to alleged acquiescence by the County in the Department's construction of the statute as embodied in rule 5198, it affirmatively appears that the County never made the agreement required by 5198, refused to comply with it, did not furnish the information necessary to its application, and at all times resisted enforcement of that regulation.

Laches and estoppel are so closely akin that they may be treated together. There is no showing of prejudice to the Department or anyone else through reliance upon conduct of the County. No moneys were ever paid to it on the basis of any express or implied recognition of 5198 by the County. No moneys were received by it which were not legally due and payable. What appellants now seek is to preclude respondent from resisting a retroactive charge against it predicated upon an erroneous construction of the statute. The rule was not invoked against respondent until July, 1952, when its subsidy claim for the second six months of 1951 was reduced; it sought mandamus in August, 1953, and filed the instant actions in May, 1954. There was no unreasonable delay in this. Even if there had been long delay in attacking the regulation that would not afford ground for a finding of laches or estoppel. Anent this matter the court said in *Del Mar Canning Co. v. Payne*, 29 Cal.2d 380, 384, 175 P.2d 231, 233: "No authority is cited to the point that the failure to object to the promulgation of an unconstitutional rule raises an estoppel to attack it afterwards and we are satisfied that the commission has no legal power to place the burden of objecting to a rule at the time of its formulation upon those engaged in the industry under pain of thereafter being estopped to attack its validity."

We conclude that the trial judge did not err in holding regulation 5198 to be void or in molding relief to plaintiff accordingly.

[9] Appellants challenge the jurisdiction of the court in each of the instant cases. It is said that they are suits against the state and will not lie because the state has not consented to be sued, citing Constitution, Art. XX, Sec. 6, and cases which construe it.⁴ The defendants in each action are the State Department of Public Health, its director, the members of the State Board of Public Health, the State Controller and the State Treasurer. One of the actions seeks declaratory relief under § 11440, Government Code, which says: "Any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure * * *." But the county was uncertain whether said section affords an exclusive remedy or whether it can embrace any relief beyond the mere declaration of validity or invalidity of regulation 5198; so it brought a companion case in mandamus upon the theory that that proceeding would lie if declaratory relief proved to be an inadequate remedy, not broad enough to cover a necessary accounting or to declare rights and duties for the future administration of the statutes with reference to part-pay patients.

It will be noted that each action runs against state officers in their official capacities and seeks primarily a correct disbursement of funds appropriated by the legislature for tuberculosis subsidies. It also seeks a binding direction to them as to proper disbursement of future subsidy appropriations so long as § 3300 remains unchanged. The state has already acknowledged and declared an obligation to supply the subsidy and the basic question of each suit is the proper interpretation of the statute as to method of disbursing the appropriated moneys.⁵ Each proceeding is brought against state officers having control

4. Const. Art. XX, Sec. 6: "Suits may be brought against the State in such manner and in such courts as shall be directed by law."

5. For appropriations covering the years 1947-1953, see the following statutes: Stats.1947, Ch. 486, p. 1456, Item 332; Stats.1948, Ch. 23, p. 112, Item 372;

over the funds and prays for judgment directing them to perform their statutory duty. Such an action is not one against the state within the purview of the constitutional provision, Article XX, Section 6. 34 Am.Jur. § 123, p. 905: "The immunity of a State and of the United States from suit prevents mandamus against a public officer, board, or commission where it is in reality a proceeding against either sovereign. It is otherwise where the proceeding against the officer is not in effect one against the State or the United States. In such case, the immunity of the sovereign to suit cannot be invoked to defeat the mandamus to compel performance by the officer of duties imposed upon him by law. If the mandamus proceeding in which the State's officers or boards are made respondents cannot subject the State to the payment of money or result in any diminution of its sovereignty, it is not a proceeding against the State, as where all that can possibly flow from the judgment in mandamus is that the public official or official board will be required to refund or release money or property wrongfully detained from the relator."

County of Los Angeles v. Riley, 20 Cal. 2d 652, 128 P.2d 537, was a proceeding in mandamus to compel officers of the state to recalculate credits to which the county claimed to be entitled upon certain reports of aid to needy children and to allow the county a credit as the result of such recalculation. In rejecting the contention that the proceeding would not lie as the state had not consented to be sued, the court said, 20 Cal.2d at page 662, 128 P.2d at page 543: "The rule is well established in this state that where the action is one simply to compel an officer to perform a duty expressly enjoined upon him by law, it may not be considered a suit against the state. [Citations.] As the present action is not one against the state, the provision of section 688 of the Political Code,⁶ re-

quiring the presentation of a claim to the Board of Control as a prerequisite to the institution of suit, has no application to actions of this character. The action was properly commenced and petitioner has the legal right to maintain the same." To the same effect, see, California Physicians' Service v. Garrison, 28 Cal.2d 790, 800, 172 P.2d 4, 167 A.L.R. 306; U'Ren v. State Board of Control, 31 Cal.App. 6, 12, 159 P. 615; City of Oakland v. Brock, 8 Cal.2d 639, 643, 67 P.2d 344. As heretofore shown, the object of the present suits is to compel state officers to disburse funds specifically appropriated for tuberculosis subsidies in the manner provided by the statute. This involves no invasion of state sovereignty and does not fall within the rule precluding suits against the state without its consent.

[10] The foregoing considerations also dispose of the argument that respondent is barred from recovery by failure to exhaust administrative remedies through filing of claims with the Controller pursuant to § 16021 and §§ 16041-16054 of the Government Code. Those sections relate to claims against the State; as the present claims of the County do not fall in that category there was no necessity of complying with any of the claim sections in question. Indeed the procedure applicable to subsidy payments called for filing of claims therefor with the State Department of Public Health and this was done. The language last above quoted from County of Los Angeles v. Riley, supra, 20 Cal.2d 652, 662, 128 P.2d 537, 543, is here applicable.

[11] Each action is attacked upon a separate jurisdictional ground. With respect to the declaratory relief action it is argued that § 11440, Government Code, is a consent to suit for the narrow purpose of obtaining a judicial declaration "as to the validity of any regulation." Aside from the fact that it is not a suit against the

Stats.1949, Ch. 700, p. 1284, Item 380; Stats.1949, Ch. 1242, p. 2196, § 2.5; Stats.1950, Ch. 2, p. 344, Item 485; Stats.1951, Ch. 1020, p. 2738, Item 371; Stats.1952, Ch. 3, p. 107, Item 420; Stats. 1953, Ch. 971, p. 2446, Item 401. Most

of these Statutes use the following phraseology: "To be expended in accordance with Division 4 of the Health and Safety Code."

6. Now § 16041, Government Code.

state at all, it further appears that this is a myopic view of the section. It provides that declaratory relief may be obtained "by bringing an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure." This is a reference to § 1060 et seq., Code of Civil Procedure. Section 1060 says that the plaintiff "may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time." Section 1062: "The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts." If specific consent to suit were necessary this incorporation of §§ 1060-1062, Code of Civil Procedure, into § 11440 by reference would clearly be sufficient consent to support all phases of the declaratory judgment. But the true aspect of the matter is that validity of administrative regulation is added by § 11440 to the enumeration of subjects for declaratory relief found in § 1060, Code of Civil Procedure. It is established law that: "It is the duty of the court hearing an action for declaratory relief to make a complete determination of the controversy * * *." *Osborne v. Security Ins. Co.*, 155 Cal.App.2d 201, 318 P.2d 94, 97. Accord: *Petersen v. Ridenour*, 135 Cal.App.2d 720, 727-728, 287 P.2d 848; *American Enterprise, Inc., v. Van Winkle*, 39 Cal.2d 210, 219, 246 P.2d 935.

[12] It is now well settled that no specific consent is requisite to a suit for declaratory relief brought against public officials and designed to adjudge and declare the obligations of their office with respect to a given factual situation. Indeed, the cases go so far as to say that such an action may run against the state itself without the necessity of specific statutory consent. So held in *Hoyt v. Board of Civil Service*

Commissioners, 21 Cal.2d 399, 403, 132 P.2d 804; *Lord v. Garland*, 27 Cal.2d 840, 852, 168 P.2d 5; *California Physicians' Service v. Garrison*, supra, 28 Cal.2d 790, 800, 172 P.2d 4; *Bess v. Park*, 132 Cal.App.2d 49, 53, 281 P.2d 556.

[13] Objection is made to the inclusion of an injunctive provision in each judgment. After decreeing the invalidity of regulation 5198, requiring an accounting from defendants to plaintiff, awarding judgment for \$330,715.69 and directing issuance of warrant for payment of same, the court further declared it to be the duty of defendants: "(a) To set aside their determination of the amount of tuberculosis subsidy payments and their rejection and disallowance of a part of the plaintiff's claim for each of the subsidy periods from July 1, 1951, to December 31, 1953; (b) To cease and desist from any action whereby there is withheld all or any portion of the tuberculosis subsidy claims of the County of Los Angeles for tuberculosis care furnished to eligible individuals by the County of Los Angeles, except as to amounts in excess of the amount set forth in Section 3301.5 of the Health and Safety Code, which excess amount is determined by the accounting between the parties to be the amount of \$2,969.89; (c) To take that necessary action within each of their particular jurisdictions so that the County of Los Angeles will forthwith be paid the tuberculosis subsidy payments as enjoined upon the respondents by Section 3301.5 of the Health and Safety Code. * * * (d) To hereafter allow and pay in full all claims of the County of Los Angeles for subsidy for tuberculosis care furnished to eligible individuals in the amounts provided in Section 3301.5 of the Health and Safety Code without any deductions made by application of Section 5198, Title 17, California Administrative Code." The objection goes to paragraph (b).

[14] It is argued that an injunction is not permissible in a declaratory relief action. The law is to the contrary, as was declared in *Knox v. Wolfe*, 73 Cal.App.2d 494, 505, 167 P.2d 3; *James v. Hall*, 88

Cal.App. 528, 535, 264 P. 516; *Jones v. Feichtmeir*, 95 Cal.App.2d 341, 344, 212 P.2d 933; *Staley v. Board of Medical Examiners*, 109 Cal.App.2d 1, 5-6, 240 P. 2d 61.

The contention that the "cease and desist" paragraph is improper in either judgment because violative of § 526, subdivision 7(4), Code of Civil Procedure and Civil Code, § 3423, subdivision 4, is equally untenable. Those sections prohibit the granting of an injunction to prevent the execution of a public statute by officers of the law. But they apply only to valid statutes. A statute or a regulation has no existence if it is invalid and its enforcement may be enjoined. "The argument, in any case, against the validity of an injunction issued to restrain the execution of a statute, rests, of course, on the premise that the statute in question is a valid exercise of the legislative power. An act of the Legislature which is in conflict with the Constitution is no statute at all. It is utterly void, and has no force or legal existence. * * *'" *Wheeler v. Herbert*, 152 Cal. 224, 228, 92 P. 353. The provisions of section 3423, subd. 4, of the Civil Code 'refer solely to injunctions against the execution of valid statutes.' *Wheeler v. Herbert*, [152 Cal. 224, 92 P. 353]." *Reclamation District No. 1500 v. Superior Court*, 171 Cal. 672, 676, 154 P. 845, 847.

[15] Appellants invoke the statute of limitations, relying on Code of Civil Procedure § 343, the four-year statute. Counsel argue that rule 5198 was adopted in August, 1946, and the County's suit not brought within four years and hence is barred. Respondent aptly replies: "In this case the appellants duly processed and paid all of the County's subsidy claims through the claim for the period of ending June 30, 1951. * * * The first time that Section 5198 was asserted against Los Angeles County was when its subsidy claim for the period July 1, 1951, to De-

cember 31, 1951, was reduced by application of this rule on July 2, 1952. * * * This action being for the purpose of enforcing a liability created by statute is governed by the three-year Statute of Limitations provided in Code of Civil Procedure Section 338.1. Since this action was filed May 4, 1954, it was filed well within the three-year statutory period, which commenced July 2, 1952." We agree. Neither action was barred by limitation.

[16,17] Section 11440, Government Code, having been found broad enough in scope to enable the court to afford to plaintiff all necessary and appropriate relief, it follows that there was no actual need of mandamus and that the familiar test of its applicability, absence of other adequate remedy (*Bartholomae Oil Corporation v. Superior Court*, 18 Cal.2d 726 730, 117 P.2d 674) is not met at bar. But that is not fatal to the mandamus judgment. "While originally mandate would not lie if there were other remedies available, that is no longer the situation in California. See *Sipper v. Urban*, 22 Cal.2d 138, 137 P.2d 425. Therefore, the fact that an action in declaratory relief lies (Gov.Code, § 11440) and there is some indication that in a proper case injunction will lie, see *Brock v. Superior Court*, 11 Cal.2d 682, 81 P.2d 931; *Challenge Cream & Butter Ass'n v. Parker*, 23 Cal.2d 137, 142 P.2d 737, 149 A.L.R. 1203; *Agricultural Pro-rate Commission of California v. Superior Court*, 5 Cal.2d 550, 55 P.2d 495 does not prevent the use of mandate." *Brock v. Superior Court*, 109 Cal.App.2d 594, 603, 241 P.2d 283, 289.

[18,19] The record shows that the judgments in the two cases run parallel courses and grant the same relief.⁷ The cases were consolidated for purposes of trial only and the court and counsel agreed that separate findings and judgments must be made. The question therefore arises whether appellants are prejudiced by the existence of the mandamus judgment which

7. Appellants assert that these are money judgments against the individual public officials. But this is not correct for they

are ordered to pay out the moneys in the course of their duties as such public officers.

grants the same relief as the other one. The answer must be a negative. 2 Freeman on Judgments, 5th Ed., p. 2344, § 1126, states the apposite principle: "Where two judgments have been obtained for the same cause of action or debt, the payment or satisfaction of one operates as a satisfaction of the other, except as to costs." The rule is stated in substantially the same language in 49 C.J.S. Judgments § 575, p. 1058. Cf. Ballentine v. Superior Court, 26 Cal.2d 254, 261, 158 P.2d 14. Costs were taxed at \$6.50 in the declaratory relief judgment, but no costs were taxed in the other case. Hence we have no problem growing out of costs. As payment or other performance of one of the judgments operates as a satisfaction *pro tanto* of the other judgment, appellants can suffer no prejudice from the existence of both decrees and we conclude that the duplication does not require or warrant a reversal of either judgment.

Other points raised in support of the appeal have been examined and found without merit. They require no further discussion.

The judgment in each case is affirmed.

FOX, P. J., and KINCAID, J. pro tem., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR and SPENCE, JJ., dissenting.



158 Cal.App.2d 590

Henry D. MARTZ et al., Plaintiffs
and Appellants,

v.

Marcos RUIZ, Defendant and Respondent.
Civ. 22601.

District Court of Appeal, Second District,
Division 2, California.

March 21, 1958.

Rehearing Denied April 15, 1958.

Hearing Denied May 14, 1958.

Action arising out of collision between meeting vehicles. The Superior Court of Los Angeles County, William E. Fox, J.,

rendered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Fox, P. J., held that absence of evidence that accident had resulted from any cause other than negligence made it error to give instruction on unavoidable accident; and that, on record presented, such error must be held to have been prejudicial to plaintiffs.

Reversed.

Appeal and Error ⚡1066

Trial ⚡252(7)

In action arising out of collision between meeting vehicles, absence of evidence that accident had resulted from any cause other than negligence made it error to give instruction on unavoidable accident; and, on record presented, such error was prejudicial to plaintiffs.

William Jerome Pollack, Beverly Hills,
for appellants.

Spray, Gould & Bowers, Los Angeles, for
respondent.

FOX, Presiding Justice.

The suit grows out of an automobile collision at the intersection of Balboa Boulevard and Sherman Way in San Fernando Valley. Those streets intersect at right angles. The two cars were traveling on Balboa Boulevard in opposite directions. The plaintiffs' car was going south while the defendant was driving north. This was almost a head-on collision. The left front of defendant's car hit the front of plaintiffs'. There is a conflict in the evidence as to where the impact took place, that is to say, on which side of the double white line. There is evidence that approximately three-quarters of defendant's car was across this line. He maintains, however, that at the moment of impact his entire car was on his side of the white line. Plaintiffs, one of whom (James LaFever) was a passenger in the back seat, were injured. The jury returned a verdict for defendant. Plaintiffs have appealed.

The court gave the jury an instruction on unavoidable accident; the pertinent portion of which reads as follows:

"In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence.

"Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

* * * * *

"Whether or not the accident in question in this case was unavoidable is, of course, a question of fact for you to determine; * * *

Since the trial of this case the Supreme Court has passed on the propriety of giving such an instruction in the case of *Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 320 P.2d 500. The court points out (49 Cal.2d 659, 320 P.2d 504) that "the instruction on unavoidable accident serves no useful purpose" and that (49 Cal.2d 660, 320 P.2d 505) "[t]he instruction is not only unnecessary, but it is also confusing" and "can lead only to misunderstanding." The court states (49 Cal.2d 660, 320 P.2d 505) that "[t]he giving of a confusing or misleading instruction is * * * error" and, except in special situations not here present, "the use of an unavoidable accident instruction should be disapproved." The court then went on to say (49 Cal.2d 660, 320 P.2d 505): "The determination whether, in a specific instance, the probable effect of the instruction has been to mislead the jury and whether the error has been prejudicial so as to require reversal depends on all the circumstances of the case, including the evidence and the other instructions given. No precise formula can be drawn."

In the instant case there is no evidence that the accident resulted from any cause other than negligence. There is no suggestion that any other vehicle interfered

with the movement of either of the two cars or that either of them developed any mechanical difficulty that caused or contributed to the collision. It is thus clear there was no basis in the evidence for giving an instruction on unavoidable accident.

Did the giving of such instruction likely mislead the jury to plaintiffs' prejudice? We think this question may fairly be answered in the affirmative. The testimony of the police officer, who arrived at the scene of the accident only a few minutes after it happened, that three-fourths of defendant's car was over the double white line, that from an examination of the debris and the position of the cars he determined that the plaintiffs' car was never over on the wrong side of the road, and that defendant stated to him at the scene, "I didn't see the other car at all"; defendant's admission on the stand that he did not notice a double white line there and that it was just his feeling from his driving experience that he was on his side of the roadway; and the testimony of Mr. and Mrs. Martz that their car was at all times on their own side of the dividing line: all this evidence makes a strong showing that defendant was negligent and that such negligence was a proximate cause of the accident and injuries to plaintiffs. In this connection it will be recalled that plaintiff LaFever, a lad 14 years of age, was a passenger in the back seat of the Martz car. The verdict of the jury in favor of the defendant and against all the plaintiffs on this state of the record is in itself an indication that the jury was misled to plaintiffs' prejudice. In addition, as pointed out in the *Butigan* case, "the giving of the instruction obviously overemphasized" the defendant's case and "suggested to the jury that they should consider unavoidability as an issue or ground of defense separate and apart from the questions of negligence and proximate causation. An attempt by the jurors to carry out such a direction could be expected to result in confusing and misleading them." (49 Cal.2d 661, 320 P.2d 506). Under all the circumstances, the record

indicates that the error in giving the instruction was prejudicial.

It is unnecessary for us to pass upon other questions that counsel have raised.

Since there is no appeal from a verdict, the purported appeal therefrom is dismissed. The judgment is reversed.

ASHBURN and HERNDON, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



158 Cal.App.2d 583

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Emmett HOLLAND, Defendant and
Appellant.

Cr. 3371.

District Court of Appeal, First District,
Division 2, California.

March 21, 1958.

Defendant was convicted of sale of heroin and of maintaining place for sale of narcotics. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., entered judgment, and defendant appealed therefrom and from order denying new trial. The District Court of Appeal, Dooling, J., held that the evidence relating to single sale of narcotics by defendant in barbecue stand was insufficient to sustain conviction for maintaining place for sale of narcotics.

Judgment and order affirmed in part and reversed in part.

1. Criminal Law ⇨1032(7)

In prosecution for sale of heroin and for maintaining place for sale of narcotics, defendant could not assert for the first time on appeal that there was a fatal variance between indictment and proof in that witnesses before grand jury referred to in-

former-purchaser as a man whereas they testified in the trial that informer-purchaser was a woman. West's Ann.Health & Safety Code, § 11557.

2. Criminal Law ⇨1032(7)

A defendant waives his right to object to an alleged variance between pleading and proof by failing to raise objection in trial court.

3. Criminal Law ⇨1167(1)

In prosecution for sale of heroin and for maintaining place for sale of narcotics, defendant was not prejudiced by variance between witness' testimony before grand jury that informer-purchaser was a man and witness' testimony at trial that informer-purchaser was a woman, where defendant was fully advised that he was meeting the charge of making sales to named woman and the proof offered showed sales to such woman so that defendant would be fully protected against further charges based on the same offenses. West's Ann. Health & Safety Code, § 11557.

4. Criminal Law ⇨1036(1)

Defendant could not urge error in the admission of evidence to which he made no objection in trial court.

5. Criminal Law ⇨650

Trial judge has a wide discretion in controlling experiments in the court room.

6. Criminal Law ⇨650

In prosecution for sale of heroin and for maintaining place for sale of narcotics, refusal to allow defendant to try experiment with a penny in bag to test powers of observation of witness who identified packages of heroin in court was not abuse of discretion. West's Ann.Health & Safety Code, § 11557.

7. Criminal Law ⇨1170½(5)

In prosecution for sale of heroin and for maintaining place for sale of narcotics, where defendant was permitted on cross-examination to develop that witnesses in testifying before grand jury knowingly described female informer-purchaser by masculine pronouns and falsely testified that one of them searched "his" person when they knew this was done by policewomen,

sustaining objection to questions on cross-examination characterizing this conduct as "perjury" and by other epithets was not prejudicial. West's Ann.Health & Safety Code, § 11557.

8. Criminal Law ⚖1166½(12)

In prosecution for sale of heroin and for maintaining place for sale of narcotics, it was not prejudicial error for trial judge to develop from one of the witnesses that it was the policy of the Bureau of Narcotics to keep secret the identity of informers if possible. West's Ann.Health & Safety Code, § 11557.

9. Witnesses ⚖246(2)

The trial judge has a right to question witnesses to develop facts which he deems pertinent.

10. Criminal Law ⚖1177

Errors in connection with counts on which defendant was not convicted did not prejudice defendant.

11. Poisons ⚖9

Evidence warranted conviction for sale of heroin to informer-purchaser who entered barbecue stand with money and without narcotics and met no one therein but defendant who stooped behind counter while facing informer-purchaser who left barbecue stand without money and with narcotics. West's Ann.Health & Safety Code, § 11557.

12. Poisons ⚖9

Evidence relating to single sale of narcotics by defendant in barbecue stand was insufficient to sustain conviction for maintaining place for sale of narcotics. West's Ann.Health & Safety Code, § 11557.

13. Poisons ⚖4

To constitute the offense of "maintaining" place for sale of narcotics, there must be some purpose of continuity in the use of the place for the proscribed illegal conduct. West's Ann.Health & Safety Code, § 11557.

See publication Words and Phrases, for other judicial constructions and definitions of "Maintaining".

14. Poisons ⚖9

Evidence of a single, isolated instance of sale of narcotics, standing alone, without any other corroborating circumstances of which the defendant is shown to have any knowledge, is not legally sufficient to prove that he was "maintaining" the place at which the single sale was made for purpose of selling narcotics. West's Ann.Health & Safety Code, § 11557.

John W. Bussey, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was charged in four counts with violations of the Health and Safety Code, all dealing with prohibited offenses in connection with narcotics. The jury failed to reach a verdict on Counts 1 and 2 and those counts have been dismissed. Appellant was found guilty on Count 3 (sale of heroin on August 23, 1956) and Count 4 (maintaining a place for sale etc. of narcotics, § 11557, Health & Safety Code).

The sales charged were testified to have been made to one Marge Hackney, a female narcotics addict. Since the charges on Counts 1 and 2 have been dismissed we shall detail only the evidence relating to Counts 3 and 4.

On August 23, 1956, Miss Hackney was thoroughly searched by a policewoman about 12:30 p. m. She was given \$20 in identified currency and was driven to the corner of Ellis and Hollis Streets in San Francisco by State narcotic agents. She was under constant observation from the time that she left the State automobile until she entered a barbecue stand operated by appellant at 1404 Fillmore Street. While Miss Hackney turned a corner in going to this stand, as soon as she left the sight of the officers who drove her to Ellis and Hollis Streets she came under the observation of other officers

stationed on Fillmore Street. These latter officers saw her enter the barbecue stand where she talked to appellant. No other person was present in the stand at that time. During the conversation appellant was observed to stoop down behind the counter and rise again. The hands of Miss Hackney and appellant were not visible to the witnesses. Without approaching any other person Miss Hackney left the barbecue stand and returned to the automobile where she handed the agents a package containing heroin. A subsequent search by a policewoman disclosed that Miss Hackney no longer had the \$20 which had been given to her.

Testimony was given of another transaction on the same date in which Miss Hackney met appellant and his wife on the street and returned to the officers with another package of heroin. No objection was made to the introduction of this evidence.

Similar testimony was introduced, over objection, that on August 27 and on September 5 Miss Hackney went to the barbecue stand with marked money and returned with heroin. On these occasions there were several people present with some of whom Miss Hackney was seen to converse. On neither occasion did the witnesses see the appellant.

[1, 2] Appellant's first contention is that there is a fatal variance between the indictment and the proof since the transcript of the testimony before the grand jury shows that the witnesses there referred to the informer-purchaser as a man while in the trial court they testified that the informer-purchaser was a woman. When this fact developed in the trial court appellant's attorney (not the counsel representing him on appeal) made no motion or objection on the ground of this variance, nor did he ask the trial court for a continuance nor suggest that he was prejudiced in any way. His present counsel argues prejudice in having to meet an unexpected charge but no such showing was made in the trial court and it is too late to advance this claim for the first time on appeal. A defendant

waives his right to object to an alleged variance between pleading and proof by failing to raise the objection in the trial court. *People v. Blankenship*, 103 Cal.App. 2d 60, 66, 228 P.2d 835; *People v. Yachimowicz*, 57 Cal.App.2d 375, 380, 134 P.2d 271; *People v. Abila*, 137 Cal.App. 26, 28-29, 29 P.2d 796.

[3] We heartily disapprove of the conduct of these witnesses, but they testified that the informer whom they had spoken of in the masculine before the grand jury was in truth Marge Hackney and appellant's trial counsel chose to discredit them by emphasizing this discrepancy on cross-examination rather than to urge the variance as now is done by the present counsel on appeal. Appellant was fully advised that he was meeting the charge of making sales to Marge Hackney (no purchaser was named in the indictment and appellant concedes that on its face it sufficiently charged the offenses) and we cannot find that he suffered any prejudice in this regard. The proof offered shows sales to Marge Hackney and appellant is fully protected against further charges based on the same offenses. *People v. Leiva*, 134 Cal. App.2d 100, 103, 285 P.2d 46.

[4] Appellant made no objection to the admission of evidence of the second sale on August 23. He is in no position to urge error in the admission of evidence to which he made no objection below. *People v. Dessauer*, 38 Cal.2d 547, 552, 241 P.2d 238. Nor when the prosecutor stated to the jury in his argument that the sale on August 23 at the barbecue stand was the offense charged in Count 3 and the later sale on that date was the subject of a separate indictment against appellant and his wife did he make any objection or motion. The matter is not of that character which a proper admonition from the trial court might not have cured and counsel's failure to object in the trial court precludes his now raising those questions on appeal. *People v. Sutic*, 41 Cal.2d 483, 496, 261 P.2d 241.

[5, 6] Appellant complains of the refusal of the trial court to allow him to try an experiment with a penny in a bag to test

the powers of observation of a witness who had identified packages of heroin in court. The trial judge has a wide discretion in controlling experiments and we find no error in this action.

[7] Appellant was permitted on cross-examination to develop that the witnesses in testifying before the grand jury knowingly described Marge Hackney by masculine pronouns and falsely testified that one of them searched "his" person when they knew this was done by policewomen. They complain that the cross-examination was unduly restricted because of the sustaining of objections to questions characterizing this conduct as "perjury" and by other epithets. Appellant's counsel was permitted to show the character of the testimony before the grand jury and its falsity in the particulars noted and we cannot find any prejudice in the rulings of the court in this connection on repetitious questions argumentative in form. *People v. Apodaca*, 132 Cal.App.2d 340, 282 P.2d 182.

[8,9] We find no prejudicial error in the fact that the trial judge developed from one of the witnesses that it is the policy of the Bureau of Narcotics to keep secret the identity of informers if possible. The trial judge has a right to question witnesses to develop facts which he deems pertinent. *People v. Boggess*, 194 Cal. 212, 241, 228 P. 448; *People v. Lopez*, 124 Cal.App.2d 100, 102, 268 P.2d 171.

[10] Alleged errors in connection with Counts 1 and 2 cannot have prejudiced appellant since he was not convicted on those counts. These and other minor alleged errors need not be noticed.

[11] Appellant contends that the evidence was not sufficient to support the convictions. As to Count 3 the evidence, while entirely circumstantial, is sufficient. From the facts that Marge Hackney entered the barbecue stand with money and without narcotics, met no one therein but appellant, appellant's stooping behind the counter while facing Miss Hackney and the fact that Marge Hackney left the barbecue stand without money and with narcotics,

the jury could reasonably draw the inference that appellant sold the narcotics to Miss Hackney.

[12] We must agree with appellant's contention that there is no substantial evidence to support his conviction of the violation of section 11557, Health and Safety Code. That section reads: "It is unlawful to open or maintain any place for the purpose of unlawfully selling, giving away or using any narcotic."

[13] There is no evidence that this barbecue stand was opened for the prohibited purpose. To constitute the offense of "maintaining" there must be some purpose of continuity in the use of the place for the proscribed illegal conduct. *People v. Mehra*, 73 Cal.App. 162, 167-168, 170-171, 238 P. 802; *People v. Calvert*, 80 Cal.App. 50, 52, 251 P. 244; *Reynolds v. United States*, 6 Cir., 282 F. 256, 258; *Hattner v. United States*, 6 Cir., 293 F. 381, 382; *Gavin v. State*, 199 Ind. 38, 154 N.E. 872, 873-874; *State v. Gastonguay*, 118 Me. 31, 105 A. 402, 403; *State v. Kepler*, 77 Mont. 307, 250 P. 603, 605; *State v. Jenkins*, 66 Mont. 359, 213 P. 590, 593. In *People v. Mehra*, supra, the court said, 73 Cal.App. 170-171, 238 P. 805:

"The better reasoning, we think, supports the holding that, in addition to possession * * * there must be shown to establish the fact of maintaining a common nuisance, a series of sales or a single sale, accompanied by such attendant circumstances as reasonably raise the inference of the purpose for which the possession of the intoxicating liquor is had, or possession, in connection with surrounding circumstances, such as the large quantity of liquor on hand, the various kinds of liquor, the containers in which it is kept, the character of the place, the manner in which it is fitted up, the use of passwords in gaining access to the premises, evidence of people visiting the place in unusual numbers or at unusual times, all of which may reasonably raise the inference of a pur-

pose to sell and sufficiently support the charge of maintaining a common nuisance."

So in *People v. Calvert*, supra, the court said, 80 Cal.App. 52, 251 P. 245: "It is true that a single sale as such, standing alone, is not sufficient upon which to predicate a charge of nuisance * * *"

[14] Here we have proof of a single sale by the appellant in the barbecue stand and no other evidence of any conduct with which the appellant is in any way connected which would furnish any ground for an inference that appellant was maintaining the stand for the purpose of selling narcotics. The two other sales of narcotics at the barbecue stand were not proved to have been made by appellant, by an employee of appellant or with the knowledge of the appellant. The testimony is clear that appellant was not seen by any witness at the time either of the other sales was made. In the only cases cited by the People a series of sales by the defendant and other circumstances personally brought home to the defendant's knowledge were proved which would reasonably support the inference that he was "maintaining" the place for the prohibited illegal purpose (*People v. Pera*, 36 Cal.App. 292, 171 P. 1091; *People v. Nolan*, 34 Cal.App. 545, 167 P. 642; *People v. Frankovich*, 64 Cal.App. 184, 221 P. 671) and in the recent case of *People v. Cannon*, 148 Cal.App.2d 163, 306 P.2d 589, the proof showed a series of circumstances, recited at pages 168 and 592, respectively, which taken together reasonably supported the inference of "maintaining" the place for the illegal purpose. From all of the cases herein cited on the subject the rule is clear that evidence of a single, isolated instance of the sale of narcotics, standing alone, without any other corroborating circumstances of which the defendant is shown to have any knowledge, is not legally sufficient to prove that he was "maintaining" the place at which the single sale was made for the purpose of selling narcotics.

The evidence of the other sales at the barbecue stand was limited in its admission

by the trial judge to the purpose of showing "the character of the place." Since knowledge of these sales was not in any way brought home to appellant it was insufficient for that purpose. However we can find no prejudice to the appellant in so far as the conviction on Count 3, the sale by him, is concerned since the evidence was not introduced in support of that count and was expressly limited by the court to such value as it might have in establishing the character of the place under Count 4.

Judgment and order denying new trial on Count 3 affirmed. Judgment and order denying new trial on Count 4 reversed.

KAUFMAN, P. J., and DRAPER, J., concur.



158 Cal.App.2d 385

In the Matter of the ESTATE of Ruth Sanford HUDSON, also known as Ruth S. Hudson, Deceased.

Laurel F. STEED, Petitioner and Respondent,

v.

Kenneth F. HUDSON, Claimant and Appellant.
Civ. 9261.

District Court of Appeal, Third District, California.

March 13, 1958.

Rehearing Denied April 9, 1958.

Hearing Denied May 7, 1958.

Proceeding in the matter of an estate. From a decree of the Superior Court, Lake County, Benjamin C. Jones, J., determining heirship a claimant appealed. The Third District Court of Appeal, Van Dyke, P. J., held, inter alia, that where husband was beneficiary of wife's life policies, husband and wife died in common accident, there was no sufficient evidence that they died otherwise than simultaneously, wife left a will bequeathing

all of her estate to husband but containing no disposition of estate in event that husband should predecease wife, and wife left no issue while husband left a son, distribution of life policies should have been made wholly to son, and it was error to distribute any part of proceeds of policies to collateral heirs of wife.

Affirmed in part and reversed in part with instructions.

1. Husband and Wife ⚭274(1)

Where husband was beneficiary of wife's life policies, husband and wife died in common accident, there was no sufficient evidence that they died otherwise than simultaneously, wife left a will bequeathing all of her estate to husband but containing no disposition of estate in event that husband should predecease wife, and wife left no issue while husband left a son, distribution of life policies should have been made wholly to son and it was error to distribute any part of proceeds of policies to collateral heirs of wife. West's Ann. Prob.Code, §§ 201, 228, 296-296.8, 296.3.

2. Husband and Wife ⚭274(1)

Where husband and wife died in common accident and there was no sufficient evidence that they died otherwise than simultaneously, wife left no issue and husband left a child, and although certain parcels of realty were held in joint tenancy form it was stipulated and found that they were in fact community property, the community property inventoried in wife's estate ought to have been distributed to husband's child and hence a distribution of community property to collateral heirs of wife was error. West's Ann. Prob.Code, §§ 228, 296.3, 296.4.

3. Death ⚭5

Husband and Wife ⚭273(1)

When community is dissolved by death, community status of property disappears with the community and the title cast upon surviving spouse is that of separate property and, though Uniform Simultaneous Death Act provisions are statutes of suc-

cession, that does not mean that in a proper case ultimate disposition under them may not be affected and changed by provisions of older statutes of succession. West's Ann. Prob.Code, §§ 228, 296.4.

4. Husband and Wife ⚭274(1)

Notwithstanding additional language put into section 296.4 of the Probate Code by 1951 amendment the ultimate devolution of title in a proper case is governed by section 228 providing that if decedent leaves neither spouse nor issue, and estate or any portion thereof was community property of decedent and previously deceased spouse, and belonged to decedent by virtue of its community character on death of such spouse such property goes in equal shares to children of deceased spouse. West's Ann. Prob.Code, §§ 228, 296.4.

5. Death ⚭5

The purpose of procedural section is to determine when other provisions of the Uniform Simultaneous Death Act apply, and those proceedings apply when people have died under such circumstances that there is no sufficient evidence that they died other than simultaneously, and court, responsive to petition, can determine whether such circumstances existed and having so determined may make its decree accordingly, and added portion of decree that they in fact died simultaneously was outside the issues tendered and beyond scope and intent of the statute and does not prevent full application of dispositive sections of the act. West's Ann. Prob.Code, §§ 296-296.8, 296.41, 296.42.

Files & McMurchie, Sacramento, for appellant.

Ralph V. Devoto, Lakeport, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a decree determining heirship in the Estate of Ruth Sanford Hudson, deceased.

It was stipulated and found by the trial court as follows: That Ruth and Frank Hudson died in a common accident and that there was no sufficient evidence that they died otherwise than simultaneously; that Ruth left a last will and testament bequeathing all of her estate to Frank; that the will contained no disposition of her estate in the event that Frank should predecease her and that, therefore, Ruth died intestate; that appellant herein, Kenneth F. Hudson, was the only child of Frank; that Ruth left no issue; that Ruth's sister, respondent herein, and three nieces were her heirs; that all property, both real and personal, owned by Ruth and Frank, or either of them, at the time of their deaths was community property, excepting some items of personal property separately owned by Ruth.

[1] Ruth was the insured and Frank was the beneficiary in three policies of life insurance, the proceeds of which were paid into the estate of Ruth. The trial court distributed the money to the sister and nieces of Ruth. Under applicable code sections the money should have been distributed to appellant. In re Estate of Wedemeyer, 109 Cal.App.2d 67, 240 P.2d 8. Section 296.3 of the Probate Code, being one of the sections in the Uniform Simultaneous Death Act as now codified (Prob.Code, secs. 296-296.8), declares that: "Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary." Therefore, it must be taken that Ruth survived Frank. The choses in action represented by the policy belonged to the community during the life of Ruth and Frank and upon the assumed prior death of Frank, Ruth took them under Section 201 of the Probate Code, which provides that: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof

goes to the surviving spouse, * * *

But Section 228 of the Probate Code, which becomes applicable herein under the ruling in the Wedemeyer case, provides: "If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, * * * such property goes in equal shares to the children of the deceased spouse * * *." It was therefore error to distribute any part of the proceeds of the three policies to the collateral heirs of Ruth. The distribution should have been made wholly to Kenneth, sole issue of Frank.

[2] Although certain parcels of real property were held in joint tenancy form it was stipulated and found that they were in fact community property. Therefore Probate Code, Section 296.4, governs the devolution of the property so held along with all the other community property. That section reads as follows: "Where a husband and wife have died, leaving community property and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all the community property shall be administered upon, distributed, or otherwise dealt with, as if the husband had survived and as if said one-half were his separate property and the other one-half thereof shall be administered upon, distributed, or otherwise dealt with, as if the wife had survived and as if said other one-half were her separate property, except as provided in Section 296.3." With respect to the community property other than the three life insurance policies a one-half interest was inventoried in the estate of Ruth. All the community property so inventoried was distributed to the collateral heirs of Ruth. This was error. In the Estate of Wedemeyer, supra, it was held that when the spouses died under circumstances making applicable the Uniform Simultaneous Death Act, the one-half to be distributed under section 296.4 out of each estate must be distributed as if the other

spouse died first and must be ultimately distributed under section 228, if the facts make that section applicable. Therefore, under the rule in the Estate of Wedemeyer, and in view of the fact that Frank left issue and Ruth left none, the community property inventoried in Ruth's estate ought to have been distributed to Kenneth, the son of Frank.

Respondent contends, and it was evidently the view of the trial court, that because of certain amendments made to section 296.4, after the decision in *Re Estate of Wedemeyer*, supra, the rule announced and followed in that case with regard to the ultimate distribution of community property no longer applies. We shall quote the section as amended, with the amendments underscored:

"Where a husband and a wife have died, leaving community property and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all of the community property shall be *administered upon*, distributed, *or otherwise dealt with*, as if the husband had survived and *as if said one-half were his separate property* and the other one-half thereof shall be administered upon, distributed, *or otherwise dealt with*, as if the wife had survived and *as if said other one-half were her separate property*, except as provided in Section 296.3."

[3, 4] Concerning these changes in section 296.4 appellant places emphasis upon the added words "as if said other one-half were her [his] separate property." We cannot attach the meaning to the added words which respondent ascribes to them. When the community is dissolved by death, the community status of the property disappears with the community and the title cast upon the surviving spouse is that of separate property. We do not agree with the statement in *Estate of Wedemeyer* to the general effect that the Uniform Simultaneous Death Act provisions are not statutes of succession. We think they are.

But though they are statutes of succession that does not mean that in a proper case the ultimate disposition under them may not be affected and changed by the provisions of the older statutes of succession, such as, in respect of community property devolution, Section 228 of the Probate Code. Section 296.4 in respect to one-half of the community property assumes the survival of the husband and as to the other half assumes the survival of the wife and casts title on the husband and wife in accordance with those assumptions. The title so cast is to be dealt with as if it were the separate property of the assumed survivor. However, that affords no reason for a holding that Section 228 of the Probate Code does not then become applicable. That section recognizes the separate nature of the title cast by death, considers the source of that title and declares succession accordingly. The result is that, notwithstanding the additional language put into section 296.4 by the amendment of 1951, the ultimate devolution of title in a proper case is governed by section 228. In *re Estate of Wedemeyer*, supra.

Respondent, seeking to uphold the decree, attaches much significance to the fact that the trial court in the special proceeding afforded by sections 296.41 and 296.42 made a finding based upon a stipulation of facts that the deaths were in this case simultaneous. From that premise they argue that, having died simultaneously, the provisions of sections 296.3 and 296.4 have really no application because if the spouses died simultaneously, neither surviving the other, then neither could inherit from the other; no property, therefore, would have passed to Ruth under Section 201 of the Probate Code, with the result that section 228 of that code could have no application. These arguments mistake the purpose and the scope of the procedural sections. Section 296.41 provides in part that:

"When it is claimed that, in accordance with the provisions of this chapter, any persons have died under circumstances where there is no sufficient

evidence that they have died otherwise than simultaneously, the executor or administrator of any such person may file a petition, in the proceeding where he received his appointment, seeking to have it determined that such persons died under circumstances where there is no sufficient evidence that they died otherwise than simultaneously."

The section provides for notice and hearing; and section 296.42 provides:

"* * * [I]f, after a full hearing, the court is satisfied that the named persons are dead and that there is no sufficient evidence that they died other than simultaneously, it shall make an order to that effect. If the court is satisfied that the named persons are dead and that they did not die simultaneously then the court shall make an order setting forth the order in which such persons died."

[5] The purpose and the whole scope of the procedural section is to determine when the other provisions of the Uniform Simultaneous Death Act apply. Those proceedings apply when people have died under such circumstances that there is no sufficient evidence that they died *other than simultaneously*. Therefore the court, responsive to the petition, can determine whether such circumstances existed and having so determined may make its decree accordingly. In this case it did so decree. The added portion of the decree that they in fact died simultaneously is outside the issues tendered and beyond the scope and the intent of the statute. It does not prevent the full application of the dispositive sections of the act.

The decree, in so far as it distributes to the collateral heirs of Ruth the proceeds of the life insurance policies and the community property which the spouses possessed, is reversed with instructions to the trial court to enter a decree distributing the same to appellant herein. In all other respects the decree is affirmed.

PEEK and SCHOTTKY, JJ., concur.

158 Cal.App.2d 404

Margaret JONES and Roy Jones,
Plaintiffs and Appellants,
v.

The ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO, L. A. Walker,
Bernie Birch, L. A. Walker Company,
et al., Defendants and Respondents.

No. 17313.

District Court of Appeal, First District,
Division 2, California.

March 17, 1958.

Hearing Denied May 14, 1958.

Action by conditional buyer's transferee for personal injuries allegedly resulting from acts of collection company employee in retaking possession of automobile by deception. The Superior Court, City & County of San Francisco, Preston Devine, J., rendered judgment for defendants, and transferee appealed. The District Court of Appeal, Kaufman, P. J., held that fact that collection company used ruse in retaking possession of automobile, did not entitle transferee to recover for injuries allegedly sustained when she attempted to prevent automobile from being taken, in absence of negligence on part of collection company employee or an assault against transferee.

Affirmed.

1. Trial ⇨295(1)

Instructions must be read as a whole in considering whether particular instruction was prejudicial.

2. Torts ⇨7

Fact that collection company used ruse in retaking possession of automobile, did not entitle conditional buyer's transferee to recover for injuries allegedly sustained when she attempted to prevent automobile from being taken, in absence of negligence on part of collection company employee or an assault against transferee.

3. Torts ⇨28

In action by conditional buyer's transferee for personal injuries allegedly resulting from acts of collection company's employee in connection with repossession of automobile by deception in presence of

transferee, who fell while attempting to prevent automobile from being taken, instruction that if proximate cause of accident was due to some act or omission on part of transferee in her walking or running, then collection company was exonerated from any responsibility, was not improper.

4. Negligence $\S$ 62(3), 82

Acts of a plaintiff or a third person may intervene and constitute sole proximate cause of harm, relieving defendant of liability, even though defendant has done something which set a chain of events into motion.

5. Appeal and Error $\S$ 1068(5)

Where verdict was in favor of defendant as to compensatory damages, refusal of requested instruction as to exemplary damages was not prejudicial. West's Ann. Civ.Code, $\S$ 3294.

Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco, Joseph W. Rogers, Jr., San Francisco, of counsel, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondents.

KAUFMAN, Presiding Justice.

Plaintiff Margaret Jones brought this action to recover damages for personal injuries resulting from the alleged acts of the defendant Walker's employee in retaking possession of an automobile. She appeals from a judgment entered on a jury verdict in favor of the defendants, alleging that the trial court committed prejudicial errors in its instructions to the jury.

The automobile in question, a 1947 De Soto, was bought in August 1947, by the plaintiff's brother-in-law, Russell Bennet, on a conditional sales contract subsequently assigned to the defendant Anglo California Bank. After Bennet became ill, the plaintiff and her husband, with the oral consent of the bank, took over the car and the payments. They punctually made all of the payments including the final payment in August 1949. A controversy developed as

to the propriety of a charge of \$114 for collision insurance. After the trial the plaintiffs conceded that the charge was proper and that under the contract, the bank was entitled to make a lawful repossession of the car. The appeal as to defendant Anglo California Bank has therefore been abandoned. Plaintiff contends only that the manner of repossession was unlawful and resulted in personal injuries to her. The complaint initially contained three counts: (1) assault and battery; (2) negligence; (3) the amount of the insurance premium and expense of recovering the car. The third count was dismissed before the trial started.

The facts are as follows: The defendant, L. A. Walker Company, which specialized in collecting payments and repossessing cars for banks and finance companies, had received instructions from its client, the Anglo Bank to repossess the vehicle without contacting either Bennet or Mr. & Mrs. Jones. On July 6, 1950, two employees of the Walker Company, Bernie Birch and E. C. Hunt, drove to the Jones' residence in Sharp Park to locate the car. According to the report subsequently filed with their employer, the following ensued:

"Client's car was not there, called on the phone, lady advised Jones was in S. F., started to return to S. F. and spotted car returning—followed it back, subject parked directly in front of his place [a real estate and contracting office in Edgemar], it was impossible to repossess without contacting subj.

* * *

"Decided to try to get subj. to drive car out by inquiring about lots he had for sale on top of hill nearby

* * *

As Birch had been employed by the Joneses a few months earlier, they decided that Hunt was to undertake the repossession. Hunt made another call to the Jones' real estate office, stating he was interested in buying some lots, and was coming down from Petaluma to look at them.

Hunt entered the office and informed Mrs. Jones that he was the gentleman from

Petaluma who had called earlier. When he explained that he had no car, Mrs. Jones agreed to take him out to see the lots in her car. The lots Hunt wanted to see were on a hill and could be reached only by a narrow unpaved road. The report continues as follows: The wife, interested in showing the property, drove to the top of the hill, she got out of the car to show how far the lines ran, and when she had walked to the end of the property, leaving the keys in the car, no time was lost by Hunt in starting the car and driving away down the hill. She was surprised at seeing the car being taken; her footing on the hill became insecure and as the car was being driven away she was seen slipping as she started down the hill. Birch remained in his car in front of the Jones' office until he saw Hunt drive by in the automobile about 20 minutes after he had left with Mrs. Jones. Hunt drove the car to a garage and notified the San Mateo Sheriff's office that the car had been repossessed and stored for the Anglo Bank.

The testimony of the plaintiff substantiated the above, except as to the details of the repossession. She stated that when she first saw Hunt return to the car she thought that the handbrake had failed and he was going to stop the car from rolling down the hill. Then, when she saw Hunt start the car, she thought the car was being stolen, so she opened the door a few inches. Her sleeve caught in one of the door handles and she held on, fearing she would fall under the rear wheels, as the car was moving forward to the right. After she had been dragged for a considerable distance the car swerved suddenly, threw her to the ground, and continued down the hill. Mrs. Jones picked herself up and went down the road 300 to 400 feet toward the nearest houses crying for help. She was almost hysterical, her clothes bedraggled and her knees skinned and bleeding. She attracted the attention of Mrs. Simpson and Mrs. Schoeneck, who lived in the nearest houses, and told them her car had been stolen. Mrs. Simpson called the sheriff's office. Mrs. Schoeneck

drove Mrs. Jones back to the real estate office. At the suggestion of the deputy sheriff, who soon arrived to take a report, Mrs. Jones was taken to her doctor by some friends. There was extensive and conflicting evidence as to the cause, nature and extent of her injuries, Mrs. Jones seeking to establish that due to the occurrence of June 6, 1950, she suffered an incisional hernia on the site of a previous operation which necessitated two further operations as well as injuries to her shoulder.

[1,2] Plaintiff's first allegation of error on appeal is the following instruction given by the court of its own motion:

"XV. So the fact that one has the legal right to repossess does not entitle one to commit an assault. Of course, he must exercise ordinary care as defined later in these instructions. The fact that you may find that there was a device or ruse or deception, of which you may not approve, does not constitute a ground for a verdict in favor of the plaintiff. You must find either that there was negligence or an assault committed against her."

Plaintiff contends that this instruction was prejudicial because it informed the jury that Hunt's ruse was not relevant to any issue in the case. The rule is that the instructions must be read as a whole. *Smith v. H. E. Anning Co.*, 156 Cal.App.2d 842, 320 P.2d 42. This instruction, when read with Instructions XII and XIII, which are as follows, is a proper statement of the law:

"XII. Now, to clear away any confusion as to what the issues are; I have given you the issues namely; was there any assault; was there negligence; and if so, was such negligence or assault the proximate cause of injury to the plaintiff, and then the issues as to agency, but the issue of whether or not there was a legal right to repossess the car really isn't an issue in this case. There was evidence relating to it only so far as it may throw any light upon the real and true

issues in the case. However, I instruct you that under the conditional sales contract, and under the evidence that developed here, the Anglo California National Bank had the legal right to repossess said automobile from the plaintiff with or without notice to her; and

"You are hereby further instructed that any person employed by said bank to repossess said automobile on behalf of said bank had the same legal right as the bank to repossess said automobile with or without notice to the plaintiff, whether that party was an agent or independent contractor.

"XIII. Now, the fact that the bank or anyone employed or delegated or whether it was an agent or contractor to repossess, the fact that they had a legal right, does not entitle the party to take the property from the one in possession by force or violence. If a person is entitled to recover property in the possession of another, he had no privilege to commit an assault or battery upon that person, even if the one in possession has lost his right to retain the property and is therefore a wrongdoer in refusing to give it up. Unless the property can be recovered by the person entitled to possession without any force or violence, he must resort to legal proceedings."

Plaintiff is correct in her statement that one who has the right to retake a chattel peaceably, has no right to retake by force or breach of the peace, and is liable for any damage proximately caused by the improper method of retaking. However, these principles have no relevance here. The jury did not find an unlawful repossession which proximately caused injury to the plaintiff. The jury heard the conflicting versions of the repossession, and believed, as their verdict indicates, the evidence offered on behalf of the defendant and rejected that presented on behalf of the plaintiff. Plaintiff here concedes that he has found no case in which a repossession

accomplished by deception resulted in personal injury. The method used by Hunt cannot be condoned, but this does not mean that under these circumstances mere deception without any resulting injury is a wrong of sufficient magnitude to be recognized by the law.

[3,4] Plaintiff next contends that the court committed further error in giving the following instruction:

"If you find that the sole proximate cause of the accident was due to some act or omission on the part of Mrs. Jones in her walking or running, then this completely exonerates the defendant from any responsibility, and under such circumstances, your verdict should be in favor of the defendant."

There is no merit in this contention. The jury was properly instructed that proximate cause was a necessary element of liability. There was evidence which the jury could have believed that the plaintiff's own acts were the sole proximate cause of her injuries which according to some of the evidence were minor and negligible. The plaintiff was a rather obese woman who was running after a car on rough terrain. It is well established that the acts of a plaintiff or a third person may intervene and constitute the sole proximate cause of harm, relieving the defendant of liability, even though the defendant has done something which set a chain of events into motion. *Girard v. Monrovia City School Dist.*, 121 Cal.App.2d 737, 264 P.2d 115; *Johnson v. Union Furniture Co.*, 31 Cal. App.2d 234, 87 P.2d 917; *Von Stetten v. Yellow-Checker Cab Co.*, 100 Cal.App. 775, 281 P. 95.

[5] Plaintiff's final contention of error is the trial court's denial of her requested instructions on punitive damages and giving an instruction that punitive damages could not be awarded. In view of the verdict in favor of the defendant as to compensatory damages, there could not have been any prejudice to the plaintiff in the refusal of the instruction as to exemplary damages. Civ.Code § 3294; *Ster-*

ling Drug, Inc., v. Benatar, 99 Cal.App.2d 393, 221 P.2d 965.

No prejudicial error appearing in the record before us the judgment must be affirmed.

Judgment affirmed.

DRAPER, J., concurs.

DOOLING, Justice.

I concur, but since the opinion of the Presiding Justice omits all discussion of the point most stressed by appellant I feel obliged to add the following comments:

Appellant argues, with citation of supporting authority from other jurisdictions, that the use of ruse or deception to retake possession of a chattel is tortious even though the recaptor is legally entitled to the possession. She then argues that if a reasonably foreseeable result of the recapture by ruse or deception is that the plaintiff might be injured in attempting to regain the property and such injury does occur, the retaking is a proximate cause of the resulting injury. Appellant's argument amounts to this: Hunt in driving off the car as he did might reasonably foresee that she would believe that he was stealing the car, and would run over the rough ground in an attempt to retake it and might in so doing fall and injure herself.

Conceding, without deciding, that such conduct would be actionable the plain answer is that appellant did not plead such a cause of action. She pleaded in Count 1 assault and battery and in Count 2 a negligent driving of the automobile "so as to cause it to strike plaintiff and to drag her along the road."

These two issues went to the jury under instructions that would make it their duty to find for the plaintiff if they found these allegations of either count to be true. We must therefore conclude that the jury found against plaintiff on both issues. Appellant cannot, under settled principles, introduce on appeal a third issue which was not presented by her pleadings.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

Gaston PESCE, Petitioner and Respondent,
v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Russell S. Munro, Director of Alcoholic Beverage Control, Alcoholic Beverage Control Appeals Board, Ralph J. McGill, as Chairman of said Alcoholic Beverage Control Appeals Board, and Donald H. Bonar and Coleman E. Stewart, as members thereof, Respondents and Appellants.*

Civ. 17688.

District Court of Appeal, First District,
Division 1, California.

March 18, 1958.

As Corrected on Denial of Rehearing

April 17, 1958.

Hearing Granted May 14, 1958.

Proceeding to set aside Alcoholic Beverage Control Appeals Board's decision dismissing appeal of petitioner from order and decision of Department of Alcoholic Beverage Control revoking petitioner's on-sale liquor license. The Superior Court, County of Alameda, Charles Wade Snook, J., rendered judgment for petitioner, and department and board appealed. The District Court of Appeal, Bray, J., held that under statute providing that within forty days after decision of department is mailed, party aggrieved may appeal to board, mailing of notice of appeal on fortieth day after petitioner received decision did not constitute filing of notice of appeal and in view of fact that department did not receive such notice of appeal until forty-first day, appeal was not effected.

Reversed.

Intoxicating Liquors — 108(10)

Under statute providing that within forty days after decision of Department of Alcoholic Beverage Control is mailed, party aggrieved may appeal to Alcoholic Beverage Control Appeals Board, mailing of notice of appeal on fortieth day after party received decision revoking on-sale liquor license did not constitute "filing" of notice of appeal and in view of fact that department did not receive such notice of appeal until the forty-first day, appeal was not

* Opinion vacated 333 P.2d 15.

effected. West's Ann.Bus. & Prof.Code, § 23081.

See publication Words and Phrases, for other judicial constructions and definitions of "Filing".

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Wiley W. Manuel, Deputy Attys. Gen., for appellants.

Theodore Golden, Robert N. Stefan, J. Bruce Fratis, Oakland, for respondent.

BRAY, Justice.

The Department of Alcoholic Beverage Control, its director, the Alcoholic Beverage Control Appeals Board and its members appeal from a judgment of the Superior Court of Alameda County issuing a peremptory writ of mandate ordering said appeals board and its members to set aside their decision dismissing the appeal to that board of petitioner Pesce from an order and decision of said department revoking petitioner's on-sale liquor license and to proceed to hear petitioner's said appeal. The sole question raised is whether under section 23081, Business and Professions Code, an appeal is filed when notice of appeal is deposited in a United States post office or when actually received by the department.

Time of Filing.

Section 23081 provides: "Within 40 days after the decision of the department is delivered or mailed to the parties, any party aggrieved by a final decision of the department may appeal to the board from such decision. The appeal shall be in writing and shall state the grounds upon which a review is sought. A copy of the appeal shall be mailed by the appellant to each party who appeared in the proceeding before the department, including the department which shall thereafter be treated in all respects as a party to the appeal."

Concededly petitioner mailed his notice of appeal properly addressed, in the United States Post Office at Oakland on the 40th day after the date of mailing to him the de-

cision of the department. It was received and filed by the appeals board at Sacramento on the 41st day. Claiming that it was filed too late, the board dismissed petitioner's appeal.

Section 23081 does not provide the manner in which one effects an appeal thereunder. It merely states that the aggrieved party "may appeal to the board" in writing stating the grounds, and shall send copies of the appeal to the department and the parties to the proceeding. Petitioner contends that the section should be construed as considering the appeal effected when notice thereof is mailed, regardless of when it is actually received and filed. Appellants contend that the section should be construed as the department has administratively construed it, namely, that the appeal is effected only when it is actually filed at the board's principal office which has been designated as Sacramento.

It is not a question of what this court might consider to be the best method of effecting the appeal, but what we can determine the legislative intention to have been. In this connection it is significant that the Legislature in dealing with the manner of giving notice of any act of the *department* (including notice of its decision in disciplinary matters) provided that the notice might be given either by personal service or by mail. "In case of service by mail, the service is complete at the time of deposit in the United States Post Office." Bus. and Prof. Code, § 25760. It would seem that had the Legislature intended that appeals were to take effect at the time of mailing notice of appeal rather than of filing, section 23081 would have said so, or at least have some provision similar to the above quoted portion of section 25760. See *Van De Veer v. Department of Alcoholic etc. Control*, 155 Cal.App.2d 817, 318 P.2d 686.

Moreover, making the filing date the effective one makes for a more uniform operation of the section. Thus the department would know that on the expiration of the 40th day it could forthwith put into operation the disciplinary order, without

having to wait several days to find out whether a notice of appeal had been mailed from some distant point or delayed in the mails.¹

To construe section 23081 as determining an appeal to be effective when mailed would require us to read into the section something which is not there, namely, (1) that an appeal may be taken either by mail or by filing with the board, and (2) that depositing the notice of appeal in a post office is effecting the appeal.

We have in mind that in *Hollywood Circle v. Department of Alcoholic Control*, 1957, 153 Cal.App.2d 523, 314 P.2d 1007, in which the notice of appeal was held to be filed too late under any interpretation of section 23081, the court said "[i]n passing" (153 Cal.App.2d at page 526, 314 P.2d at page 1009) that it seemed to the court that the effective date should be that of mailing rather than of filing. However, the statement is purely dicta and made without discussing the exact language of the section involved. The court did state that the question of the effective date of the appeal "is a matter of legislative concern primarily * * *." (153 Cal.App.2d at page 526, 314 P.2d at page 1009.)

Moreover, the same court, in a later decision, *Van De Veer v. Department of Alcoholic etc. Control*, supra, 155 Cal.App. 2d 817, 318 P.2d 686, flatly held that a notice of appeal from the decision of the department mailed 39 days after the department mailed its decision to the licensee but not received by the appeals board until 41 days therefrom, was filed too late, and upheld the decision of the appeals board in dismissing such appeal. The court quoted from the *Hollywood Circle* case (155 Cal.App.2d at page 820, 318 P.2d at page 688): "'But it is the policy of our law that time limits for filing notices of appeal in all legal proceedings must be complied with literally and exactly. This is generally held to be a jurisdictional

prerequisite. Cf., *In re Estate of Hanley*, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250 * * *; 3 Cal.Jur.2d 653. * * *'" It stated (155 Cal.App.2d at page 821, 318 P.2d at page 689): "'* * * the Supreme Court has held that the mailing of a notice of appeal is not the equivalent of constructive filing'" and held that the Legislature meant to provide that the time to appeal would start from the time the decision was mailed by the department, and that the notice of appeal must be filed with the appeals board within 40 days thereafter. It further quoted from the *Hollywood Circle* case (155 Cal.App.2d at page 821, 318 P.2d at page 688): "'Section 1013 of the Code of Civil Procedure does not affect the time specified in section 23081 of the Business and Professions Code.'" The fact that the Legislature in section 25760 of the Business and Professions Code provides that service of notices mailed by the *department* shall be made in the manner prescribed by section 1013, Code of Civil Procedure, and that no similar provision as to notices of appeal by licensees appears anywhere, supports the above conclusion and the further statement in the *Hollywood Circle* case, 153 Cal.App.2d 527, 314 P.2d at page 1010: "There appears to be no intent by the people in enacting current liquor control laws in their Constitution, nor by the legislature in implementing them, to extend in any manner the time for filing a notice of appeal specified in section 23081 of the Business and Professions Code."

Section 25760, Business and Professions Code, provides: "Notice of *any act of the department* required by this division to be given may be signed and given by the director or an authorized employee of the department and may be made personally or by mail. If made by mail, *service shall be made in the manner* prescribed by Section 1013 of the Code of Civil Procedure. In case of service by mail, the service is complete at the time of deposit in the United States Post Office." (Emphasis

1. Business and Professions Code, section 23082 provides that no decision of the department shall become effective during

the period in which an appeal may be "filed."

added.) Section 1013, Code of Civil Procedure, provides the *manner* of mailing in case of service by mail, and then states: "The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day, together with one day additional for every full 100 miles distance between the place of deposit and the place of address, if served by different post offices, but such extension shall not exceed thirty days in all." Petitioner contends that by referring to section 1013, Code of Civil Procedure, in section 25760, Business and Professions Code, the Legislature intended to extend the 40 day period for appeal set forth in section 23081, Business and Professions Code. However, as shown by the above emphasized portion of section 25760, the section is dealing only with the *manner* of giving notices of the acts of the department. Had the Legislature not been restricting the application of section 1013, Code of Civil Procedure, to the *manner* of giving department notices, and had it intended that the balance of that section should apply, there would have been no reason for including in section 25760 its last sentence: "In case of service by mail, the service is complete at the time of deposit in the United States Post Office," for section 1013 states: "The service is complete at the time of the deposit
* * *

In connection with appeals from the superior court under sections 939 and 940, Code of Civil Procedure, which, prior to the adoption of the Rules on Appeal, provided that an appeal was taken by *filing* the notice of appeal with the clerk of the court, it was held in *Estes v. Chimes*, 40 Cal.App.2d 41, 42, 104 P.2d 74, that the effective date was not the date of mailing the notice but the actual date of filing. See also *People v. Martiz*, 130 Cal.App.2d

602, 604, 279 P.2d 568, and *People v. Slobodion*, 30 Cal.2d 362, 367, 181 P.2d 868, holding that the mere depositing in the mail of a notice of appeal in a criminal case is not a filing of the appeal.

In *Lewis-Hall Iron Works v. Blair*, 57 App.D.C. 364, 23 F.2d 972, 974, certiorari denied 277 U.S. 592, 48 S.Ct. 529, 72 L.Ed. 1004, it was held that the mere depositing in the mail was not the filing of an appeal where under the then provisions of the Internal Revenue Code a taxpayer was given 60 days from the mailing to him of a notice of deficiency in which to appeal. See also *Poynor v. Commissioner of Internal Revenue*, 5 Cir., 81 F.2d 521, 522.

As before stated, section 25760, Business and Professions Code, provides that the notice of an act of the department may be served by mail, in which event deposit in the post office constitutes service. Petitioner argues from that fact that a similar provision should be read into section 23081 concerning notices of appeal given by an aggrieved party. In the *Poynor* case, *supra*, there was a provision in the tax code (26 U.S.C.A. § 613) to the effect that the mailing "of any pleading, decision, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, decision, order, notice, or process." The court held that such a general section did not purport to deal with appeals to the Board of Tax Appeals and that mailing did not constitute filing where the appeal section required the appeal to be filed within 90 days of the mailing of the notice of deficiency by the tax commissioner. *Poll v. City of Plainfield*, 25 N.J. Misc. 325, 53 A.2d 366, 367, states that the prevailing view in jurisdictions throughout the country is that in the absence of an express statutory declaration, mailing is not filing.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

George H. ARMSTRONG, Plaintiff and Appellant,
v.

CITY OF BELMONT, a municipal corporation, Wallace Benson, Charles H. Cook, Ildo Rosellini, Donnel B. McCarthy and F. Nason O'Hara, individually and as members of the City Council of the City of Belmont, a municipal corporation, Fred J. Nelson, as City Administrator, and Pacific Gas and Electric Company, a corporation, Defendants and Respondents.

No. 17332.

District Court of Appeal, First District,
Division 1, California.

March 25, 1958.

Rehearing Denied April 24, 1958.

Hearing Denied May 21, 1958.

Action against city and others to recover damages for wrongfully preventing plaintiff from obtaining electric service at his residence. The Superior Court, San Mateo County, Louis B. Dematteis, J., sustained a general demurrer to second amended complaint without leave to amend and rendered judgment in favor of city, members of city council, and city administrator, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that complaint stated a cause of action in damages against officers of city in their individual capacities for wrongfully and intentionally preventing plaintiff from obtaining electric service at his residence in willful breach of statutory duty of each individual defendant to abstain from injuring person or property of another, or infringing upon his rights.

Judgment reversed as to named defendants in their individual capacities with instructions, and in all other respects affirmed.

1. Municipal Corporations ⚡747(2)

Granting, denying, or revoking a permit which would authorize the furnishing of electricity to a new dwelling was a governmental function of city, involving exercise of police power, and hence city was not liable in damages to owner of dwelling

Cal.Rep. 321-322 P.2d—55

for any misconduct of city officers in refusing to grant such permit, in absence of constitutional or statutory provision imposing liability.

2. Municipal Corporations ⚡742(4)

Complaint stated a cause of action for damages against officers of city in their individual capacities for wrongfully and intentionally preventing plaintiff from obtaining electric service at his residence in willful breach of statutory duty of each individual defendant to abstain from injuring person or property of another, or infringing upon his rights. West's Ann.Civ.Code, § 1708.

3. Municipal Corporations ⚡742(4)

In complaint seeking recovery of damages for wrongfully and intentionally preventing plaintiff from obtaining electric service at his residence, designation of named defendant "as city administrator" should be regarded as descriptio personae so as to state cause of action against such defendant in his individual capacity. West's Ann.Civ.Code, § 1708.

Norman S. Menifee, Redwood City, for appellant.

Paul A. McCarthy, City Atty., City of Belmont, Redwood City, and Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for respondents.

FRED B. WOOD, Justice.

Judgment was rendered in favor of the city, its councilmen and its city administrator, after sustaining a general demurrer to the second amended complaint, without leave to amend.

Plaintiff alleges he built a house in Belmont. Final inspection disclosed full compliance with the city's electrical code, entitling plaintiff to be furnished with electrical service. All electrical wiring was approved by the electrical inspector. Defendants and each of them "arbitrarily, wilfully, maliciously and unlawfully refused to cause or permit to be energized the electrical service for the residence" despite

plaintiff's demands that they do so. By reason of said conduct of the defendants plaintiff was compelled to file a complaint before the state Public Utilities Commission against defendant Pacific Gas and Electric Company. The commission ordered the company to install an electric meter and furnish electric service. By reason of defendants' conduct, plaintiff was deprived of electric service for some seven months, to his damage in the sum of \$50,000.

[1] No cause of action against the city has been stated, nor can there be. The granting, denial or revocation of a permit such as that here involved is, obviously, the exercise of the police power. It bears no relation to any activity that might be carried on by a private enterpriser. It is a governmental function in the performance of which the city is not liable for the misconduct of its officers in the absence of a constitutional or statutory provision imposing liability. We are aware of no such provision.

However, we think the complaint does state a cause of action against the officers in their individual capacities. The gist of the complaint is that these persons wrongfully and intentionally prevented plaintiff from getting electric service at his residence for a considerable period of time. If plaintiff proves that, will he not have shown a violation by each individual defendant of his duty "to abstain from injuring the person or property of another, or infringing upon any of his rights"? Civ. Code, § 1708. Here we find alleged a willful breach, no mere negligent breach of that duty. If authority be needed, it is furnished by *Doeg v. Cook*, 126 Cal. 213, 216, 58 P. 707; *Mock v. City of Santa Rosa*, 126 Cal. 330, 344, 58 P. 826; *Payne v. Baehr*, 153 Cal. 441, 444, 95 P. 895; *Ferneilus v. Pierce*, 22 Cal.2d 226, 138 P.2d 12; *Dillwood v. Riecks*, 42 Cal.App. 602, 610, 184 P. 35; *Ham v. County of Los Angeles*, 46 Cal.App. 148, 161, 189 P. 462; *People v. Standard Accident Ins. Co.*, 42 Cal.App. 2d 409, 411, 108 P.2d 923; *Bettencourt v. State of California*, 139 Cal.App.2d 255, 257, 293 P.2d 472; *Collenburg v. County*

of Los Angeles, 150 Cal.App.2d 795, 802 310 P.2d 989. *Stang v. City of Mill Valley*, 38 Cal.2d 486, 488, 240 P.2d 980, is inapplicable. The court there held that the alleged aggravation of property damage by fire resulting from negligent maintenance of a fire hydrant was the denial of a benefit owing to the community as a whole. There was no such duty owing to the individual property owner as would furnish a basis for redress in the form of compensatory relief for property injured. That, obviously, is not the situation here.

Defendants urge that upon the basis of the facts alleged in the complaint, if proven, plaintiff was entitled to a writ of mandamus to compel issuance of the permit and, therefore, should not be allowed to stand by, augment his damages instead of mitigating them, and then be given compensatory relief. A similar contention was overruled in *Payne v. Baehr*, supra, 153 Cal. 441, 444, 95 P. 895.

Nor are we persuaded by defendant's argument that the electric company's refusal to furnish electric energy (until ordered so to do by the state commission) was an unforeseeable, independent, intervening cause; hence, the sole cause of plaintiff's injury. The fallacy of such a line of reasoning is too obvious to require elaboration.

[3] The doctrine of respondeat superior is not here involved. The complaint speaks of the personal conduct of each councilman and the city administrator. It alleges an intentional (not merely negligent) failure and refusal to perform a nondiscretionary duty imposed by law. It invokes the officers' common-law liability as individuals. We observe that the caption of the complaint gives the names of the defendant council members followed by the designation "individually and as members of the City Council" but refers to defendant Fred J. Nelson simply "as City Administrator." The latter designation can and should be regarded as *descriptio personae*, upon the authority of *Mock v. City of Santa Rosa*, supra, 126 Cal. 330, 343-344, 58 P. 826.

The judgment is reversed as to respondents Wallace Benson, Charles H. Cook, Ildo

L. Rosellini, Donnell B. McCarthy, F. Nelson O'Hara and Fred J. Nelson in their individual capacities, with instructions to the trial court to overrule the general demurrer of said respondents to the second amended complaint; in all other respects the judgment is affirmed. The respondent city will recover its costs upon this appeal from the appellant and the appellant will recover his costs from the other respondents.

PETERS, P. J., and BRAY, J., concur.



158 Cal.App.2d 724

PEOPLE of the State of California,
Plaintiff and Appellant,

v.

E. J. CORNETTE, Dwight Ewing and Kenneth Koorndyk, Defendants and Respondents.

Cr. 1166.

District Court of Appeal, Fourth District,
California.

March 26, 1958.

Prosecution for grand theft and for conspiracy to obtain money or property under false pretenses. From an order of the Superior Court, San Bernardino County, Carl B. Hilliard, J., dismissing the information, the People of the State of California appealed. The District Court of Appeal, Fourth Appellate District, Griffin, J., held that evidence relating to activities of branch manager, salesman and repairman of furnace company in connection with inspection and cleaning of furnaces, and attempts to sell new furnaces on ground that furnaces examined were seriously defective, showed reasonable and probable cause for commitment on the offenses charged.

Order setting aside information reversed.

1. Indictment and Information ⚡144

On motion to dismiss indictment for insufficiency of evidence court is not authorized to weigh evidence and determine conflicts, but sole duty is to determine whether there was sufficient evidence presented to committing magistrate, conflicting or otherwise, which would establish a reasonable probability of defendant's guilt. West's Ann.Pen.Code, § 995.

2. Criminal Law ⚡238

Proof of guilt of defendants need not be demonstrated to hold them to answer. West's Ann.Pen.Code, § 995.

3. Criminal Law ⚡238

Evidence with respect to activities of branch manager, salesman and repairman of furnace company in connection with inspection and cleaning of furnaces, and attempts to sell new furnaces on ground that those examined or cleaned were seriously defective, showed reasonable or probable cause for commitment on charges of grand theft involving purported sale and installation of furnaces and conspiracy to obtain property under false pretenses. West's Ann.Pen.Code, §§ 182, 184.

4. Conspiracy ⚡28

The gist of a criminal conspiracy is a corrupt agreement of two or more persons to commit an offense prohibited by statute accompanied by some overt act in furtherance of objects of agreement. West's Ann.Pen.Code, §§ 182, 184.

5. Conspiracy ⚡47

A conspiracy may be established by circumstantial evidence and may be inferred from acts and conduct of defendants in mutually carrying out a common purpose in violation of a statute. West's Ann. Pen.Code, §§ 182, 184.

6. Conspiracy ⚡27

Since members of a conspiracy are bound by all acts of all members, an overt act by one member is sufficient. West's Ann.Pen.Code, §§ 182, 184.

7. Conspiracy — 23

To establish criminal conspiracy it is not necessary to show that each party personally benefited from the product of the crime. West's Ann.Pen.Code, §§ 182, 184.

Edmund G. Brown, Atty. Gen., William E. James, Dep. Atty. Gen., Lowell E. Lathrop, Dist. Atty., and Edward P. Foley, Dep. Dist. Atty., San Bernardino, for appellant.

No appearance for respondent Cornette.

Harold M. Fagin, Riverside, for respondent Ewing.

Hennigan, Ryneal & Nixen, Riverside, for respondent Koorndyk.

GRIFFIN, Justice.

Defendants E. J. Cornette, Dwight Ewing and Kenneth Koorndyk were held to answer and were subsequently charged jointly in an information in count one with conspiracy to obtain money or property under false pretenses (Sec. 182 Penal Code). Five claimed overt acts are set forth, alleging generally the surrounding facts pertaining to five separate specified charges of grand theft contained in five separate counts involving the purported sale and installation by defendants of gas furnaces upon written contract for the parties named. On a motion to dismiss and set aside the information and action, made under the provisions of section 995 of the Penal Code, the court granted it on the ground the record showed no reasonable or probable cause for the commitment. The people appealed.

Defendant Koorndyk was branch manager of Holland Furnace Company in Riverside. Cornette was a salesman. Ewing was an installer of new furnaces and a repairman. The *modus operandi* of the conspiracy charged was that Cornette would go to the home of a prospective customer dressed in a semi-uniform with a badge of some sort displayed on the shirt. After knocking at the door he in-

formed the housewife or occupant that he was inspecting floor furnaces in houses in that area to see if they were functioning properly or needed cleaning. On some occasions, believing he was a city inspector or gas inspector, he was permitted to enter and make the examination. Thereafter, the occupant of the house was told that the furnace needed cleaning, and that this operation would cost about \$17.50. Very few of them had that amount of cash available. The agent would then agree to do the work at \$5 down and the balance in installments. The following day Ewing or some workman would perform the cleaning job. Cornette would return to the home that night and after the cleaning job was partially rendered he would take his flashlight and point to parts of the furnace and tell the occupants: "Do you know the condition of your furnace is a fire hazard?" or "The flues are badly burned and deteriorated" or "The thermostat is out of order and your family could die of asphyxiation", or that it was a waste of money repairing the furnace when it might blow up any time. Being laymen the occupants could not determine the truth of his representations although some of them said they had never noticed the odor of gas or known that anything was wrong with the furnace. They were told that escaping gas had no odor. The evidence produced by the People was to the contrary. Generally thereafter, the floor furnace was removed by Koorndyk or the agent, taken into the yard, water poured into it and the occupants were shown water leaking from it and were told this test indicated a leak through which gas could escape and cause an explosion in the house and kill all the family and children through asphyxiation. Through this fright the alleged victims would become interested in the purchase of a new furnace. Defendant Koorndyk generally appeared soon thereafter with pictures and a description of new heaters and said he had heard their furnace was in bad shape. He was generally successful in signing up the victim to a contract of purchase and to install a new furnace at a cost ranging from

\$300 to \$1100. Loan notes on a time-payment plan were generally secured and assigned to the bank by defendants' company. Thereafter payments were to be made to it. Ewing generally did the installation work, but agreed with Koorndyk on occasions that the furnaces were corroded or "burned out" and that a new installation was necessary. The method of approach varied somewhat in each instance but the representations as to the condition of the furnaces and the likelihood of the inhabitants and the children becoming asphyxiated were about the same. In one instance one victim said they signed her up for a new furnace at \$300, but when she got the bill it was \$432. After the installation of a new furnace, another victim took her old furnace to a sheet-metal shop, and after investigation she was told there was nothing wrong with it. She called Koorndyk and told him about it and he refused to let her rescind the contract but allowed her to sign a new one giving her credit for \$60 for her old unit. Another party claimed Koorndyk agreed to put in a Holland furnace but when an inspector and an expert furnace man came out to look at the old furnace they found the new one installed was not a Holland Furnace but another make unknown to them, to wit, Frazer-Johnson. Another party claimed that it was represented that the new furnace installed had a capacity of 70,000 BTU's, but she later learned it was only 65,000 BTU's, and that the new one installed was insufficient to do the work represented.

A City Building Inspector testified that he sent a letter directed to Koorndyk and asked him to come to his office in regard to installing furnaces in the City of San Bernardino without a permit. He informed Koorndyk that he had found installations which had not been inspected by his department and that he was subject to a penalty for so doing. He testified Koorndyk agreed to pay the penalty and to furnish a list of other furnaces installed which were not then known to the inspector, and that he returned with a partial list. He

further testified he had no conversation with Koorndyk about his method of selling furnaces, and that the subject did not come up.

Two qualified experts testified that they went to the homes of several of these claimed victims, examined the furnaces that were removed and found nothing wrong with them and no defects; that the furnaces were not burned or rusted out; and that they did not give them the so-called "water test" because that would not necessarily reflect the condition of a furnace. Parts of other furnaces dismantled by defendants were introduced in evidence. The testimony of the experts showed, in respect to them, that it would be difficult to determine whether a furnace leaked gases by examining those parts but in their opinion the parts examined by them did not indicate they were either "corroded" or "burned out".

A representative of a sheet metal concern, dealing in furnaces and their installation and repair, to whom the heating element of one of the furnaces was taken for examination, testified that he found nothing wrong with the heating element; that it was in good shape; and no defects were noticeable.

Koorndyk testified he did not believe Ewing cleaned any of the furnaces indicated but confined his labor, under his direction, to installation of new ones; that he was paid \$90 a week for his services, did not receive commissions on any of these deals, and had no knowledge as to what representations were made by other men, but he could not "be 100 per cent accurate" on some of these things.

Defendants, in justifying the ruling of the court, contend that in establishing grand theft by obtaining money by false pretenses, it must first be shown: (1) That certain representations were made; (2) That they were false; (3) That they were known to be false by the persons making them; (4) That they were relied upon by the victim; and (5) That money or property was obtained as a result. Peo-

ple v. Frankfort, 114 Cal.App.2d 680, 251 P.2d 401; People v. Myers, 206 Cal. 480, 483, 275 P. 219.

[1,2] We have not set forth all of the testimony respecting each count of the information but have stated a general résumé of it which tends to support the charges. There are some conflicts and discrepancies in the evidence which might have some weight in the ultimate trial of the action. On a motion to dismiss under this section neither the trial court nor this court is authorized to weigh the evidence and determine the conflicts. The sole duty is to determine whether there was sufficient evidence presented to the committing magistrate, conflicting or otherwise, which would establish a reasonable probability of defendants' guilt. Davis v. Superior Court, 78 Cal.App.2d 25, 27, 177 P.2d 314; People v. Platt, 124 Cal.App.2d 123, 130, 268 P.2d 529; People v. Sears, 124 Cal. App.2d 839, 269 P.2d 683; Bompensiero v. Superior Court, 44 Cal.2d 178, 183, 281 P.2d 250; People v. Jackson, 146 Cal.App. 2d 553, 303 P.2d 767; People v. Misner, 134 Cal.App.2d 377, 285 P.2d 938; People v. Nathanson, 134 Cal.App.2d 43, 284 P.2d 975. Proof of guilt of the defendants need not be demonstrated. People v. Sears, supra.

[3] The evidence, examined in the light indicated, shows a compliance with the first four prerequisites above mentioned by defendants. As to the fifth, it may be questioned whether money or property was obtained in the amounts alleged. It does appear by these claimed false representations the so-called victims did have their furnaces removed when in fact, had they known their true condition, they would not have incurred the additional obligations. They were falsely induced thereby to sign contracts to purchase new ones and to have them installed for prices ranging from \$300 to \$1100. Negotiable promissory notes were given as evidence of payment. Although few payments had been made on them at the time of the discovery of the alleged fraud, it does appear that

the respective parties are still being held liable for payment of the full amounts indicated. Some of the parties were questioned as to whether they contemplated having said notes set aside for fraud in a subsequent legal action. There was no affirmative answer, and so far as the record indicates they are still liable on them.

In People v. Frankfort, 114 Cal.App.2d 680, 251 P.2d 401, it was said that a promissory note itself is property within the meaning of section 484 of the Penal Code and that if the thing stolen consists of any evidence of debt or other written instrument the amount of money due thereupon or which in any contingency might be collected thereon, is the value of the thing stolen. It then held that when it is shown that the victims signed promissory notes and contracts obligating themselves to pay sums in excess of \$200 they parted with property justifying a conviction for grand theft. Whether the so-called victims in this case were defrauded of property or money exceeding \$200 in value was a factual question for the trier of fact.

[4-7] The gist of a criminal conspiracy, as charged in count one, is a corrupt agreement of two or more persons to commit an offense prohibited by statute, accompanied by some overt act in furtherance of the objects of the agreement. Penal Code sections 182 and 184. It may be established by circumstantial evidence and may be inferred from the acts and conduct of defendants in mutually carrying out a common purpose in violation of a statute. Since members of a conspiracy are bound by all acts of all members, an overt act by one member is sufficient. People v. Frankfort, supra. There is evidence in this case indicating that Ewing was present and joined in some of the representations made and assisted in removing the furnaces which he might well have known were not defective. Whether he is an innocent victim of the alleged conspiracy is a question for the determination of the trier of fact. People v. Steccone, 36 Cal.2d 234, 237, 223 P.2d 17. It is not necessary to show that

each party personally benefited from the product of the crime. *People v. Rabe*, 202 Cal. 409, 423, 261 P. 303; *People v. Platt*, 124 Cal.App.2d 123, 131, 268 P.2d 529. There was sufficient evidence to show a reasonable probability that the offenses alleged were committed by the defendants charged.

Order setting aside information reversed.

BARNARD, P. J., and MUSSELL, J.,
concur.



158 Cal.App.2d 712

**ISBRANDTSEN COMPANY, Inc., Plaintiff
and Respondent,**

v.

**PRODUCERS COTTON OIL COMPANY, a
corporation, Defendant and Appellant.**

Civ. 5623.

District Court of Appeal, Fourth District,
California.

March 26, 1958.

Action by charterer of ship for damages based on failure of shipper to ship an agreed amount of cotton. From adverse judgment of the Superior Court, Fresno County, Strother, P. Walton, J., the shipper appealed. The District Court of Appeal, Barnard, P. J., held that proper measure of damages was difference between net amount charterer would have received on number of bales defendant failed to ship and net amount it received from substitute cargo, with allowances for savings realized in connection with cargo not shipped and additional expenses incurred in connection with substitute cargo.

Judgment affirmed.

1. Shipping ⇐108

In action by charterer of ship for damages based on failure of shipper to ship

agreed amount of cotton, proper measure of damages was difference between net amount charterer would have received on number of bales shipper failed to ship and net amount it received from substitute cargo, with allowances for savings realized in connection with cargo not shipped and additional expenses incurred in connection with substitute cargo.

2. Damages ⇐62(4)

Upon breach by shipper of contract to ship agreed amount of cotton, charterer of ship had duty to minimize damage to extent possible by obtaining substitute cargo for space that would have been occupied by cotton contracted for but not shipped.

3. Shipping ⇐108

Where charterer of ship originally intended to send ship only to Bombay, but upon failure of shipper to ship agreed amount of cotton, charterer was required to send vessels to Karachi to deliver substitute cargo, defendant shipper was properly charged with proportion of total charge for unloading, cleaning and usual delay at Karachi as pro-rated between substitute cargo and cargo which was not substitute cargo but which was delivered there.

4. Shipping ⇐108

Where shipper failed to ship agreed amount of cotton on chartered vessel, charterer of vessel properly used average weight of bales actually shipped in computing damages for bales not shipped.

Docker & Docker, Wm. F. Docker,
Fresno, for appellant.

Stammer, McKnight & Barnum, Fresno,
for respondent.

BARNARD, Presiding Justice.

This is an action for damages based on the failure to ship an agreed amount of cotton.

[1] The plaintiff is engaged in a world-wide shipping business in which it owns and operates a number of ships in

regular service with scheduled sailings. It also engages extensively in "tramp" operations whereby it charters a vessel from its owner for a definite voyage between given ports, and contracts with various shippers for the transportation of cargo between those points. This case involves such a tramp operation.

Early in 1951, shipping space for cotton from the Pacific Coast to India was difficult to obtain. The plaintiff proposed to a number of cotton shippers that if sufficient offers of cotton at a freight rate of \$2.65 per 100 pounds could be obtained it would charter a vessel to load at Los Angeles and San Francisco between March 15 and April 15, for a direct voyage to Bombay, India. As a result, it obtained contracts from the defendant and three other shippers to ship a total of 17,175 bales of cotton, the defendant agreeing to ship 5,000 bales.

The plaintiff chartered a vessel at the rate of \$2,136.53 per day of 24 hours and agreed to redeliver the vessel at a port in the Colombo-Karachi range. On March 24, while the vessel was en route to Los Angeles to begin loading, the various shippers tried to cancel a part or all of their respective commitments for space for cotton on this ship. The plaintiff refused to cancel these contracts. Each of these shippers shipped some cotton and a total of 10,946 bales of cotton were thus shipped. Of the 6,229 bales which were not shipped the defendant failed to ship 2,846 bales.

Prior to this attempted cancellation the plaintiff had booked some other cargo for Bombay, including some oil and asphalt in drums, and was looking for additional cargo to fill portions of the ship in which cotton could not be placed. After the attempted cancellation it was unable to locate any additional cotton, but it obtained two large additional shipments of asphalt and oil in drums, part of which was to be delivered at Colombo and part at Karachi, Pakistan. This necessitated an extra stop for loading at Port Hueneme, an extra stop at Colombo on the

way to Bombay, and an extension of the voyage from Bombay to Karachi. The plaintiff returned the vessel to its owners at Karachi when the final unloading was completed.

The plaintiff then brought this action to recover the difference between the net amount it would have received from the defendant's share of the 6,229 bales which were not shipped and the net amount it received from the substitute cargo obtained, with allowances for the savings realized in connection with the cargo not shipped and the additional expense incurred in connection with the substitute cargo. The court found in favor of the plaintiff finding, among other things, that the plaintiff had used all reasonable effort to minimize the damage by securing substitute cargo, and that it was successful in securing other cargo which served to decrease in part the damage which would otherwise have resulted from the defendant's breach of its contract to ship 5,000 bales of cotton. As a conclusion of law, it was found that the plaintiff was entitled to a judgment in the sum of \$24,378.10 (this being the defendant's proportion of the total damage shown), together with interest thereon from April 16, 1952, to entry of judgment. A judgment was accordingly entered for \$32,089.87, from which the defendant has appealed.

The appellant's main contention is that the court followed the wrong measure of damage in arriving at this result. It is argued that the respondent was not entitled to recover more than it would have gained by the full performance of the contract, and that the proper measure of damage here is the anticipated revenue of the ship (the contract price for carrying 17,175 bales of cotton) adjusted for savings arising from the breach, less the amount actually earned by the ship adjusted for any additional costs incurred in carrying substitute cargo. We are unable to agree with this contention. These shippers did not contract for the use of all the space on the ship. They contracted only for the space that would be required for 17,-.

175 bales of cotton, and they had no interest in or concern with the remaining space on the ship. The cotton could be carried only in a certain part of the ship, and the appellant had no reason to believe that the remainder of the ship would not be utilized. This was planned by the respondent, in fixing the rate on the cotton, and the evidence justifies the conclusion that this was understood by the appellant. The breach of the contract affected only the space which would have been occupied by the 6,229 bales which were not shipped. The proper measure of damage is the difference in the net return from that space, as it actually was and as it would have been had the contract been performed, as adjusted in accordance with any savings on the one hand and any extra expense on the other. This difference resulted from the lower rate at which the substitute cargo had to be carried, and the fact that it was necessary, in order to get the substitute cargo, to extend the voyage from Bombay to Karachi.

The appellant also contends that by erroneous assumptions and conjecture, which were admitted in evidence over objection and adopted by the trial court, the respondent overstated its anticipated revenue and understated the credit due the appellant from substituted cargo. It is argued that the respondent arbitrarily assumed that it was entitled to bales of 517 pounds each although it was entitled only to bales averaging about 500 pounds each, thus overstating its anticipated revenue on all 17,175 bales; that it improperly assumed that certain cargo was substitute cargo, although it was carried in portions of the ship where cotton would not have been carried, and although it was originally intended to send the ship to Bombay only and no other cargo for that port could be obtained; that the respondent improperly assumed that certain expenses after the ship left Bombay for Karachi were chargeable against the appellant; and that without these erroneous assumptions and matters of speculation the appellant's proportion of the actual damage would be about \$10,000.

[2, 3] It was the duty of the respondent, after the breach, to minimize the damage to the extent possible by obtaining substitute cargo for the space that would have been occupied by the cotton contracted for but not shipped. The evidence is undisputed that the only cargo which could be secured for that purpose in a sufficient amount was the cargo which was taken, and it clearly appears that had that cargo not been accepted the resulting damage would have been much greater. The fact that a short extension of the voyage was made necessary by the acceptance of this cargo is not controlling. Proportionate credits and allowances were made, and the net result was favorable to the appellant rather than otherwise. No question is raised concerning the propriety of any item of expense as allowed by the court except for some of the charges at Karachi. It is admitted that the cotton shippers should be charged for the additional fuel and charter time in steaming from Bombay to Karachi, but argued that they should not be charged anything for the time used at Karachi in unloading, cleaning and usual delays since the same time would have been required had the voyage ended at Bombay as originally contemplated. The items of expense are also affected, of course, by the contentions that what was actually substitute cargo was improperly determined, and that the anticipated revenue from the 6,229 bales of cotton which were not shipped was improperly increased by assuming that those bales, if shipped, would have averaged 517 pounds each instead of 500 pounds each.

The evidence with respect to the time spent in unloading, cleaning and usual delays at Karachi is undisputed, and the appellant was only charged with its proportion of the total charge as prorated between the substitute cargo and the cargo which was not substitute cargo which was delivered there. This was all a part of what was done to minimize the damages to the appellant's advantage, and the evidence supports the findings in that connection. The matter of what was and what was not

substitute cargo could not properly be determined by the exact location in the ship in which various parts of the substitute cargo was carried. The controlling element was the amount of cargo which could be carried in the space which would have been required for the 6,229 bales of cotton had they been shipped. The evidence in this regard was sufficiently definite to sustain the court's findings in that connection, and it cannot be said that these findings rest upon mere assumptions, speculation or conjecture.

[4] The court adopted the respondent's estimate of the net return to be expected from the 6,229 bales of cotton not shipped, based on an average weight of 517 pounds per bale. There was evidence that in the cotton industry it is commonly estimated that the average weight of a bale will be about 500 pounds; that it is known that they vary, some bales weighing a little less and some a little more; that some weigh as high as 540 pounds and some less than 500; and that most of them weigh a little more than 500 pounds. There was evidence that in the shipping industry estimates are made on the average cubic feet of space per bale, and not on the average weight. There was also evidence that the 10,881 bales of cotton which were actually shipped on this vessel averaged 517 pounds per bale. The contract here in question was for 5,000 bales, with no weight specified. A weight of 517 pounds could reasonably be considered as being "about" 500 pounds. No evidence was produced in any way suggesting or indicating that the appellant, or the other shippers, intended that the remainder of the bales contracted for should be of any lesser weight, or that they were entitled to rely on any smaller space being reserved for them. Under the evidence as a whole it could reasonably be inferred that the remaining bales, if they had been shipped, would have weighed approximately as much and taken up approximately the same space on the ship as those which were actually shipped. The appellant, whose wrongful act gave rise to the injury, may not be heard to complain that the exact amount

thereof could not be determined with mathematical precision. *Zinn v. Ex-Cell-O Corp.*, 24 Cal.2d 290, 149 P.2d 177; *Phalanx Air Freight v. National Skyway Freight Corp.*, 104 Cal.App.2d 771, 232 P.2d 510.

While the amount of total damage here allowed would appear from the record to be quite liberal, we are unable to hold that any element used in determining that damage was improper, or that any item of charge or credit was not sustained by the evidence.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



158 Cal.App.2d 531

ROBERT E. BAXTER, Plaintiff, Cross-Defendant and Appellant,

v.

John PRESCOTT and Jacqueline W. Prescott, his wife, Defendants, Cross-Complainants and Respondents.

Civ. 17590.

District Court of Appeal, First District,
Division 1, California.

March 19, 1958.

Action to quiet title wherein after default judgment defendants filed a cross complaint. From an order of the Superior Court, San Mateo County, A. R. Cotton, J., granting defendants' motion to set aside the default and the judgment, the plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held, *inter alia*, that an order setting aside default judgment in vendor's quiet title action based on default in making monthly payments of purchase price for realty was not an abuse of discretion under evidence including showing that negotiations for settlement were pending at time default was entered, that defendants were

unaware of default until sheriff served them with writ of possession that defendants had paid in excess of \$6,000 of purchase price, and that if judgment were allowed to stand they would have suffered extreme forfeiture in that they occupied the premises for only ten months, reasonable value of which was not in excess of \$1,500.

Affirmed.

1. Appeal and Error ⇨957(1)

Only in cases where lower court has abused its discretion in setting aside default judgment will the appellate tribunal reverse its action.

2. Appeal and Error ⇨989, 1011(2)

A reviewing court cannot participate in exercise of function of resolving conflict in evidence and must accept trial court's appraisal of written testimony in affidavit form as well as oral testimony and upon appeal inquiry is limited to question whether or not there is substantial evidence to support express or implied findings of the trial court.

3. Judgment ⇨138(1)

An order setting aside default judgment in vendor's quiet title action based on default in making monthly payments of purchase price for realty was not an abuse of discretion under evidence including showing that negotiations for settlement were pending at time default was entered, that defendants were unaware of default until sheriff served them with writ of possession, that defendants had paid in excess of \$6,000 of purchase price, and that if judgment were allowed to stand they would have suffered extreme forfeiture in that they occupied the premises for only ten months, reasonable value of which was not in excess of \$1,500. West's Ann.Code Civ.Proc. § 473.

4. Vendor and Purchaser ⇨335

Under contract of purchase of realty declaring that if purchaser failed to perform any of his obligations he would forfeit all rights under agreement and all moneys theretofore paid by him to seller, strict forfeiture is not countenanced and

purchaser, upon default, whether willful or otherwise, is entitled to the excess paid by him to seller over and above amount of damages incurred by the seller.

5. Judgment ⇨153(1)

Under statute predicated relief from default upon application therefor being made "within a reasonable time," a question of fact is presented for determination of trial court unless circumstances are such as to demonstrate unreasonable delay as matter of law. West's Ann.Code Civ.Proc. § 473.

6. Judgment ⇨153(1)

Where there was evidence that defendants were unaware of default judgment until served with writ of possession, and plaintiff's affidavit stated that defendants were served "about" August 3 and were removed from the premises "about" August 21, and there was evidence that defendants sought and obtained new counsel who prepared and on October 9 filed moving papers to set aside the default, such facts did not demonstrate unreasonable delay as a matter of law. West's Ann.Code Civ.Proc. § 473.

E. C. Mahoney, Burlingame, for appellant.

Currie, Lebsack & Hannig, Redwood City, for respondent.

FRED B. WOOD, Justice.

Plaintiff brought this action for quiet title, alleging default by defendants in making monthly payments of the purchase price for certain real property. Defendants were served May 31, 1956. Demand for entry of their default was filed July 11, 1956. On July 31, a decree quieting title was filed.

October 9, defendants noticed a motion for October 15, to set aside the default and the judgment. October 25, 1956, this motion was granted by an order from which plaintiff has appealed.

[1,2] Plaintiff concedes, as is proper, that "only in cases where the lower court has abused its discretion will the appellate

tribunal reverse its action." *Hughes v. Wright*, 64 Cal.App.2d 897, 903, 149 P.2d 392, 395. In support of his contention that here the trial court did abuse its discretion, appellant relies heavily upon the affidavit which he filed in response to defendants' motion and endeavors to minimize the probative force of defendants' affidavits and their verified answer and cross-complaint. The conflict in the evidence was resolved by the trial court. A reviewing court cannot participate in the exercise of that function. It must accept the trial court's appraisal of written testimony in affidavit form as well as oral testimony. *People v. Kirk*, 109 Cal.App.2d 203, 207, 240 P.2d 630; *Baratti v. Baratti*, 109 Cal.App.2d 917, 922, 242 P.2d 22. Upon appeal the inquiry is limited to the question whether or not there is substantial evidence to support the express or implied findings of the trial court.

It appears from defendants' affidavits that negotiations for settlement were pending at the time default was entered; defendants were unaware of the default or of the judgment until the sheriff served them with the writ of possession; defendants had paid in excess of \$6,000 of the purchase price; if the default judgment be allowed to stand defendants will have suffered an extreme forfeiture in that they occupied the premises for ten months, the reasonable value of such use and occupancy being not in excess of \$1,500. The facts concerning the equities in favor of defendants were set forth somewhat more explicitly in the verified cross-complaint which defendants tendered with their notice of motion. It appears both from the complaint and from the cross-complaint that the full purchase price of the property was \$19,950.

[3] These facts sufficiently support the order. They prove no abuse of discretion. The pendency of negotiations for settlement was deemed significant in *Beard v. Beard*, 16 Cal.2d 645, 647, 107 P.2d 385, and *Dahlin v. Moon*, 141 Cal.App.2d 1, 5, 296 P.2d 344. In *Smith v. Los Angeles Bookbinders Union*, 133 Cal.App.2d 486, 500, 284 P.2d 194,

failure to give notice of intention to take a default was deemed of some significance.

[4] It is true that the contract of purchase declared that if the purchaser failed to perform any of his obligations, he would forfeit all rights under the agreement and all moneys theretofore paid by him to the seller. However, a strict forfeiture in such a case is not countenanced by the law. A purchaser, upon default, whether willful or otherwise, is entitled to the excess paid by him to the seller over and above the amount of damages incurred by the seller. *Freedman v. Rector*, 37 Cal.2d 16, 19-23, 230 P.2d 629, 31 A.L.R.2d 1; *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367; *Baffa v. Johnson*, 35 Cal.2d 36, 216 P.2d 13. Accordingly, even if upon the trial of this case it should appear that the defendants are not entitled to reinstatement of their right to purchase property (a question not decided upon this appeal), they will have the right to present evidence upon the issue tendered by their claim that the payments they have made to the plaintiff exceed the damages sustained by him.

[5, 6] Plaintiff directs attention to that provision of section 473, Code of Civil Procedure, which predicates relief upon application therefor being made "within a reasonable time." That, of course, presents a question of fact for determination of the trial court unless the circumstances are such as to demonstrate unreasonable delay as a matter of law. Here, there is evidence that defendants were unaware of the default and of the judgment until served with the writ of possession. Plaintiff's affidavit states that defendants were served "about" August 3 and were removed from the premises "about" August 21. Also, there is evidence that defendants sought and obtained new counsel who prepared and on October 9 filed the moving papers in their behalf. These facts do not demonstrate unreasonable delay as a matter of law.

The order is affirmed.

PETERS, P. J., and BRAY, J., concur.

158 Cal.App.2d 466

In the Matter of the ESTATE of May C.
HALL, Deceased.

Nettle BEAVERS, Contestant, Petitioner
and Appellant,

Walter W. Beavers, Contestant and
Appellant,

v.

SECURITY-FIRST NATIONAL BANK,
Petitioner and Respondent,

Hattie Freeman (now Deceased), Mrs. Karl
Dauble, Charlotte Gillespie, Lillian Pinker-
ton, Mrs. Edward M. Wales and Los An-
geles Orthopedic Foundation, Contestants
and Respondents.

Civ. 22499.

District Court of Appeal, Second District,
Division 2, California.

March 18, 1958.

Will contest. The Superior Court of Los Angeles County, John Gee Clark, J., denied probate of purported will, and proponents appealed. The District Court of Appeal, Kincaid, J. pro tem., held that where testatrix was living in home of proponents of will as paying guest, testatrix relied upon them for her material and physical needs, and one proponent transacted business for testatrix by making bank deposits and keeping a file of some of her papers in safe, proponents stood in confidential relationship toward testatrix and in view of fact that one of proponents, who was chief beneficiary of will, was active in its preparation and execution, rebuttable presumption of undue influence arose, and that proponents did not overcome such presumption.

Affirmed.

1. Appeal and Error ⇨989

Where sole ground of appeal was that findings of trial court were unsupported by the evidence, reviewing court's power began and ended with determination as to whether there was any substantial evidence contradicted or uncontradicted which would support the findings of fact.

2. Principal and Agent ⇨10(1) Wills ⇨166(1)

In will contest, conflicts and inconsistencies in testimony of proponents were sufficient to justify trial court in disbelieving their testimony that they had exercised no improper influence over testatrix in securing her signature to will and power of attorney.

3. Wills ⇨157, 163(4)

Where testatrix was living in home of proponents of will as paying guest, testatrix relied upon them for her material and physical needs, and one proponent transacted business for testatrix by making bank deposits and keeping a file of some of her papers in safe, proponents stood in confidential relationship toward testatrix and in view of fact that one of proponents, who was chief beneficiary of will, was active in its preparation and execution, rebuttable presumption of undue influence arose.

4. Wills ⇨163(2, 4), 324(3)

A rebuttable presumption of undue influence arises from proof of a confidential relationship between a beneficiary and a testator plus proof of activity on part of beneficiary in preparation of will, and when proof is made sufficient to give rise to presumption, burden is on beneficiary to show that will was not procured by his undue influence, and whether presumption was overcome is question for trier of facts.

5. Wills ⇨163(4)

In will contest, burden was upon proponents, who stood in confidential relationship toward testatrix, and one of whom was chief beneficiary of will and was active in its preparation and execution, to overcome presumption of undue influence.

6. Wills ⇨166(4)

In will contest, evidence sustained finding that at time testatrix executed purported will she was acting under undue influence of proponents, who stood in confidential relationship toward testatrix and one of whom was chief beneficiary of will and had been active in its preparation and execution.

Moss, Lyon & Dunn, Los Angeles, for appellants.

Roland Maxwell, Paul H. Marston and Richard W. Olson, Pasadena, for respondents.

KINCAID, Justice pro tem.

May C. Hall died on February 23, 1955, leaving a will dated December 10, 1947 and a subsequent will dated July 16, 1954, purporting to revoke all former wills. The latter will, hereinafter referred to as "the will," is the subject of this appeal. The appellants, Nettie Beavers and Walter W. Beavers, are its proponents and Nettie Beavers is its sole beneficiary with the exception of two bequests of one dollar each. The 1954 will was denied probate, the 1947 will was admitted to probate and the appeal is from that order. Respondents are the executor and beneficiaries under the 1947 will.

1. Finding 3 states: "That at the time said deceased signed said purported Will dated July 16, 1954, she was acting under the undue influence of Nettie Beavers and Walter W. Beavers, who at all times mentioned herein were and now are husband and wife. That said deceased was at the date of the execution of said Will of the age of 87 years, and was weak and ill in body and mind. That her physical condition on said date was such as to permit the circumvention of her Will. That on said date, and prior and subsequent thereto, said deceased was being cared for in the home of Nettie Beavers and Walter W. Beavers and was under their complete charge and control. That on said date the said Nettie Beavers and Walter W. Beavers occupied a close and confidential relationship toward said deceased. That on said date and for a long time prior thereto and for a long time thereafter, the said Nettie Beavers and Walter W. Beavers kept the said May C. Hall under their constant and personal supervision. That following said date, the said Nettie Beavers and Walter W. Beavers refused to permit friends and acquaintances to see said deceased, except in the presence of said Nettie Beavers. That following said date, all requests made by friends and acquaintances of said deceased and by her attorney to see the said deceased alone were denied, except that on one occasion when the said deceased insisted that she be permitted to consult her attorney

The trial court found that the 1954 will was executed and obtained while the decedent was acting under the undue influence of appellants who occupied at that time a confidential relationship toward the decedent.¹ The sole ground of appeal is that these findings are unsupported by the evidence.

[1] Under such circumstances our power as an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. *Primm v. Primm*, 46 Cal.2d 690, 693, 299 P.2d 231; *Estate of Poole*, 156 Cal. App.2d 768, 320 P.2d 62. Viewed in that light, the evidence discloses the following:

Mrs. Beavers with her husband, Walter W. Beavers, owned and operated a rest home for elderly people and decedent Miss Hall had resided in the Beavers' home as

alone the said attorney did talk with said deceased privately, and except that on another occasion one of the friends of said deceased was allowed to remain alone for a few minutes with said deceased. That prior to said 16th day of July, 1954, the said Nettie Beavers and Walter W. Beavers, for the sole purpose of asserting an undue influence over said deceased, threatened to discontinue their care of her in the event she did not execute documents which would cause them to receive all of her property upon her death. That Nettie Beavers and Walter W. Beavers were active in procuring the execution of the purported Will dated July 16, 1954, and that prior to said 16th day of July, 1954, Walter W. Beavers, the husband of Nettie Beavers, without any instruction, request or direction whatsoever from said deceased, prepared the document bearing date of July 16, 1954, and on July 16, 1954 presented the same to the said May C. Hall in the presence of other persons for signature. That solely by reason of the overpowering and undue influence of the said Nettie Beavers and Walter W. Beavers over the said May C. Hall at said time, the said May C. Hall signed said document. That said Nettie Beavers had, at all times, been fully and adequately compensated for the care provided for said deceased and that under the terms of said purported Will dated July 16, 1954 she would have unduly profited."

a paying guest since February 29, 1954. The will, which is on a printed form, was prepared by Mr. Beavers. Mr. and Mrs. Beavers were both present when the will was executed and the witnesses to the will were neighbors of the Beavers who had never before met decedent. On the same day as the execution of the will, namely July 16, 1954, Miss Hall executed a general power of attorney in favor of Nettie G. Beavers which in addition to its general powers contained the specific power to sign checks for the payment of bills and services. This power of attorney was notarized by one of the witnesses to the will. Also on the same day, Miss Hall executed a typewritten agreement for life care² to be furnished by Nettie Beavers and this document was witnessed by the daughter and son-in-law of the Beavers. At the time these documents were executed, Miss Hall was 87 years of age and there was the testimony of her physician who saw her three days after the execution of the will that on that date she was "rather arteriosclerotic and senile."

At the time of the execution of the will, the power of attorney, and the life-care agreement, Miss Hall had no independent legal advice as to their terms or conditions or concerning the disposition of her property. Mrs. Beavers did not have a certificate of authority to enter into a life-care contract as required by section 2350, Welfare and Institutions Code. It is also significant that at the time she executed the life-care agreement, Miss Hall was and had been paying \$150 per month to the

Beavers for her care and that the life-care agreement makes no diminution in the sum to be paid. In return for her promise to make a will and power of attorney in favor of Nettie G. Beavers, Miss Hall received no consideration other than that, if any, which might exist in Mrs. Beaver's agreement "to handle the affairs of May C. Hall in a business like manner in case of illness or other, which might prevent her from handling her affairs, and to make accounting to her as she may request."

Vera Bautch was one of the witnesses to the will and with respect to what was said by Mr. Beavers to Miss Hall before the signing of the power of attorney Mrs. Bautch testified as follows: "He just explained to her that she had to sign it, that the notary was here to notarize her signature." When asked what Mr. Beavers said about the will, Mrs. Bautch testified: "He said, 'This is your will,' and she said, 'Read it to me.'" Mrs. Bautch also testified that the operation took but two or three minutes. There is evidence that Miss Hall herself did not ask the witnesses to sign her will. Mr. and Mrs. Bautch had been friends of the Beavers since 1950.

Both Mr. and Mrs. Beavers were present when the preparation of the will was discussed and according to the testimony of Mrs. Beavers, Miss Hall became ill at 3 a.m. on July 17, 1954. The Bautches testified that the will was signed in Miss Hall's room which was on the first floor of the house. Mrs. Beavers testified that she saw Miss Hall reading the will on the 16th of

"Agreement

2. "Whereas it is the intention of the undersigned to enter into a mutual agreement as follows:

"May C. Hall hereby proposes to execute her last will and testament [sic] and power of attorney in favor of Nettie G. Beavers. Nettie G. Beavers for such consideration does hereby propose to care for May C. Hall for the remainder of her natural life, and to provide services as she is now receiving or may need in the future. May C. Hall shall continue to pay Nettie G. Beavers \$150.00 per month to cover expenses.

"Nettie G. Beavers further agrees to handle the affairs of May C. Hall in a business like manner in case of illness or other, which might prevent her from handling her affairs, and to make accounting to her as she may request.

"This agreement is irrevocable on the part of either party.

"Witness our hand and seal this 16th day of July 1954.

"Signed: May C. Hall

Nettie G. Beavers.

"Witness:

"Mary R. Larson

"Roger Q. Larson"

July or sometime shortly before that date in Miss Hall's room and she further testified that Miss Hall was then upstairs in the southeast wing or room. Mrs. Beavers also testified that Miss Hall indicated a desire to stay in the Beavers' home. Mrs. Beavers told her that "the county said she would have to come in by law." Mrs. Beavers stated that the life-care agreement was signed in the upstairs room in the southeast corner; that July 16, 1954, was a Saturday and that Mr. Beavers was at home that day because of the fact that it was Saturday. July 16, 1954, actually fell on a Friday.

In a later proceeding involving the guardianship of Miss Hall, Mrs. Beavers directly and positively testified that the will was prepared by the notary. At the probate proceedings Mr. Beavers testified that he had an Underwood typewriter and that he had prepared the will on July 15 on that typewriter. He also testified that he had had only one typewriter. When his attention was called to certain erasures on the power of attorney, he testified specifically that he had made a mistake and thereupon had changed the date. He also testified that the actual date, "16," was inserted on the day the documents were signed but left blank when they were prepared on the 15th. When his attention was called to the difference in the typewriting appearing in the power of attorney, he refused to offer any explanation and said that all of the typewriting had been done on the same typewriter. The Beavers were handling business matters for Miss Hall as was established by Mr. Beavers' testimony that he had a file "in our safe" which contained among other things cancelled checks and that he made bank deposits for Miss Hall.

Mr. Glenn L. Davis testified to many visits to the decedent in company with his wife and that they were permitted to see decedent alone until July of 1954 after which Mrs. Beavers was always present during their visits except that on one occasion Mrs. Beavers went out for a few minutes. It is significant that the first

visit of Mr. Davis and his wife to Miss Hall in July of 1954 occurred on July 17, the day after the execution of the will. Mrs. Davis also testified to the foregoing facts and in addition testified to a conversation with Mrs. Beavers on July 17, 1954, in which Mrs. Beavers said that Miss Hall could not visit at the Davis home. This testimony is as follows:

"The Court: This is when you came on the 17th?

"The Witness: Yes. I went to get Miss Hall to make a dress for her. We had made this date. She gave me an old dress to rip up, and I had ripped this dress up, and pressed it in order to make a new dress and I went to get her to make this new dress, and, when I got up to the porch, why, Mrs. Beavers was watering the lawn, and she came up behind me, and I said to Miss Hall, 'Now, we are going to make the dress. We have come for you.'

"Q. By Mr. Maxwell: Was Miss Hall out of doors also? A. Yes. She was sitting on the front porch.

"Q. Now, just go ahead and tell us what happened? A. So I asked her to get ready, we would go make the dress today, because we had talked sometime ago about changing the dress, and Mrs. Beavers said, 'No, Miss Hall can't go home with you today,' and I said, 'Any [sic] why not?' And she said, 'It is too warm for her to go out today.' I said, 'We live in an apartment house on the first floor, and it is quite comfortable, and I have an electric fan,' and I had planned to make this dress that day, and she said, 'Well, she cannot go today. She isn't feeling well. She just doesn't feel well enough to go out.'

"Q. Was there anything else? Was that the entire occurrence? A. I said to her, 'Well, I guess Miss Hall could speak for herself. Miss Hall, what do you say.' And she put her little hand up like this (illustrating), and shook and said, 'I guess I can't go.'

"Q. Was there anything else? A. No. That was all. I turned around and went home."

Mrs. Lorena Dwyer also visited Miss Hall. Before July 16, 1954, Mrs. Beavers never stayed in the room during the visits. Mrs. Dwyer saw Miss Hall about 9:30 in the morning of July 16, 1954. On that day Mrs. Dwyer had called the Beavers' home and was told that Miss Hall could not go out with her. She became concerned and went to the home to see Miss Hall. She found Miss Hall on the porch and Miss Hall cautioned her to "talk very low" because she was afraid the Beavers might be listening. On this occasion Miss Hall said, "it would just be too bad for her if they [the Beavers] found that she was going to move." When Mrs. Dwyer went back on the 17th, she was unable to rouse any one.

On the 18th Mrs. Dwyer visited Miss Hall and Mrs. Beavers went into the room with her. When the doorbell rang Mrs. Beavers allowed it to ring seven or eight times before she left to answer it and came back in a minute. During Mrs. Dwyer's visits Miss Hall occupied the upstairs room in the southeast corner. Many times when Mrs. Beavers was present during Mrs. Dwyer's visits, Mrs. Beavers told Miss Hall that she "wasn't able to talk." On another occasion she told Miss Hall that she "had talked all she could." A few months before July, 1954, Miss Hall told Mrs. Dwyer: "* * * that they told her if she expected to be treated as one of the family that she should sign a will to them, and also a power of attorney, and then she would be treated as one of the family."

Mrs. Bertie Cummings testified that after July 16, 1954, there was never an occasion when she was permitted to visit with Miss Hall alone, except on one occasion Mrs. Cummings and her husband were left in the room alone for a few seconds after Mrs. Beavers had told Miss Hall that she was not supposed to talk.

Paul Marston, an attorney associated with Roland Maxwell, testified that when he visited Miss Hall at the Beavers' home following his receipt of a document requesting the delivery to Mr. Beavers of Miss Hall's bank books, etc., Mrs. Beavers stayed in the room.

Roland Maxwell testified that he was an attorney and had known Miss Hall for seven or eight years. During this time he had custody of her savings account book and safe deposit key, along with other papers belonging to her. From time to time he went with Miss Hall to the bank to assist her in transacting her business. On June 21, 1954, he called for Miss Hall at the home of Mrs. Freeman on North Raymond Avenue in Pasadena, and took her to the bank. Soon after that he left for Europe and did not return until August of 1954, and on August 27, 1954, went to the Beavers' home to see Miss Hall. Mrs. Beavers was not willing to admit him to Miss Hall's room and after he saw Miss Hall, Mrs. Beavers refused to leave the room until Miss Hall indicated that she wished Mrs. Beavers to do so. Before she left the room, she said to Miss Hall, "[Y]ou know what our agreement is, and you tell him what our agreement is." Miss Hall then said that she was not entirely sure what had taken place during Mr. Maxwell's trip, but that the Beavers had "had her sign some papers, a will, she thought. They had told her that there was a copy in the closet, but she hadn't been able to find it, and that she thought or was afraid that this will left everything to Mrs. Beavers." Miss Hall then indicated to Mr. Maxwell that she would like him to look at the papers which had been signed. Mr. Maxwell's request that he be given the opportunity to examine the papers was denied by Mrs. Beavers. On the day the petition for the appointment of a guardian for Miss Hall was filed, Mr. Maxwell again visited the Beavers' home. His testimony concerning the conversation with Mrs. Beavers about Dr. Toy was as follows: "A. Well, I asked Mrs. Beavers if she knew that Dr. Toy had been

there in the forenoon of that day. I came in the afternoon, and he had been refused admittance, and she said that she had dismissed Dr. Toy, and I said, 'You dismissed him?' She said, 'Miss Hall dismissed him through me. She did not want to pay any more doctor bills.' I said, 'Doesn't Miss Hall need a doctor?' She said, 'No. We want to get her well.'"

Richard W. Olson who was also associated with Mr. Maxwell visited the Beavers' home on July 30, 1954, during Mr. Maxwell's absence in Europe and was told by Mrs. Beavers that "We are handling all of her affairs now." He was also told that Miss Hall was asleep and he could not see her.

David A. Black, a qualified handwriting expert, testified that the will in question was written on a Smith-Corona standard elite typewriter. The entire document with the exception only of the letters "r-i-x" in the words executrix and the words "to serve without bond" in the last paragraph were typed at one sitting without removing the document from the typewriter. In the July 16th date, the "16th" was in alignment and appeared to have been written at the same time as the remainder of the document with the exceptions above noted. He testified that the power of attorney was written on two different typewriters, (1) an Underwood elite type of old vintage and (2) a Smith-Corona elite of late vintage, the same machine on which the will was written. Mr. Black went on to point out the precise portions of the power of attorney written on each machine. He also testified that the original date on the power of attorney was 25 May which had been erased and 16 July written over it. The life-care agreement was all typed at one time, including the date, on the Smith-Corona elite of late vintage.

After the testimony of Mr. Black, Mr. and Mrs. Beavers did not testify again and no explanation of any kind was offered by them concerning the disparity between their testimony and that of Mr. Black as to the documents in question.

[2] There is other testimony indicating the control which the Beavers maintained over Miss Hall both before and after the execution of the will, but it appears unnecessary to detail it here. The conflicts and inconsistencies in the testimony of both Mr. and Mrs. Beavers were sufficient to justify the trial court in disbelieving their testimony that they had exercised no improper influence over Miss Hall in securing her signature to the various documents.

[3] The fact that before and at the time of the execution of the will, the Beavers and particularly Mrs. Beavers, stood in a confidential relationship toward Miss Hall is apparent from the evidence. She was living in their home as a paid patient or guest; she relied upon them for her material and physical needs such as food, shelter and nursing care; and there is evidence that Mr. Beavers at least transacted business for Miss Hall by making bank deposits and keeping a file of some of her papers in the safe.

It is also obvious from the evidence that Mrs. Beavers, the chief beneficiary of the will, was active in its preparation and execution. Under such circumstances it is elementary that a rebuttable presumption of undue influence arises.

[4] This rule is well stated in the Estate of White, 128 Cal.App.2d 659, 276 P.2d 11, where the court said commencing at pages 668 and 17, respectively: "A presumption of undue influence arises from proof of a confidential relation between a beneficiary and a testator plus proof of activity on the part of the beneficiary in the preparation of the will. * * * 'In some cases * * * the rule is expressed that "where one who unduly profits by a will sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, the burden is upon him to show that the will was not induced by his undue influence.'" Both of these expressions of the rule are essentially the same, although the first does not refer to "one who unduly profits by

a will." There would be no need for such a presumption and it would serve no purpose where any supposed influence had accomplished nothing.' The presumption is rebuttable. When proof is made sufficient to give rise to the presumption, the burden is on the beneficiary to show that the will was not procured by his undue influence. Whether the presumption was overcome is a question for the trier of fact." See *Estate of Harkleroad*, 62 Cal. App.2d 60, 64, 144 P.2d 88; *Estate of Witt*, 198 Cal. 407, 419, 245 P. 197; *Estate of Johnson*, 31 Cal.App.2d 251, 257, 87 P.2d 900; see also *Estate of Cowhick*, 156 Cal. App.2d 635, 320 P.2d 181.

The instant case has a fact situation remarkably similar to that existing in *Estate of Chesney*, 102 Cal.App.2d 708, 228 P.2d 46, in which probate of the proponent will was denied. In that case the testatrix was old and the proponents of the will were neighbors who lived across the street and took care of her. She deeded her property to them and they agreed to take care of her for the rest of her life. She drew a will in their favor. Other neighbors testified that after the Bosworths had taken charge they were not allowed to speak to the testatrix. In affirming the order of the trial court denying probate to the will, the appellate court said at page 711 of 102 Cal.App.2d, at page 48 of 228 P.2d: "There is ample evidence in the record to substantiate the findings of the trial court that a confidential relationship existed between Mr. and Mrs. Bosworth and the decedent, that proponents were active in procuring the execution of the will and unduly profited thereby. Where such a confidential relationship is found to exist and the beneficiaries have been active in procuring the execution of the will to their undue advantage, a presumption of undue influence arises. (Citation.) In such a situation, the burden is cast upon the beneficiaries to overcome the presumption existing against them. This the trial court held they failed to do. This

court is empowered only to determine whether there is substantial evidence in the record to support the findings. From the foregoing brief summary of the evidence it clearly appears that a confidential relationship existed, that the testatrix was physically incapacitated, and apparently completely dependent upon the services of others, and that the Bosworths were active in procuring the execution of the will under which they benefited exclusively. Mrs. Bosworth gave instructions to the attorney, was present when the will was executed and, so far as the record discloses, Mrs. Chesney received no independent advice concerning the disposition of her property. There was no showing that the attorney ever consulted personally or at all with the testatrix concerning the terms of the will."

So it is in the case now before us. There is ample evidence of breach of confidence and undue influence on the part of the Beavers in securing, not only the execution of the will, but the other documents. In fact, there is some evidence that the power of attorney was obtained at an earlier date than that which it now bears and that the date was changed to coincide with the date of the notarization. The facts in the instant case weigh more heavily of undue influence than do those in the *Chesney* case for the reason that here the decedent was actually being cared for in the home of appellants and was under their constant supervision, whereas in the *Chesney* case the persons found to have exercised the undue influence lived across the street, and in this case the documents were prepared by one of appellants, whereas in the *Chesney* case an attorney was obtained.

Appellants rely upon *Estate of Welch*, 43 Cal.2d 173, 175, 272 P.2d 512, 514, where the Supreme Court reversed a jury verdict denying probate to a will and codicil on the ground of undue influence. Appellants point out that the court there held: "Mere general influence, however strong and controlling, not brought to bear upon

the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to *coercion* destroying free agency on the part of the testator." (Emphasis that of the court.)

But Estate of Welch, *supra*, is not applicable to the facts in the instant case for the reason that there was in the Welch case no confidential relationship creating a presumption of undue influence as there is in the case before us. In Welch the proponent and beneficiary of the will and codicil was a brother of the decedent and the Supreme Court said, 43 Cal.2d at page 178, 272 P.2d at page 516: "Consanguinity of itself does not create a fiduciary relationship. (Citation.) Myrtle's mental and physical condition was not shown to have been such as to permit a subversion of her freedom of will or to negate her independent management of her own affairs. On the contrary, so far as appears from the record, Myrtle was at all times a clear thinking, deliberate woman, aware of her property holdings and financial situation, and it was not until a few days before her death that her general condition deteriorated." The codicil was executed by her almost two years after the will. In the Welch case the decedent was aged 68 when she made the will; in the instant case Miss Hall was 87 years old and there is some evidence that after she had signed the documents, she herself did not know for sure what she had signed.

[5,6] In the case before us, because of the confidential relationship, the burden was upon appellants to overcome the presumption of undue influence. This they did not do to the satisfaction of the trial court and there is ample evidence to sustain his finding.

The order from which this appeal is taken is affirmed.

FOX, P. J., and HERNDON, J., concur.

158 Cal.App.2d 544

In re MAXWELL'S ESTATE.

In the Matter of the Estate of Adrian I. Maxwell, also known as Adrian Ivy Maxwell, also known as A. I. Maxwell, Deceased.

**Ellen MAXWELL and Kermit E. Maxwell,
Petitioners and Appellants,
v.**

**Adrian I. MAXWELL, Jr., and Louisa
Kinnebrew, Petitioners and
Respondents.**

Civ. 5617.

**District Court of Appeal, Fourth District,
California.**

March 19, 1958.

Proceeding to determine rights of parties under will, which was executed by father at time when his two children of prior marriage were 21 and 19 years of age and his two children of second marriage were 4 and 2 years of age, and which provided that if father and second wife died at same time, bulk of estate should go to younger children because of fact that older children were self-supporting but which made no provision for contingency that would arise if second wife predeceased father. The Superior Court, Kern County, W. L. Bradshaw, J., rendered judgment favorable to children of second marriage, and children of first marriage appealed. The District Court of Appeal, Barnard, P. J., held that where second wife predeceased father and at time father died, youngest of four children was 29 years old, father died intestate and property passed to his heirs under laws of succession.

Portion of decree appealed from reversed.

I. Wills §§440, 450, 470

The primary consideration in construing a will is to determine intention of testator as expressed in language used and not as it may have existed in mind of testator, and this intention is to be gleaned from reading of will as whole and not from ap-

parent meaning of any clause or clauses considered alone. West's Ann.Prob.Code, § 102.

2. Wills Ⓒ448

An interpretation which will prevent a total intestacy is preferred if it is justified by language used in the will. West's Ann. Prob.Code, § 102.

3. Wills Ⓒ478

Under some circumstances a will may be construed as creating a gift by implication, but where will does not clearly disclose such an intention a gift may not be implied. West's Ann.Prob.Code, § 102.

4. Wills Ⓒ849

Where father made will at time when his two children of prior marriage were 21 and 19 years of age and his two children of second marriage were 4 and 2 years of age, will provided that if father and second wife died at same time, bulk of estate should go to two younger children because of fact that older children were self-supporting, but will made no provision for contingency that would arise if second wife predeceased father, second wife predeceased father, and, at time father died, youngest of four children was 29 years old, father died intestate and property passed to his heirs under laws of succession. West's Ann.Prob.Code, §§ 90, 92, 102.

5. Wills Ⓒ441

Will, which was executed at time when testator's two children of prior marriage were 21 and 19 years of age and self-supporting, and testator's two children of second marriage were 4 and 2 years of age, and which provided that bulk of estate should go to younger children would be construed in view of situation existing at time it was executed. West's Ann.Prob. Code, §§ 90, 92, 102.

6. Wills Ⓒ435, 448

While intestacy is to be avoided if possible, in construing a will, this may be done only under well established rules, and court may not make a different will for testator when one made by him sufficiently discloses his intention as expressed in language of will. West's Ann.Prob.Code, § 102.

7. Wills Ⓒ448, 449

A testator has right to make a will which may, in certain contingencies, leave a part or all of his property to pass to his heirs under the law of succession. West's Ann.Prob.Code, § 102.

Baker, Palmer, Wall & Raymond, H. E. McCombie, Bakersfield, for appellants.

J. Richard Thomas, Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a portion of a decree determining the rights of the parties to take under a will.

The testator died on January 20, 1955, leaving a will executed on March 27, 1928. He had been married three times and he was survived by a son and daughter of the first marriage, a son and daughter of the second marriage, and a widow Mary Lenore Maxwell whom he married on March 13, 1948, his second wife, Eva L. Maxwell, having previously died. When the will was made the children of the first marriage were 21 years and 19 years old, respectively, and the children of the second marriage were four years and two years old, respectively. At the time of the testator's death all four children were over 30 years of age, except Louisa who was 29 and she was then Louisa Kinnebrew.

In his will the testator declares that this is his last will and that he revokes all other wills made by him; that he is married to Eva L. Maxwell and they are the blood parents of one daughter named Louisa and one son named Adrian, Jr.; that he is the father of another son and another daughter by a previous marriage named Kermit and Ellen, who are "now about grown up"; and that he gives \$5 to Kermit and \$5 to Ellen. The Fifth paragraph of his will reads as follows:

"I give, devise and bequeath all the remainder of my estate, both real and personal, of whatsoever kind and wherever situated, including the pro-

ceeds of my life insurance, to my wife, Eva L. Maxwell, and in the event of her death occurring at the same time as my own, then in that event equally to the two children of myself and wife, Louise Newton Maxwell and Adrian I. Maxwell, Jr.

"In thus leaving the bulk of my estate to my present wife and our children, it is done thru no want of paternal affection, but with the conviction that it is best, because of the fact that my older children are grown up and self-supporting."

In the Sixth paragraph he appoints his wife, Eva L. Maxwell, as executrix to serve without bond and with authority to sell, lease or mortgage any part of the estate. The Seventh paragraph reads:

"In the event my wife's death occurs at the same time as my own or before my estate is settled thereafter, then In that event I appoint the Security Bank and Trust Co., ~~Taft~~, Cal., to act as Executor in accordance with law."

The will was admitted to probate and in due course Ellen filed a petition on behalf of herself and Kermit for a decree determining their interest in the estate, claiming that except as to the bequests of \$5 to each of them, the deceased died intestate. The widow filed her claim of interest, and the two children of the second marriage also filed claiming all of the residue of the estate except for the two \$5 gifts to the children of the first marriage. It was stipulated at the hearing, among other things, that the widow is entitled to all of the community property and to one-third of the decedent's separate property since the will made no provision for her. The court found in accordance with the admitted facts, and also found that the will was drawn by a layman and not by a lawyer; that the decedent died intestate as to the widow; and that, with the exception of his widow, he died testate. As conclusions of law it was found that upon distribution of the estate the surviving widow is entitled to receive all of the com-

munity property, Ellen and Kermit are each entitled to receive \$5 from the separate estate, and the widow, Louisa and Adrian, Jr. are each entitled to receive one-third of the remainder of the separate property. Judgment was entered accordingly, and the two children of the first marriage have appealed from that part of the decree which awards two-thirds of the remainder of the property to the children of the second marriage.

The appellants contend that by the language used in the Fifth paragraph of the will the testator intended to give the remainder of his property to the two children named in that paragraph only if he and his wife Eva died at the same time; that he made no provision for the disposition of his estate if his wife Eva should die before he did, because his sole concern at that time was for the care of the two young children, and he believed that if they lost their mother only he would be able to care for them; that he made it clear in his will that no such disposition was intended; and that since his wife Eva predeceased him he died intestate, and the remainder of his estate goes to all four of his children according to the law of succession. It is argued that courts are not permitted, in order to avoid a conclusion of intestacy, to adopt a construction based on conjecture as to what the testator may have intended, although not expressed, citing *Estate of Hoytema*, 180 Cal. 430, 181 P. 645; that the words "in the event of her death occurring at the same time as my own", are clear and certain and no ambiguity appears; that the testator obviously intended this document to be effective only if he predeceased his wife, or if he and his wife died at the same time; that the nominal gift of \$5 to each of the appellants was intended only to comply with section 90 of the Probate Code, and would not prevent their taking their share of the estate if their father died intestate; and that the decree should be reversed with instructions to award one-third of the remainder to the appellants and one-third to the children of the second marriage. The respondents con-

tend that a construction of a will preventing an intestacy is to be favored over one which results in total or partial intestacy; that the court's decision is sustainable upon the theory of raising a gift to the respondents by implication, and by inserting words in the will or striking words therefrom in order to cover the contingency not provided for in this will; and that the modern trend, as indicated by the decisions in *Brock v. Hall*, 33 Cal.2d 885, 206 P.2d 360, 11 A.L.R.2d 672 and *Estate of Hubbard*, 122 Cal.App.2d 942, 266 P.2d 196, and decisions in other states, is to be more liberal in sustaining gifts by implication in such cases.

[1-3] There is no dispute as to the facts or as to the established rules of law, the only question being as to how those rules should be applied under the facts of this case. The primary consideration in construing a will is to determine the intention of the testator as expressed in the language used, and not as it may have existed in the mind of the testator. This intention is to be gleaned from a reading of the will as a whole and not from the apparent meaning of any clause or clauses considered alone, and an interpretation is to be preferred which will prevent a total intestacy if justified by the language used in the will. *Estate of Sessions*, 171 Cal. 346, 153 P. 231; *Gore v. Bingaman*, 29 Cal.App.2d 460, 85 P.2d 172; *Probate Code*, Sec. 102. Also, under some circumstances a will may be construed as creating a gift by implication (*Brock v. Hall*, supra; *Estate of Hubbard*, supra).

[4] Taken literally, the language of this will did not give the remainder of this estate to the children of the testator and his then wife, except in the event that both parents should die at the same time, and no expressed disposition of such remainder was made in the event she died before he did. With that omission of something which would reasonably seem should have been provided for, and if it also clearly appeared from the will as a whole that a gift to these two younger children was in-

tended even though this wife predeceased her husband, the principle of a gift by implication might become applicable. As said in *Brock v. Hall*, supra [33 Cal.2d 885, 206 P.2d 363], "* * * a gift will be raised by necessary implication where a reading of the entire instrument produces a conviction that a gift was intended." It naturally follows that where a reading of a will as a whole does not clearly disclose such an intention, or produce such a conviction, a gift may not be implied.

While this will was drawn by a layman it is clearly expressed in perfect legal form and substance, except that no provision was made therein for the contingency that would arise if this wife should predecease the testator, which is what here occurred. The basic question here is as to whether the will as a whole so clearly discloses an intention to make the same gift to these younger children in the event this wife died first, that a gift results by necessary implication.

The testator here gave the remainder of his estate to his then wife or, if she died at the same time, to the younger two children and followed this by his reason for "thus leaving" the bulk of his estate to them. Consistent with that provision, he appointed this wife as executrix of his estate with the further provision that if she died at the same time, or thereafter but before his estate was settled, he appointed a bank to act as executor. He made no provision for a substitute executor if she died before he did, thus to a certain extent indicating that he did not intend this gift to the two younger children to be effective in the event his wife died before he did. Moreover, in expressly stating his reason for not leaving more to his older children he based it solely on the fact that the older children "are grown up and self-supporting." This indicates merely a desire and intention, in the event that he and his wife should die at the same time, to favor the younger children because of their youth and their inability to care for themselves. The reason thus given for distinguishing between the two sets of children would

probably cease to exist after the younger children also became adults. The fact that the clause expressing this reason immediately followed the clause here in question is somewhat suggestive with respect to the intention of the testator at the time he made the will. The words used in the clause here in question are not, in themselves, ambiguous. These words clearly and definitely conditioned this gift upon the fact of the mother of these children dying at the same time as the testator, and the will nowhere contains any expressed provision for such a gift under any other circumstances. Assuming that in his own mind the testator may have intended to give these two children the remainder of the property if his wife predeceased him, there is nothing in the will itself which would clearly disclose such an intention. While it clearly appears that he intended to give the remainder to these two children in the event he and his wife died at the same time, it does not clearly appear from the will itself that he intended to make the same provision if his wife died before he did, or that he intended to disinherit his older children in that event.

The testator may well have intended this gift to the two younger children to be ineffective unless he and his wife died at the same time, as otherwise he would be able to look after them himself. The words used in that clause of the will would so indicate, and when the will is read as a whole it tends to support that conclusion rather than one to the contrary. In any event, and even though a possible doubt may appear in this connection, there is nothing in this will which so clearly discloses the testator's intention to make this gift to these younger children effective even in the event his wife predeceased him, as to result in a gift by necessary implication. As was said in *Estate of Franck*, 190 Cal. 28, 210 P. 417, 418, "The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that imputed to the testator

cannot be supposed to have existed in his mind." No such situation here appears.

[5] This will should be construed in view of the situation existing at the time it was executed in 1928. At that time, under Sections 1310 and 1343 of the Civil Code,¹ the gift to this wife would lapse if she died before the testator did unless he disclosed in his will an intention to substitute "some other" in her place. *Estate of Sowash*, 62 Cal.App. 512, 217 P. 123, 126. No such substitution was here provided if the wife should predecease him. The failure to thus fully provide for such a substitute was only natural since if his wife died first he would expect to care for them in some other way. In any event he expressly limited the provision for a substitute, making the gift to these two children applicable only in the event he and his wife died at the same time, and no intention to provide for any other substitution clearly appears from the will as a whole. As was said in *Estate of Sowash*, supra:

"It must therefore be held that the will was made in view of existing conditions at the time of its execution. Here Sowash gave his estate to his wife, and the fact that he made no provision in the event that she predeceased him shows that he did not anticipate this contingency. What his intent may or may not have been after this condition was changed by the death of his wife we have no means of knowing, except from the fact that he allowed the will to stand as originally executed. We are limited in our powers to an interpretation of the will as we find it. The rule of construction that the intent of the testator must be carried out if possible does not authorize courts to make a new will to conform to what they may think the testator intended. The intent of the testator must be ascertained from the will as it stands. *Estate of Hittell*, 141 Cal. [432] 436, 75 P. 53."

1. Now Probate Code, § 92.

[6, 7] While intestacy is to be avoided if possible, in contruing a will, this may be done only under well established rules; a court may not make a different will for a testator when the one made by him sufficiently discloses his intention as expressed in the language of the will; and a testator has the right to make a will which may, in certain contingencies, leave a part or all of his property to pass to his heirs under the law of succession. Estate of Beldon, 11 Cal.2d 108, 77 P.2d 1052.

Under established rules the record does not support the finding that, except in relation to the rights of his widow, the decedent died testate. The decree should be modified accordingly.

The portion of the decree appealed from is reversed.

GRIFFIN and MUSSELL, JJ., concur.



158 Cal.App.2d 593

Marvin HAYUTIN and Albert Hayutin,
Plaintiffs and Appellants,

v.

Oscar RUDNICK, Individually and as Executor of the Estate of Libbie Rudnick, deceased, Defendant and Respondent.

Civ. 5638.

District Court of Appeal, Fourth District,
California.

March 21, 1958.

Rehearing Denied April 16, 1958.

Action for breach of contract, specific performance, to impose a trust, for an accounting, and for moneys had and received. From adverse judgment of the Superior Court, Kern County, Robert B. Lambert, J., dismissing action for want of prosecution, the plaintiffs appealed. The District Court of Appeal, Mussell, J., held that where considerable delay in bringing

cause to trial was caused by plaintiffs' failure to allege a cause of action which was not subject to demurrer and further delay resulted from plaintiffs' failure to take proper steps to cause action to be transferred to another county and to pay required filing fee therefor, and delay was occasioned by time consumed by rulings on demurrers to complaint, filing of amended pleadings, and from extensions of time for hearings requested by plaintiffs, trial court did not abuse its discretion in determining that plaintiffs failed to show that their failure to bring cause to trial within time allowed by statute was not caused by their lack of diligence.

Judgment affirmed.

1. Appeal and Error ⇨436

Dismissal and Nonsuit ⇨60(3)

Where appeal from a judgment is taken, trial court has no jurisdiction to proceed in cause during pendency of appeal and time consumed on appeal is not to be considered as part of the statutory time within which to bring action to trial. West's Ann.Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⇨60(6)

Filing of numerous pleadings and delay in giving notices, etc., standing alone are insufficient to bring cause within one or more of exceptions to mandatory provisions of statute requiring that an action be brought to trial within specified time limit. West's Ann.Code Civ.Proc. §§ 583, 949.

3. Dismissal and Nonsuit ⇨60(3)

Where delay in bringing cause to trial was caused by plaintiffs' failure to allege cause of action which was not subject to demurrer and further delay resulted from plaintiffs' failure to take proper steps to cause action to be transferred to another county and to pay required filing fee therefor, and delay was occasioned by time consumed by rulings on demurrers to complaint, filing of amended pleadings, and from extensions of time for hearings requested by plaintiffs, trial court did not abuse its discretion in determining that

plaintiffs failed to show that their failure to bring cause to trial within time allowed by statute was not caused by their lack of diligence. West's Ann.Code Civ.Proc. §§ 583, 949.

4. Appeal and Error ⇨962

Dismissal and Nonsuit ⇨60(1)

Question of whether plaintiffs could have brought action to trial within statutory period is one of fact for trial court, and its determination cannot be set aside unless there was an abuse of discretion. West's Ann.Code Civ.Proc. §§ 583, 949.

Desser & Rau, Beverly Hills, and Dorsey, Bultman & Bianchi, Bakersfield, for appellants.

Borton, Petrini, Conron & Brown, Bakersfield, for respondent.

MUSSELL, Justice.

The original complaint in this action for breach of contract, specific performance, to impose a trust, for an accounting, and for moneys had and received was filed in Los Angeles county on November 5, 1951. On motion for change of venue, the cause was transferred to Kern county on December 28, 1951. Plaintiffs appealed from the order transferring it and the order was affirmed on December 29, 1952. Hayutin v. Rudnick, 115 Cal.App.2d 138, 251 P.2d 707.

[1] Plaintiffs failed for more than five years after the action was filed to bring it to trial and on January 17, 1957, defendants filed a motion to dismiss the action for want of prosecution. This motion was made under the provisions of section 583 of the Code of Civil Procedure and on the ground that the action was not brought to trial within the time limits specified in said section. The hearing was had on this motion on January 28, 1957, and on February 13, 1957, the trial court granted the motion and entered a judgment of dismissal of the action. Plaintiffs appeal from this judgment, claiming that under the circumstances of this case it would

have been impracticable, futile or impossible to bring the action to trial within the time prescribed by the statute and that it would be a miscarriage of justice to deprive plaintiffs of a trial on the merits.

In *Rose v. Knapp*, 38 Cal.2d 114, 117, 237 P.2d 981, 983, the court said:

"The provision of section 583, requiring dismissal if an action is not brought to trial within five years after the filing of the complaint unless the parties have stipulated for an extension of the period, is mandatory, but it is subject to implied exceptions. As stated in *Christin v. Superior Court*, 9 Cal.2d 526, 532-533, 71 P.2d 205, 208, 112 A.L.R. 1153, 'The purpose of the statute is plain: to prevent avoidable delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years * * *' and one exception has been recognized 'where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile.' (Citations.) What is impossible, impracticable or futile must, of course, be determined in the light of the facts of the particular case."

In *Hayashi v. Lorenz*, 42 Cal.2d 848, 851, 271 P.2d 18, 19, it is held that

"Section 583 of the Code of Civil Procedure provides, in part, 'The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial * * *.' The discretion is that of the trial court, and it will be disturbed only in cases of manifest abuse. *Hillsdale Builders Supply Co. v. Eichler*, 109 Cal.App.2d 117, 118, 240 P.2d 343, and cases there cited."

It was held in *Christin v. Superior Court*, 9 Cal.2d 526, 530, 71 P.2d 205, 112

A.L.R. 1153, that despite the mandatory language of the statute (Code Civ.Proc., Sec. 583), implied exceptions have been recognized where it was not possible to bring the cause to trial. Thus, where an appeal from a judgment is taken, the trial court has no jurisdiction to proceed in the cause during the pendency of the appeal, and consequently the time consumed on appeal is not considered as part of the statutory period. Citing *Kinard v. Jordan*, 175 Cal. 13, 164 P. 894.

The record indicates that on January 24, 1952, a writ of supersedeas was granted by the District Court of Appeal, Second Appellate District, and under the provisions of section 949 of the Code of Civil Procedure, proceedings in the trial court were suspended during the pendency of the appeal from the order changing the place of trial. Under such circumstances and the holding in the *Christin* case, *supra*, the time during which the appeal was pending should not be taken herein as part of the statutory period. However, the decision on appeal from the order granting the change of venue was dated December 29, 1952. The remittitur was entered on the minutes of the Superior Court at Los Angeles on March 20, 1953, and the motion to dismiss for want of prosecution was not filed until January 17, 1957. On December 11, 1955, plaintiffs filed a motion for setting the cause for trial and on January 8, 1957, the cause was set for a pre-trial conference.

[2-4] Plaintiffs do not question the rules announced in the cases heretofore cited but contend that it would have been impracticable, futile or impossible to bring the cause to trial within the statutory period. They set forth in their opening brief a schedule of the many proceedings, motions, orders and correspondence between the parties in an effort to sustain their contention. However, in *De Mota v. Superior Court*, 130 Cal.App.2d 58, 62, 278 P.2d 537, it was held that the filing of numerous pleadings and the delay in giving notices, etc., standing alone are insufficient to bring the cause within one or

more of the exceptions to the mandatory provisions of the statute. The record shows that considerable delay in bringing the cause to trial was caused by plaintiffs' failure to allege a cause of action which was not subject to demurrer for on September 22, 1955, the demurrer to their fourth amended complaint was overruled by the trial court. Further delay resulted from plaintiffs' failure to take proper steps to cause the action to be transferred to Kern county and to pay the required filing fee therefor. Delay was also occasioned by the time consumed by the rulings on the demurrers to the complaints, the filing of amended pleadings, and from extensions of time for hearings requested by plaintiffs. Admittedly, the question of whether plaintiffs could have brought the action to trial within the statutory period was one of fact for the trial court and its determination cannot be set aside unless there was an abuse of discretion. As was said in *Simonini v. Jay Dee Leather Products Co.*, 85 Cal.App.2d 265, 268, 193 P.2d 53, 54:

"It seems well settled that the power of a trial court to dismiss an action for failure on the part of plaintiff to prosecute it with diligence is an inherent power which exists without the aid of statutory authority and that the provisions of section 583 of the Code of Civil Procedure and of other related sections must be read in the light of the existence of such inherent power.' *Hibernia Sav. & Loan Soc. v. Lauffer*, 41 Cal.App.2d 725, 728, 107 P.2d 494, 495. Section 583 of the Code of Civil Procedure provides: 'The court may *in its discretion* dismiss any action for want of prosecution * * * whenever plaintiff has failed for two years after action is filed to bring such action to trial.' (Emphasis added.) It is well settled that the action of a trial court in dismissing an action for failure to prosecute diligently should not be disturbed except upon a showing of clear abuse of discretion. *Hibernia Sav. & Loan Soc. v. Lauffer*, *supra*; *Inde-*

bitzen v. Lane Hospital, 17 Cal.App.2d 103, 61 P.2d 514. '* * * it is incumbent upon the appellant to establish affirmatively that there has been an abuse of discretion.' St. Clair v. Brix, 89 Cal.App. 94, 99, 264 P. 307, 309; Grigsby v. Napa County, 36 Cal. 585, 95 Am.Dec. 213."

In the instant case the trial court did not abuse its discretion in determining that plaintiffs failed to show that their failure to bring the cause to trial was not caused by their lack of diligence.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



158 Cal.App.2d 506

Leonard WILLIAMS, Plaintiff and Appellant,

v.

STANDARD ACCIDENT INSURANCE
COMPANY, Defendant and Respondent.

Civ. 5614.

District Court of Appeal, Fourth District,
California.

March 18, 1958.

Action against automobile liability insurer which allegedly had insured owner's automobile for injuries sustained by plaintiff who had recovered judgment against the owner. The Superior Court, Kern County, Gordon L. Howden, J., rendered judgment for insurer, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that provision in automobile liability policy requiring insured to notify insurer within thirty days after delivery of newly acquired automobile in order to extend coverage on it beyond thirty-day period, was plain and unambiguous, and where insured did not notify insurer of delivery until more than thirty days thereafter, even if automobile

was not in use on highway until two days before accident because it was being repaired, automobile was not insured at time of accident.

Affirmed.

1. Insurance ⚡435.3

Under policy insuring newly acquired automobile if insured notified insurer within thirty days following date of its delivery to insured and if insurer insured all automobiles owned by insured at delivery date, even if policy automatically insured all of insured's automobiles, requirement of notice after delivery of newly-acquired automobile was condition subsequent which must have been complied with in order to keep coverage in effect beyond that period.

2. Insurance ⚡665(4)

In action against automobile liability insurer which allegedly had insured all of owner's automobiles under policy requiring insured to notify insurer of delivery of newly acquired automobile within thirty days thereafter, for injuries sustained by plaintiff in accident involving owner's automobile, evidence sustained finding that automobile was delivered to owner more than thirty days prior to accident.

3. Insurance ⚡668(10)

In nonjury action by passenger against automobile liability insurer which allegedly had insured all of owner's automobiles under policy insuring newly acquired automobile if insured notified insurer within thirty days of date of delivery to insured, credibility of owner and weight to be accorded his testimony that when he bought automobile more than three months before accident there were no wheels or tires on it, that it didn't have windshield, that it needed fenders, radiator and grill, and that he did not drive it until two days before accident were for trial judge.

4. Evidence ⚡588, 594

Trier of fact may accept all or such part of testimony of any witness as he believes to be true, or may reject all or any part he believes to be untrue and may reject

uncontradicted testimony provided he does not act arbitrarily.

5. Appeal and Error ⚡931(1)

All reasonable inferences must be indulged in to uphold judgment of trial court if possible.

6. Automobiles ⚡1

An "automobile" is a self-propelling vehicle suitable for use on street or road-way.

See publication Words and Phrases, for other judicial constructions and definitions of "Automobile".

7. Insurance ⚡435.3

Provision in automobile liability policy requiring insured to notify insurer within thirty days after delivery of newly acquired automobile in order to extend coverage on it beyond thirty day period, was plain and unambiguous, and where insured did not notify insurer of delivery of automobile until more than thirty days thereafter, even if automobile was not in use on highway until two days before accident because it was being repaired, automobile was not insured at time of accident.



Vizzard, Baker & Sullivan and Jere N. Sullivan, Bakersfield, for appellant.

H. T. Ellerby and Henry F. Walker, Los Angeles, for respondent.

MUSSELL, Justice.

On May 5, 1952, plaintiff Leonard Williams was injured in an automobile accident involving a 1941 Chevrolet sedan owned and operated by one Alvin Weishaar. Williams brought a personal injury action against Weishaar and on January 21, 1954, recovered a judgment against him for \$5,959.60 and costs. This judgment became final and when it was not paid, Williams instituted the instant action for damages against the defendant insurance company, claiming that an automobile liability insurance policy which it had issued to Weishaar covering his 1941 Dodge coupe also provided coverage of the said Chevrolet sedan at the time of the accident. Trial was had

by the court without a jury and plaintiff appeals from the judgment entered for the defendant.

Weishaar applied to defendant insurance company for insurance on his 1941 Dodge coupe and upon receipt of the premium therefor, defendant company issued an insurance policy to him as the named insured, covering the period January 7, 1952 to January 7, 1953. The said Dodge coupe was the sole described automobile in the policy and the company agreed to pay on behalf of the insured "all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at the time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile." Appellant Williams claims that the evidence as a matter of law establishes that this protection is to be extended to coverage of the Chevrolet sedan which was owned by Weishaar and involved in the accident on May 5, 1952. Appellant's claim is based on the provisions in the insurance policy found under "Insuring Agreements", subdivision IV, and reading as follows:

"(a) Automobile. Except where stated to the contrary, the word "automobile" means:

"(1) Described Automobile—the motor vehicle or trailer described in this policy: * * *

"(4) Newly Acquired Automobile—an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insur-

ance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile."

The record shows that on January 25, 1952, Weishaar purchased and paid for the Chevrolet sedan involved. The certificate of title given to him is dated January 28, 1952, and he testified that the car was delivered to him "anywhere within a couple of days to two weeks after January 25, 1952." Weishaar did not notify the defendant company within thirty days of this delivery to him, as required by the quoted portion of the insurance policy, and such notice was not given to the company until after the accident had occurred. On May 15, 1952, Weishaar applied to the Automobile Club of Southern California for and secured insurance on the Chevrolet sedan involved. He sold his Dodge car in November, 1952, and cancelled his insurance on it.

He testified that he owned a 1939 Oldsmobile and had owned it since 1951 and until after the date of the accident; that the Oldsmobile was not insured at the time of the accident; that while he did not know just how long it had been since it had been insured, the only car he recalled as being insured in the period January 7, 1952, to the date of the accident was the Dodge; that if he "had any on the Oldsmobile, he did not recall it." He further testified that when he purchased the Chevrolet on January 25, 1952, there were no wheels or tires on it, "didn't have any windshields, the windshields were broke, the headlight was gone, upholstery was tore up, it needed two new fenders, needed a bumper"; that it needed a radiator and a grill; that about two weeks after the Chevrolet was delivered to him, he started rebuilding it and did not drive it until about the 3rd of May, 1952.

[1] The replacement provision of the policy is not here involved and appellant's claim that the Chevrolet sedan was insured by the policy at the time of the accident is based on the premise that the company insured all of Weishaar's automobiles owned

by him at the delivery dates thereof. If it be assumed that the policy automatically insured Weishaar's Chevrolet as well as his Dodge, such automatic insurance continued and was in force for thirty days after the delivery of the Chevrolet and no longer, unless the insurance company was notified of such delivery within said thirty-day period. The requirement of notice is a condition subsequent which must be complied with in order to keep such coverage in effect beyond that period. *Birch v. Harbor Insurance Co.*, 126 Cal.App.2d 714, 719, 272 P.2d 784; *Everly v. Creech*, 139 Cal.App.2d 651, 657, 294 P.2d 109.

[2] Appellant argues that the Chevrolet was not an automobile when it was delivered to Weishaar and did not become such until two days before the accident, and that the notice given to the company on the day following the accident was a compliance with the requirements of notice in the policy. The court found that the Chevrolet was not insured; that it was acquired by Weishaar and delivered to him more than thirty days prior to May 5, 1952. These findings are supported by substantial evidence.

[3-5] Appellant argues that as a matter of law the Chevrolet sedan was not an automobile until it was put in operating condition, about two days before the accident. This argument is based on the assumption that the trial court was required to believe the testimony of Weishaar as to the condition of the Chevrolet when it was delivered to him. However, the credibility of the witness Weishaar and the weight to be accorded to his testimony were questions directed to the trial judge who, under proper circumstances may accept all or such part of the testimony of any witness as he believes to be true, or may reject all or any part he believes to be untrue (*Bechtold v. Bishop & Co., Inc.*, 16 Cal.2d 285, 291, 105 P.2d 984), and the trier of fact may reject the uncontradicted testimony of a witness provided he does not act arbitrarily. *Hill v. Thomas*, 135 Cal.App.2d 672, 681, 288 P.2d 157. Furthermore, all reasonable inferences must be indulged to uphold the

judgment of the trial court if possible. Memorial Hospital Ass'n of Stanislaus County v. Pacific Grape etc. Co., 45 Cal.2d 634, 635, 290 P.2d 481, 50 A.L.R.2d 442.

While Weishaar testified that when the Chevrolet was delivered to him there were no wheels or tires on it, he did not state when wheels or tires were put on or when the car could have been operated. He purchased it as an automobile and secured a certificate of title thereto and possession thereof, as such, several months prior to the accident and immediately started to repair it.

[6] In Webster's International Dictionary, Second Edition, an automobile is defined as a self-propelled vehicle suitable for use on a street or roadway, and in 4 Words and Phrases, Automobile, p. 855, it is said that "'Automobile' is general name adopted by popular approval of all forms of self-propelling vehicles for use on highways and streets, and is presumed to have been used in indemnity provision of accident policy in its common, general, and popular sense, in absence of proof to the contrary. Life & Casualty Ins. Co. of Tennessee v. Metcalf, 42 S.W.2d 909, 910, 240 Ky. 628."

[7] Obviously, the Chevrolet involved was an automobile and was registered and operated as such, and the fact it was not in use on the highways and streets while being repaired did not change it into something else. The insurance policy herein requires the insured to notify the company within thirty days after *delivery to him* of an automobile in order to extend the coverage on it beyond the thirty-day period. This provision is plain and unambiguous and cannot be interpreted as a provision that notification to the company is to be given within thirty days after completing repairs on an automobile or after making it operable. The policy herein obligates the company to pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages * * * arising out of the ownership, maintenance or use of the automobile. This coverage is not limited to liability arising out of use and

maintenance of an automobile on the highway or while it is being operated. The meaning of maintenance encompasses repairs and an automobile obviously can be repaired and maintained irrespective of whether it is operable or not. The Chevrolet automobile here involved was not a replacement under the terms of the policy and it was not described or referred to therein. If insured under the automatic insurance provision of the policy, such insurance was only for thirty days following the delivery of the car to Weishaar, and since he did not notify the company of such delivery to him within said thirty days, it follows that the car was not insured by the company at the time of the accident.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



158 Cal.App.2d 623

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joseph Benjamin ELLIOTT, Defendant and
Appellant.
Cr. 6001.

District Court of Appeal, Second District,
Division 1, California.

March 24, 1958.

Rehearing Denied April 8, 1958.

Hearing Denied May 21, 1958.

Defendant was convicted of lewd and lascivious acts on bodies of seven year old boy and eight year old girl. The Superior Court, Los Angeles County, Allen T. Lynch, J., entered judgment, and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Fourth, J., held that where jury found defendant guilty and court, after a hearing, found that defendant was probable sexual psychopath and ordered defendant

committed to state hospital for observation and medical director and hospital superintendent found that defendant was sexual psychopath and would not benefit by care and treatment and was a menace to health and safety of others and defendant was returned to court, under the statute the trial court could sentence defendant to state prison without giving him a hearing as to propriety of certifying him to state hospital for treatment.

Affirmed.

1. Criminal Law ☞768(1)

In prosecution for lewd and lascivious acts on bodies of seven year old boy and eight year old girl, instruction that charge was easily made and difficult to disprove and that nature of charge was such that complaining witness and defendant were usually the only witnesses and that testimony of prosecuting witness was to be examined with great caution was a proper and sufficient cautionary instruction. West's Ann.Pen.Code, § 288.

2. Infants ☞20

In prosecution for lewd and lascivious acts on bodies of seven year old boy and eight year old girl, instruction that touching, fondling, rubbing or feeling body, members or private parts of minor under age of 14 years, with intent of arousing, appealing to and gratifying the lusts, passions and sexual desires of either the minor or the accused was proscribed even though such touching, fondling, rubbing or feeling was through clothing of minor was sufficient as to the specific intent required under the circumstances of the case. West's Ann.Pen.Code, § 288.

3. Criminal Law ☞1173(2)

In prosecution for lewd and lascivious acts on bodies of seven year old boy and eight year old girl, refusal to give requested instruction regarding confession or admission was not reversible error where the probability that a different result would have been reached in the trial court had such an instruction been given was extremely remote in lieu of the testimony of

the boy and the girl and the corroboration and the absence of defense. West's Ann. Code Civ.Proc. § 2061, subd. 4; West's Ann.Pen.Code, § 288.

4. Criminal Law ☞785(12)

In prosecution for lewd and lascivious acts on bodies of seven year old boy and eight year old girl, the jury was properly instructed as to impeachment of witness. West's Ann.Pen.Code, § 288.

5. Criminal Law ☞641(1)

In prosecution for lewd and lascivious acts on bodies of seven year old boy and eight year old girl, record disclosed that defendant had effective and competent representation in that representative from public defender's office was diligent and did everything within reason properly to present defendant's defense. West's Ann.Pen. Code, § 288.

6. Mental Health ☞434

Where jury found defendant guilty of lewd and lascivious acts and the court, after a hearing, found that defendant was probable sexual psychopath and ordered defendant committed to state hospital for observation and medical director and hospital superintendent found that defendant was sexual psychopath and would not benefit by care and treatment and was a menace to health and safety of others and defendant was returned, under the statute, the trial court could sentence defendant to state prison without a hearing as to propriety of certifying him to state hospital for treatment. West's Ann.Pen.Code, § 288; West's Ann.Welfare & Inst.Code, § 5512.

William Bronsten, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Carl Bronkay, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction on two counts of an information wherein the appellant was charged with violating the provisions of section 288 of

the Penal Code, and from the order denying appellant's motion for a new trial.

In an information filed in Los Angeles county it was charged that the appellant did, on or about September 28, 1956, commit a lewd and lascivious act upon and with the body of a seven-year-old boy; and in count II thereof it was charged that appellant, did, on or about September 30, 1956, commit a similar act upon and with the body of an eight-year-old girl. It was also charged that the appellant had suffered a prior conviction of violating the same provisions of the Penal Code and served a term in prison therefor. At the arraignment the appellant pleaded not guilty to each count and denied the prior conviction. A representative of the office of the Public Defender appeared for the appellant during the trial. At the start of the trial at the bench, outside the hearing of the prospective jurors, the defendant admitted the prior conviction as alleged.

A résumé of the facts is as follows: On a Friday in September, 1956, the appellant rented a room from Mrs. Nella Moore in Lynwood, and moved into it on that, or the next day. Mrs. Moore was caring for her grandson, aged about seven years, the boy victim, and another child, aged about eight and one-half years, the girl victim. The two victims, with another child, were in the house when Mrs. Moore started to make up the appellant's bed. Mrs. Moore left the room, which the appellant was to occupy, and went to her home on the front part of the lot to get some blankets and sheets. The boy victim was talking to the appellant as Mrs. Moore left the room and the appellant then gave the lad some gum and cards. The appellant put the boy on his lap, took the child's hand and placed it on his penis and moved it back and forth. Such course was continued until appellant saw Mrs. Moore returning to the room, whereupon appellant got up and sat upon his bed. The other children were playing in the backyard while the boy was on appellant's lap.

On the Sunday following the day appellant moved into the room which he had

rented, the little girl victim's mother brought her to Moore's house on the front part of the lot, to be with Mrs. Moore. Appellant was seated on a divan in Mrs. Moore's house watching a television program. While he and the child were alone in the room, appellant called the little girl over to him from the floor where she was and pulled her onto his lap. She attempted to wriggle away but he tightened his hold upon her and put his hand under her dress and commenced rubbing her private parts. The appellant continued this course until Mrs. Moore returned to the room.

A police officer, in the course of the investigation talked with appellant and read to him the complaint which had been filed. The appellant stated in substance that he had placed the girl child upon his lap during the television program; that he had felt her hand fall upon his penis through his clothing and that he had then moved the child over to his other leg to the end that it would not occur.

Appellant first contends that the court erred in failing to give the following instructions:

- (1) A cautionary instruction where a child is involved;
- (2) One that specific intent is required in a sex case;
- (3) One concerning a statement or confession of an accused; and
- (4) One on impeachment of witnesses.

Secondly, appellant contends that he did not have effective aid of counsel, and lastly, that he was not sentenced in conformity with section 5512, Welfare and Institutions Code.

[1] The following instruction was given by the court:

"It is not essential to a conviction in this case that the testimony of the prosecuting witness be corroborated by other evidence, provided that from all the evidence you are convinced beyond a reasonable doubt and to a moral certainty of the defendant's guilt. However, a charge such as that made against the defendant in this case is one which, generally speaking, is easily

made, and, once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the prosecuting witness with caution." It appears that a proper and sufficient cautionary instruction was given by the trial court. See, *People v. Putnam*, 20 Cal.2d 885, 129 P.2d 367; *People v. Wilder*, 151 Cal.App.2d 698, 312 P.2d 425; *People v. Trolinder*, 121 Cal.App. 2d 819, 824, 264 P.2d 601.

[2] Next considering appellant's contention that an instruction concerning specific intent to commit the offense in question should have been given. The defendant did not take the witness stand and testify in his own behalf. The very nature of the acts testified to by the boy and the girl were such as to preclude the possibility that such acts complained of were committed innocently, and the question for the jury was whether the acts described by the complaining witnesses were or were not committed. The appellant made no request for any particular instruction on intent, nor does he set forth in his appeal what specific instruction should have been given. The court did, at the request of the People, instruct that: "Every person who wilfully and lewdly commits any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child is guilty of a crime"; and "It is not necessary in committing the crime charged against the defendant in the information that the bare skin of the minor be touched. The touching, fondling, rubbing or feeling of the body, members or private parts of a minor under the age of 14 years, with the intent of arousing, appealing to and gratifying the lusts, passions and sexual desires of either the minor or the accused, constitutes the offense charged, even though such touching, fondling, rub-

bing or feeling was through the clothing of the minor."

In our opinion, the instructions given suffice under the circumstances of this particular case. See, *People v. Kearney*, 20 Cal.2d 435, 439, 126 P.2d 612; *People v. Booth*, 111 Cal.App.2d 106, 108, 243 P.2d 872.

[3] Appellant next contends that it was reversible error to refuse to give the rejected instruction regarding a confession or admission. The appellant made no confession, and the only matter in the record which might be termed an admission was the testimony of the officer to the effect that the appellant told him that he had the little girl on his lap in the room watching a television show and that he felt her hand on his penis through his clothing and that he moved her over to his other leg so that it would not occur. It may be that the statement would constitute an oral admission, and if so, a cautionary instruction should have been given (Code Civ.Proc. § 2061, subd. 4). However, it is no ground for a reversal in the instant case. When the testimony of the two complaining witnesses is considered and the corroboration therefor together with the fact that no defense was offered thereto, the probability that a different result would have been reached in the trial court had such an instruction been given is extremely remote. See, *People v. Koenig*, 29 Cal.2d 87, 94, 173 P.2d 1; *People v. Clark*, 117 Cal.App.2d 134, 140, 255 P.2d 79.

[4] Appellant's last contention in the matter of instructions is that the jury was not properly instructed as to the impeachment of a witness. The court gave substantially all of CALJIC No. 52—Alternate, and in our opinion this was sufficient. See, *People v. Granados*, 49 Cal.2d 490, 319 P.2d 346.

[5] Considering appellant's contention that he lacked effective and competent representation, the record in this case belies the appellant's assertion. The representative from the Public Defender's office was

diligent and did everything within reason properly to present the appellant's defense.

[6] Appellant's last contention is that there was an impropriety in the proceedings in which he was sentenced. After the verdicts of the jury were returned, the judge appointed three doctors to examine the appellant and submit their reports, and further, ordered a probation officer's report, and set a date for the hearing to determine whether the appellant was a sexual psychopath. A hearing was held and the court found that the appellant was a probable sexual psychopath and ordered him committed to a state hospital for observation and diagnosis, pursuant to section 5512, Welfare and Institutions Code. The original proceedings were then adjourned.

Within the ninety-day period the medical director and superintendent of the hospital filed his opinion stating that the appellant was a sexual psychopath but would not benefit by care and treatment in a state hospital and was a menace to the health and safety of others. The appellant was returned to court for further proceedings. The criminal proceedings were reinstated and the court found that the appellant was a sexual psychopath but would not benefit by care in a state hospital and was a menace, and sentenced him to the state prison. Appellant seems to assert that upon his return from the hospital he was entitled to a hearing as to the propriety of certifying him to a state hospital for treatment.

The pertinent part of section 5512, Welfare and Institutions Code, reads as follows:

"If the superintendent of the hospital or person in charge of the county facility reports to the committing court that the person is a sexual psychopath but will not benefit by care or treatment in a state hospital and is a menace to the health and safety of others, the court shall then cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge. Such court shall resume

the proceedings and shall impose sentence or make such other suitable disposition of the case as the court deems necessary. If, however, such court is satisfied that the person is a sexual psychopath but would not benefit by care or treatment in a state hospital and is a menace to the health and safety of others, it *may* recertify the person to the superior court of the county. If the superior court, after hearing, finds that the person is a sexual psychopath but would not benefit by care or treatment in a state hospital and is a menace to the health and safety of others, it shall make an order committing the person for an indefinite period to the Department of Mental Hygiene for placement in a state institution or institutional unit for the care and treatment of sexual psychopaths designated by the court and provided pursuant to Section 5518. At such hearing or hearings, the person shall be entitled to present witnesses in his own behalf, to be represented by counsel and to cross-examine any witnesses who testify against him. The person shall remain in such institution or institutional unit until he is no longer a menace to the health and safety of others. Thereupon, the proceedings set forth in Section 5517 shall be followed with respect to the certifying of an opinion to the committing court and the release of the person thereby." (Emphasis added.)

Under the circumstances the trial court has the choice of passing sentence or of making "other suitable disposition of the case." The judge in this case elected to impose the sentence and we believe properly so.

If there was any error in the instructions such error did not influence the verdicts which were returned in this case, the appellant was represented by competent counsel at all times during the trial, and the sentencing procedures were proper under the law.

The judgment and the order appealed from are, and each is, affirmed.

WHITE, P. J., and LILLIE, J., concur.

158 Cal.App.2d 343

Bernard N. SMITH and Vincent Reeves,
Plaintiffs and Appellants,

v.

Jack V. HOWARD et al., Defendants,
Jack V. Howard, Ray Howard, Florence
Howard, W. Ross Campbell Co., a corpo-
ration, and Oscar C. Wyatt, Respondents.
 Civ. 22742.

District Court of Appeal, Second District,
 Division 2, California.

March 12, 1958.

Action by prospective purchaser of real property and real estate broker against another real estate broker and others for damages arising from breach of an alleged agency relationship between plaintiffs and defendant real estate broker, by sale of property to defendant's mother. The Superior Court of Los Angeles County, A. Curtis Smith, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Fox, P. J., held that evidence sustained finding that defendant broker's relationship to prospective purchaser was that of middleman and prospective purchaser rather than that of agent and principal and that defendant broker was not agent of plaintiff real estate broker.

Affirmed.

1. Brokers ⇨8(3)

In action by prospective purchaser of real property and plaintiff broker against defendant broker for alleged breach of agency relationship by sale of property to defendant's mother, evidence sustained finding that defendant's relationship to prospective purchaser was that of middleman and prospective purchaser rather than that of agent and principal and that defendant was not agent of plaintiff broker.

2. Brokers ⇨7

Act of real estate broker who delivered prospective purchaser's offer to vendor's office was purely mechanical and clothed broker with no discretion as would

be necessary for him to be constituted an agent of prospective purchaser.

3. Brokers ⇨8(3)

In action by plaintiff broker against defendant broker for alleged breach of agency relationship, evidence sustained finding that plaintiff delegated to defendant only power to deliver offer which plaintiff had obtained from his client.

4. Brokers ⇨7

Where defendant broker was given no discretionary authority to exercise for benefit of prospective purchaser and plaintiff broker, defendant was not plaintiffs' agent, was not in any fiduciary relationship toward them, and was not under any legal duty to inform them that another offer on property came from his mother.

5. Appeal and Error ⇨989

Reviewing court was not permitted to reweigh evidence in action for damages tried to court.

6. Witnesses ⇨363(1)

The trier of fact, in passing upon credibility of a witness, is entitled to consider his interest in result of case.

7. Appeal and Error ⇨1010(1)

Plaintiffs were not entitled to reversal simply because trial court did not place full reliance on their testimony especially where there was other testimony which supported court's findings.

8. Brokers ⇨32, 38(7)

Where vendor would not have accepted prospective purchaser's offer to purchase property because it involved a second trust deed, damages, which were allegedly sustained by prospective purchaser and plaintiff broker because property was sold to defendant broker's mother instead of prospective purchaser, were not proximately caused by defendant broker's failure to successfully negotiate a purchase of property by prospective purchaser, and prospective purchaser and plaintiff broker were not entitled to recover from defendant broker.

9. Torts ⇨15

A plaintiff will not be permitted to recover from a defendant whose alleged acts, however wrongful, are not the proximate cause of the injury suffered.

Downey A. Grosenbaugh, Hollywood, for appellants.

Harold W. Svenson, Van Nuys, for respondent Jack V. Howard.

Trent G. Anderson, Jr., Los Angeles, for respondents W. Ross Campbell Co., Ray Howard, Florence Howard and Oscar C. Wyatt.

FOX, Presiding Justice.

This is an action for damages in three counts. The plaintiffs are: (1) a prospective purchaser of real property—Bernard Smith; and (2) a real estate broker—Vincent Reeves. There are several defendants, the principal of whom is Jack Howard, a real estate broker.

The first cause of action is stated by both plaintiffs. This cause of action claims damages arising from the breach of an alleged agency relationship between plaintiffs and defendant Howard, and damages arising out of a conspiracy among all defendants.

The second action is stated only by plaintiff Smith. It repeats the allegations of the first action and claims damages arising from defendant Howard's negligent performance of his duties as agent.

The third cause of action is stated only by plaintiff Reeves. It repeats the allegations of the first action and claims that Reeves was deprived of a real estate commission because of the acts of defendants.

At the trial court (sitting without a jury) directed the order of proof to the question of the agency relationship between defendant Jack Howard and plaintiffs. The court did not hear the complete evidence on any other question. After hearing the evidence on the agency question, the court ruled in favor of defendants. The court concluded that having found for defendants on this one issue, it would be unnecessary to find

on any other issue. Accordingly, the court rendered judgment for defendants. Both plaintiffs have appealed.

The following is a brief summary of the facts in this case: On January 26, 1955, Jack Howard told several real estate brokers that he had received a call from defendant W. Ross Campbell Co. informing him that certain property was being offered for sale at a price of \$35,000 with \$5,000 down subject to a first trust deed of \$12,000 and a second trust deed for the balance. The next morning Jack Howard also told his mother about the property and she said she might be interested in buying it. Later that day (January 27) Reeves and Smith met Jack Howard at the property and Howard showed them through the house. Reeves described Howard as the broker representing the W. Ross Campbell Co., who told him about the house. Thereafter, all three left the house and stood in the street, at which time Reeves told Howard that he thought Smith would take the house. Reeves then told Howard to go to his (Howard's) home, which was two doors away, and wait while he (Reeves) spoke to Smith and wrote up the deal. About fifteen minutes later Reeves came to Howard with a deposit receipt naming Reeves as broker, and a check for \$1,000 to the order of the Vincent Reeves Co. Howard then called the Campbell Co. and told defendant Wyatt, who was his contact at that office, that he had an offer on the basis that Wyatt had suggested to him the previous day. He read Wyatt the terms stated on the deposit receipt and told Wyatt he would bring the offer to the office.

A discussion occurred between Reeves and Howard about commission and Howard stated he would attempt to negotiate a commission division of 40 percent to the W. Ross Campbell Co., 40 percent to Reeves, and 20 percent to Howard, which he stated he was willing to accept because he felt he had the smallest part in the deal.

Later Jack Howard spoke with his mother and she said she wanted to buy the property. He told her about his dealings with Reeves and Smith and said he had a duty

to perform and had to deliver their offer. He said she could go ahead and make an offer if she wished but he could have nothing to do with it. Thereafter he took the check and deposit receipt to Mr. Wyatt, arriving at about 2:30 p. m. on the afternoon on January 27, and told him that Mr. Smith had a house for sale and could raise additional cash for a higher down payment "if it was important to the deal." Wyatt then told Jack Howard that Mrs. Howard had telephoned and made an offer on the property. Howard returned home and later told Reeves that another offer had been made, but did not disclose that the offer was from his mother because of the embarrassing position he was in as go-between for Reeves' client. Howard gave the deposit receipt and check back to Reeves, explaining that Wyatt had told him to hold the check and the offer since the owner had not accepted either offer. Howard told Reeves that there was nothing he could do, but Reeves could call Wyatt himself. Thereafter Reeves kept in contact with the W. Ross Campbell Co. It does not appear that Reeves ever made any statement to Wyatt that he could make a better offer or that Smith would pay more cash down.

Mrs. Richardson, the owner of the property, testified that she told the W. Ross Campbell Co. that she wanted to sell the property, but did not sign any papers nor state any terms nor execute any agency agreement. She merely set a price of \$35,000. She was then called concerning an offer of \$5,000 down with a first trust deed of \$12,000 and a second trust deed of \$18,000. She refused because she was not interested in taking a second trust deed in any event. She was later called concerning Mrs. Howard's offer and was interested because no second trust deed was involved and the security offered was excellent, even though the cash down payment was less. Mrs. Richardson testified that she would rather have income than cash down, but she would never accept a second trust deed. When she came to the W. Ross Campbell Co. office on January 31, she discussed only the offer by Mrs. Howard because she was

still not interested in the other one, which involved a second trust deed. She accepted the Howard offer and signed the escrow papers that same day.

Plaintiffs' principal contention on this appeal is that the evidence established as a matter of law that defendant Jack Howard was their agent or subagent. This contention is without merit since there is ample evidence in the record to support the contrary conclusion of the trial court. The difference between a middleman and an agent is explained in *King v. Reed*, 24 Cal. App. 229, 141 P. 41. The court there stated at page 235 of 24 Cal.App., at page 48 of 141 P. (quoting from *Langford v. Issenhuth*, 28 S.D. 451, 134 N.W. 889): "A middleman is a broker whose duties are limited by his contract to finding and procuring a purchaser able, willing, and ready to accept his client's terms, or to effect a transaction with his client on any terms satisfactory to both, the term 'middleman' being merely descriptive of the nature of the contract of employment, he being in no fiduciary relation to his principal nor under any obligation not to receive compensation from the opposite party to the transaction, while a broker [who is an agent], in addition to the duties of 'middleman,' is employed to use discretionary authority for the benefit of his employer and to act for his best interests * * *." See, also, *Carothers v. Caine*, 38 Cal.App. 71, 74, 175 P. 428.

In *Anderson v. Thacher*, 76 Cal.App.2d 50, at page 67, 172 P.2d 533, at page 542, the court stated: "A broker acts as a middleman when his duty is simply to bring together two or more people who desire to exchange their property and whose entire duty is performed when he has brought the respective parties together. In such a case the broker is in no sense representing conflicting interests. He has nothing whatever to do with the trade. Under his contract * * * advice and assistance * * * [are] not called for. Therefore he is not an agent in the strict sense of the word."

[1] Applying the foregoing principles to the case at bar, it is clear that the evi-

dence is sufficient to support a finding that defendant Howard's relationship with Smith was that of middleman and prospective purchaser rather than that of agent and principal,¹ and that Howard was not the agent of Reeves. Howard was introduced to Smith by Reeves as the representative of the W. Ross Campbell Co. which was supposedly listing the property in question for sale (the owner had never signed a listing agreement with any broker). Howard was not present when Reeves negotiated with Smith concerning an offer on the property. Reeves alone prepared the deposit receipt and obtained the check from Smith; Howard's name appears on neither. Howard agreed to accept only 20 percent of the commission because of his small part in the transaction. All these facts lend substantial support to the trial court's conclusion that Howard was not the agent of either plaintiff.

[2] It is true that Howard had undertaken a duty to deliver Smith's offer to the W. Ross Campbell Co. office on the afternoon of January 27, 1955. But that act was purely mechanical and clothed Howard with no discretion as would be necessary for him to be constituted an agent. Plaintiffs argue that Howard was given the authority to make a higher offer on behalf of Smith. The evidence does not support that conclusion. Howard was instructed to inform the W. Ross Campbell Co. that Smith could raise money for a higher down payment if it was necessary in order to consummate the sale. Howard so informed Wyatt when he delivered the check and deposit receipt. But it does not appear that Howard was given any power to make a better offer for Smith.

[3, 4] The above facts and reasoning apply equally well to plaintiff Reeves. The

evidence supports the conclusion, and the court found,² that Reeves delegated to Howard only the power to deliver the offer which Reeves had obtained from his client. Since Howard was given no discretionary authority to exercise for the benefit of plaintiffs, he was not their agent. *Carothers v. Caine*, supra; *King v. Reed*, supra. He was therefore not in any fiduciary relationship toward them and was not under any legal duty to inform them that the other offer on the property came from his own mother. The cases upon which plaintiffs rely to support their contention that even a middleman is in a fiduciary relationship with his client are not in point; all of them involved situations where an agency relationship existed.

[5-7] The difficulty with plaintiffs' argument is that they would have this court reweigh the evidence. This we are not permitted to do. *People v. Gould*, 111 Cal.App.2d 1, 8, 243 P.2d 809. The evidence upon which plaintiffs most heavily rely consists of their own testimony. The trier of fact, in passing upon the credibility of a witness, is entitled to consider his interest in the result of the case. *Hamilton v. Abadjian*, 30 Cal.2d 49, 53, 179 P.2d 804; *Hicks v. Reis*, 21 Cal.2d 654, 659, 134 P.2d 788. Plaintiffs are not entitled to a reversal simply because the trial court did not place full reliance on their testimony alone, especially since there is other testimony which supports the court's findings.

[8, 9] In addition to the absence of any agency relationship, there is another compelling reason why the plaintiffs in this case should not be permitted to recover. It appears that there was no causal relationship between defendants' alleged acts (or omissions) and the injury of which plaintiffs complain. The alleged damage sustained by each plaintiff is based upon the fact

with the plaintiff Vincent R. Reeves to take said deposit receipt and check to the defendant W. Ross Campbell Co., and that he was clothed with no discretion and had no duties or obligations other than the duty to deliver said deposit receipt and check to the defendant W. Ross Campbell Co."

1. The court found that "it is not true that the defendant Jack V. Howard was the agent or broker for the plaintiff Bernard M. Smith in any respect or for any purpose."

2. The court's finding is as follows: "It is true that Jack V. Howard orally agreed

that the property in question was sold to Howard's mother instead of Smith (Reeves alleges that he was deprived of the brokerage commission of \$875 and Smith alleges that the fair market value of the property was \$45,000 so that he was damaged in the sum of \$10,000). However, it appears conclusively from the testimony of Mrs. Richardson, the owner of the property, that defendants' alleged acts had no connection with her decision to sell the property to Mrs. Howard. Mrs. Richardson's testimony indicated that she was informed of the Smith offer before she ever heard about the offer from Mrs. Howard. She turned down the Smith offer because she would not accept a second trust deed under any circumstances. She was interested in the offer by Mrs. Howard because of the excellent security which was involved. She stated specifically that she was more interested in a steady income than in a large cash down payment. The fact that Smith might have offered more money down would therefore not have affected her decision. Mrs. Richardson was asked on cross-examination whether she would have ac-

cepted an offer involving full payment in cash more readily than she would have accepted Mrs. Howard's offer. She answered that she "might have been inclined" to do so. But that was not the offer which Smith made.³ It is thus clear that Mrs. Richardson would not have accepted Smith's offer in any event since it involved a second trust deed. The alleged acts of defendants were therefore not the proximate cause of plaintiff's failure to successfully negotiate a purchase of the property. It is elementary that a plaintiff will not be permitted to recover from a defendant whose alleged acts, however wrongful, are not the proximate cause of the injury suffered. The judgment must therefore be affirmed.

In light of the foregoing discussion, it is unnecessary for us to consider plaintiffs' charge of conspiracy, the claim of joint venture and the other points raised.

The judgment is affirmed.

HERNDON, J., and KINCAID, J. pro tem., concur.

3. The offer which Smith made, as evidenced by the deposit receipt, was as follows: \$1,000 as a deposit on the full purchase price of \$35,000; \$4,000 to be paid into escrow; and Smith was to assume a

first trust deed of approximately \$12,000 and a second trust deed payable 1% per month or more, with 5% interest on the \$18,000 balance.



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